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# **CFO Law School: Employer COVID-19 Mandates and Other RTO Issues**

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# Poll # 1

- What is the current status of your operations (choose one)?
  - All offices re-open, all employees working in person
  - Essential or front-line workers in facilities in-person, others still remote
  - Most employees remote
  - Hybrid

# Overview and Basics

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# How Quickly the Discussion of Mandates has Changed

- Concerns about liability and EUA status have largely disappeared.
- Much of the workforce will be covered by a new OSHA rule or federal contract requirements.
- Many employers are already experiencing the practical issues with processing exemptions and testing protocols.
- And a big concern is the tradeoff between losing talent or needed workers who are opposed to vaccination, and vaccinated employees who are fearful of coming back to the office or working around the unvaccinated—that the impacts on company culture.

# Types of “Vaccine Mandates”

- A hard (or “cap M”) Mandate means that being fully-vaccinated is a condition of employment, and absent an exemption, the employee will be fired.
- A soft mandate means that being unvaccinated may have consequences short of termination, such as additional safety requirements or limitations.

# The New Federal EO's

- The EO for federal employees and federal contractors *appears to be* a hard Mandate. Absent exceptions, federal employees will lose their jobs, contractor employers will likely be excluded from working on contracts.
- The EO for larger companies (100+ employees) *appears to be* a soft mandate, and could be characterized as a testing mandate for the unvaccinated.

## Poll #2

- What is your company's current approach to COVID-19 vaccinations (Check all that apply)?
  - Encouraging, with or without incentives
  - Tracking vaccinations and using status for some purposes (such as mask requirements)
  - Requiring proof of vaccination for various in-person activities
  - Requiring testing or other requirements for the unvaccinated
  - Mandating vaccination except for medical or religious exemptions

# Employers Can Generally Mandate Immunizations

- Historically, this has been a question of state law. There is a long history of mandatory vaccinations by states.
- Employers have required a wide range of vaccinations in various industries, including the US military, schools and health care.
- A number of states are considering and a few have passed restrictions that apply to employers, but most of these are limited to state or local employers (e.g. FL). Montana has made being unvaccinated a “protected class”.
- Requiring vaccinations is no different than imposing new conditions of employment or safety rules.

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# Vaccine Mandates and Discrimination Laws

- The EEOC's December 2020 guidance is still good. A vaccine mandate does not violate federal EEO laws, so long as employers consider accommodations for people with disabilities under the ADA, and people with sincerely held religious beliefs under Title VII.
- Most state and local EEO laws will be consistent with the EEOC.

# Concerns About EUA Status Are Largely Gone

- The Pfizer vaccine has final FDA approval, and Moderna is close behind, so concerns that the vaccines were approved under an “Emergency Use Authorization” are becoming moot.
- Several courts have rejected claims that a mandate is the same as involuntary medical experimentation. Employees can choose whether to consent, but may face consequences.

# Employers May Need to Negotiate With Unions

- Depending on the language in a CBA or its management rights clause, a hard or soft vaccine mandate may be a mandatory subject of bargaining, or the union may have the right to bargain over effects of the action.

# The New Executive Orders and Coming Rules

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# The Rules are Going to Change Soon

- The first details about the rules for federal contractors will be issued September 24, with formal rules over the next few months.
- An OSHA ETS will be issued sometime, but we don't know how soon, or when formal rules will be proposed.
- At this point, there are some specifics; the rest is educated guesses.

# **Federal Contractors and Subs =Federal Employees**

- With respect to vaccine mandates, will generally be treated the same as federal employees.
- There will be new federal procurement rules that apply across all agencies in future contracts.
- There will probably be a required modification in all existing contracts.
- This will be a vaccine mandate, with exceptions for medical/disability and religion.

# Which Federal Contractors are Affected?

- The rule will apply to most federal contractors and subcontractors, except those providing products.
- Does not apply to anyone receiving federal grants or other types of federal financial assistance.

# Open Issues for Federal Contractors

- Which employees will be affected: those working directly on contract? Supporting the contracts? Or all employees? What about those 100% remote?
- Will the rules fully incorporate EEOC guidance? What can contractors do or not do for those who qualify for exemptions?
- How quickly will these rules take effect?
- What happens if someone who refuses is a key employee on the contract?



# The OSHA Rule-More Questions Than Answers

- Coverage (100+ employees) will probably track counting for other federal laws, e.g. FMLA or EEO-1, i.e. include part-time, exclude independent contractors.
- Will employees have the right to choose testing in lieu of vaccination? Or can employers choose to impose a hard Mandate?
- If employers are given the right to impose a Mandate, that might supersede contrary state laws.

# Will Medical and Religious Exceptions be Needed?

- Unlike a hard Mandate, if the OSHA rule merely requires that all unvaccinated employees must have weekly testing, there is no need to consider exemptions to *vaccination*.
- There will be a much smaller number who may claim they object to the test.

# OSHA Testing Rules

- OSHA faces a daunting task in trying to rush out an Emergency Temporary Rule (ETS) that addresses:
  - The types of tests (rapid test ok? Or just PCR) and frequency
  - Who pays for the tests, and whether hourly employees must be paid for the time
  - Informed consent for the tests
  - Required consequences
  - Confidentiality, and much more
- Some of this was addressed in the OSHA health care ETS.

## Poll # 3

- Based on what we know so far, how will your company be affected by these new Executive Orders (choose one)?
  1. Federal contractor or sub only
  2. OSHA Rule only (100+ employees)
  3. Both
  4. Neither

# Practical Issues With a Mandate

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# Weighing the Burdens and Effects of a Mandate

- If you are not subject to the EO, or a new state or local mandate law, or have options, you need to first assess the complexity of the issues with any type of mandate.
- The first step is to learn (if you do not already know) who is vaccinated and who is not (and if possible, why). A mandatory employee survey of vaccination status and plans does not violate the ADA.
- It will make a difference if you learn that 40% of your line employees, or some key executives or sales people, are unvaccinated and plan to stay that way.

# Cost-Benefit on Employee Retention

- How many more of your employees will get vaccinated due to a mandate? Polls of unvaccinated employees (prior to the federal announcement) indicate that on average 20% will get vaccinated, 40% will seek exemptions, and the remaining 40% will quit.
- How many of your vaccinated employees will quit (or stay 100% remote if that is an option) rather than work around unvaccinated employees?

# Poll #4

- Which of the following do you think might be legal (T/F)?
  - Providing extra paid leave for vaccinations (getting the shot and side effects)?
  - Providing cash incentives for new vaccinations? Or everyone who is vaccinated?
  - Denying paid leave to unvaccinated employees who contract COVID-19?
  - Providing health premium discounts to the vaccinated, or increased costs on those who are unvaccinated?



# Incentives are Legal

- Providing incentives for those who get vaccinated and provide documentation do not violate EEO rules. But the EEOC provides cautions if you are encouraging them to get vaccinations from the employer (where you may get confidential information).
- Depending on how they are structured, some incentives may be taxable.
- Common questions—should they be retroactive? What about employees with exemptions?

# Popular Incentives

- Those that address the main reasons people delay:
  - Additional paid leave to address concerns about lost time getting the vaccination or side effects
  - Providing transportation or stipends
- Cash bonuses can work, but most employers are still avoiding them. They are taxable, and those who received the vaccine early get jealous
- There are ways to run incentives through Wellness programs, but this is complicated.

# It's Hard to Penalize

- There is a growing sentiment to impose monetary consequences on the unvaccinated. It is much easier to incentivize than punish.
- What Delta airlines announced is actually complex and difficult for most employers—anything to do with Wellness plans involves ACA, ERISA and EEO issues.
- Penalties for those with exemptions might be challenged, especially by those who qualify for disability or religious exemptions. EEOC and state charges are possible.

# Weigh Administrative Burdens

- This is going to fall on HR and Legal.
- Weigh the cost advantages of a rapid test (if you can get them every week) against lower accuracy for asymptomatic illness, vs. the delay in getting PCR lab results.
- Following CDC guidelines for informed consent.
- If necessary tracking the hours and costs incurred.
- Processing and deciding exemptions.

# Practical Issues With Testing

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# Weekly Testing is Not Going to be Simple

- The OSHA rule should address some of the following, but may give employers the discretion to design a compliant program.
- Any testing program will need to include which tests can be used, where they may be received, when and how results are reported, whether hourly employees are paid, who pays for the cost of the tests and confidentiality.

# Do Employees Get Paid for the Time?

- Under the FLSA, you may have to pay hourly non-exempt employees for the time they spend getting weekly COVID-19 test. This is clear if the test are during work hours, or upon arrival before clocking in.
- DOL prior opinions have found that mandatory medical tests are compensable time.
- There is possibly a de minimis exception if the test takes less than ten minutes (e.g. a rapid test).

# Who Pays for the Cost of the Test?

- Good question. In the health care ETS, OSHA said that any mandatory testing was to be at no cost to the employee.
- Your health plan may cover testing, but there could be co-pays.
- There are FLSA rules and precedents that various costs required by law and paid by employees cannot reduce wages below minimum wage.
- *If* testing is considered an alternative “accommodation” for disability or religious reasons, then under EEOC guidance you cannot make the employee pay.



# Which Test(s) to Use?

- OTC rapid antigen tests. Least expensive, up to 80% accurate when employees have symptoms. Can quickly rule out COVID-19 if there are cold-like symptoms. Less accurate if asymptomatic. Could be done at home or at the workplace.
- Rapid Tests by health providers. Quick, requires a visit, more expensive.
- PCR tests. Requires a visit, 1-3 days for results.
- Availability and capacity is likely to be a problem if tens of millions of employees need weekly tests.

# Where and When to Test?

- At home rapid test? Do you trust employees not to lie?
- At work rapid test? Can you handle all of the unvaccinated employees waiting in a cafeteria while you monitor their tests?
- If you require going to a doctor or clinic for a PCR test, do you need to do these Thursday to have the results on Monday?

# Informed Consent

- The ADA prohibits medical exams unless job-related and consistent with business necessity.
- EEOC guidance says COVID-19 tests are only legal if employees provide informed consent to tests, and incorporates CDC guidance.
- The CDC guidance is fairly extensive.

# Reporting and Confidentiality

- All of the tests results are confidential medical information under the ADA (not HIPPA unless they are being done under your health plan).
- You need a secure, confidential way to collect and maintain all results.

# Dealing with Positive Results

- More testing will mean more positive tests for employees who are asymptomatic. Current CDC guidance is to isolate for 10 days after a positive viral test.
- If symptomatic, the guidance is to isolate for:
  - 10 days since symptoms first appeared **and**
  - 24 hours with no fever without the use of fever-reducing medications **and**
  - Other symptoms of COVID-19 are improving

# The Ripple Effect of Positive Results

- Positive test results also means you should do contact tracing for those employee who had close contact. With some exceptions:
  - Unvaccinated employees should quarantine for 14 days after exposure; and
  - Vaccinated employees should wear a mask indoors, and isolate if they develop symptoms.

# Other Safety Protocols or Requirements

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# Other Safety Requirements for the Unvaccinated

- OSHA may say that weekly testing is the minimum, and employers can impose other safety requirements. Small employers have the same discretion.
- The “unvaccinated” as a class, are not protected under the ADA, Title VII or state EEO laws, except for a few new laws. The EEOC says you can impose other safety rules on employees with vaccine exemptions.



# Common Requirements for the Unvaccinated

- Masking: While many employers and some states/localities are following CDC guidance for all employees to wear masks, you can impose these rules on the unvaccinated, either now or once community numbers down. This could include proper wearing of CDC approved masks all day.
- Social Distancing: Can be required, if feasible.
- Exclusion: From the office, or in-person events with food and drink where masks will be off.

# Disability/Medical and Religious Exemptions

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# Disability Exemptions Under the ADA

- The EEOC says you must consider accommodations for people who cannot receive a COVID-19 vaccine *due to their disability*. Most people refer to this as an “exemption”, but the EEOC then permits other potential safety precautions.
- The CDC has recommended the vaccine to those with numerous conditions. There are only a small number of individuals where the vaccine is contra-indicated due to a disability, including those with past severe allergic reactions to an ingredient in the vaccine.

# Other Medical Exemptions or Deferrals

- The CDC recommends that vaccinations be delayed 90 days after an individual ceases having COVID-19 symptoms or certain treatments.
- The CDC now recommends that pregnant women get the vaccine, but some doctors still recommend a delay.
- These are possible medical reasons for a deferral of a mandate.

# Handling Other Medical Requests

- Employees often can find a health care provider that will sign a note for anything.
- We believe it is appropriate to require doctors to specifically identify which CDC contraindication applies.
- But you need to decide if it is appropriate to push back on doctor's notes, or deny exemptions to employees citing medical and disability reasons.

# What Happens to the Employee with an Exemption?

- You need to consider whether alternative “accommodations” will allow the employee to perform their essential job functions. This may include other safety requirements (testing, masking, social distancing), limiting in person contact, or remote work.
- The EEOC guidance says employers cannot materially change terms and conditions or terminate an employee with a disability exemption because of safety concerns, unless you can establish that they are a “direct threat” to self or others, which is a “significant risk” of “substantial harm” to the health or safety of others.

# The “Direct Threat” Defense

- The factors you need to consider, based upon the best available medical evidence, include:
  - The duration of the risk
  - The nature and severity of the potential harm
  - How likely it is that the potential harm will occur, and
  - How imminent the potential harm
- You can consider the number of other individuals needing an accommodation.

## Poll #5

- Your office has 80 people. Eight employees are unvaccinated, but 70 (90%) are. All eight are in “essential” positions where in-person contact is required most days. Two of the unvaccinated employees have medical documentation that the Company accepts. But a number of employees are objecting to working around any unvaccinated employees, even if they are wearing masks and getting tested weekly.
- Q: Can you terminate the employees with medical exemptions because they pose a direct threat to the health of themselves or others? (Y/N)



# Religious Exemptions

- Title VII and most state laws prohibit discrimination on the basis of religion, including religious beliefs and activities, and may require accommodation of sincerely-held religious beliefs.
- There is extensive EEOC guidance and court cases on this topic, including objections to mandatory vaccination. Most state EEO laws will be interpreted consistently with Title VII.
- Most state laws requiring mandatory vaccination (e.g. public schools) will have exceptions for religious beliefs.

# “Religion”

- Under Title VII religion includes not only traditional, organized religions but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.
- An employee’s belief, observance, or practice can be “religious” under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual’s belief, observance, or practice, or if few – or no – other people adhere to it.

# What are not Religious Beliefs

- Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII.
- Under prior federal court cases, anti-vaccination beliefs are not “religious beliefs” protected from religious discrimination under Title VII, where beliefs are personal, social, and economic, rather than spiritual, were untethered to any spiritual or other-worldly mandate, and beliefs were not comprehensive in nature, but rather revolved around deeply held, but personal, anti-vaccine beliefs.

# The Essential Issue

- The essential inquiry to engage in during the interactive process is whether the belief system, as stated, is analogous to more traditional religions that have consistently been held to qualify for legal protection.
- In evaluating claims based on what appears to be a less “traditional” religious belief, ask: *Does the claimed belief system confront the same concerns, or serve the same purposes, as unquestioned and accepted religions?*

# Challenging Requests

- Ordinarily, an employer should assume that an employee's request for a religious accommodation is based on a sincerely held religious belief.
- However, where an employer has an objective basis for questioning the religious nature or sincerity of a belief, practice or observance, the employer may request additional supporting information.

# What is Your Risk Tolerance to Question Religious Beliefs?

- Responding to requests for religious exemptions is a two-step process: (i) has the employee stated a sincerely-held religious belief and (ii) if so, can an exemption be accommodated.
- Options include:
  - Pushing back on whether this is a consistently-held sincere belief;
  - Accepting the request “at this time” with the right to push back later; or
  - Moving to the next step.

# Reasonable Accommodations Under Title VII

- An employer must provide employees with reasonable accommodations for the employee's sincerely held religious belief, practice, or observance where it would prevent the employee from receiving the vaccine.
- The reasonable accommodation cannot impose an “undue hardship”. While this is the same term as the ADA, it means something different. Under Title VII undue hardship is defined as an accommodation *having more than a de minimis cost or burden on the employer.*

# Additional Requirements

- Employees with sincerely-held religious beliefs against the COVID-19 vaccination can be required to comply with other safety requirements, such as masking, social distancing at work, weekly testing, etc.
- Do not be surprised if some of them claim that wearing masks or taking tests also violates their religious beliefs. Some of the websites supporting anti-vaccine exemption claims have language for all of these requirements.
- EEOC guidance would permit continued work from home or exclusion from group events as alternatives.



# Excluding Individuals with Religious Exemptions

- Some employers may be inclined to say that even with other safety precautions such as masking and testing, having an unvaccinated employee in certain settings is a more than de minimis burden on the company, other employees or patients/customers.
- If this is based upon the risks to others (vaccinated or not), the employer does not need to meet the direct threat standard, but would still need to establish based on medical evidence why having this group of unvaccinated employees poses a risk.

# Co-Worker and Customer Requirements and Prejudice

- Under all EEO laws, customer or co-worker bias is not a defense or excuse (e.g. do not send me any [insert protected class])
- A customer request to only send vaccinated employees is not in that category.
- Employee fear of unvaccinated co-workers, while medically questionable, is not discrimination. Objecting to or refusing to work with someone because of the nature of their protected religious beliefs or disability is prejudice, and must be ignored.

## Poll #6

- Of the 8 employees discussed in Poll 5, four of them request religious exemptions, raising objections to any invasive procedure, use of fetal stem cells in vaccine development and introducing foreign substances.
- 1. Would you push back? (Y/N)
- 2. Would you terminate, or just impose other requirements? (Y/N)

# Other Return to Office Issues

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# WFH is Here to Stay

- After 18 months, a large percentage of employees enjoy working from home, which often includes flextime. Many want 100% remote, or at least hybrid. And will leave if they do not get that flexibility.
- Employers have to deal with this.
- There is no playbook. Each business needs to create one.

# Remote Work Not Required

- There are no longer federal requirements to protect those staying home due to COVID-19 heightened risks or child care.
- There is no duty under the ADA or other disability laws to accommodate employee concerns about bringing the virus home to others.
- Very few individuals with disabilities may potentially qualify for continued remote work. One group might be vaccinated immunosuppressed employees who do not produce enough antibodies.

# Getting People Back to the Office

- Unless you set hard rules, many employees will choose to come to the office only when required, or a few days a week.
- Many are asking why they ever need to be in person. You need a message other than “because I say so”

# Hybrid is not Easy

- Will there be core days or just required events?
- If minimum days, which positions/employees can choose, and which must be scheduled?
- Will there be formal flextime (either office or remote)?
- How to you integrate employees who are remote for meetings?
- How will you facility collaboration and culture in a hybrid environment?



# RTO Plan Flexibility

- Employees who have been remote for 18 months want continued flexibility, and a clear understanding of the new expectations.
- All plans must be flexible as conditions change;
  - Severity of the virus
  - Continued employee concerns, including using public transportation
  - Anxiety about re-entry
  - Commuting patterns

# Questions?



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