"Can We, Should We... Will You Please?"

Five Best Practices When Considering a Vaccination Policy

The COVID-19 vaccines have arrived, and as a nation we are seeing unprecedented efforts to make the vaccine available first to our healthcare specialists on the front lines and then to our most vulnerable citizens. We recognize that employers are left in the middle to navigate state and federal employment laws while addressing the emotionally and politically charged topic of employer-driven vaccines.

This document is a road map to assist leaders and HR professionals work through the following five topics:

- Surveys and Communications
- The Decision to Mandate
- The Decision to Offer Incentives
- Vendor Considerations
- Tracking the Process

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1 Surveys and Communications

Many employers are considering creating and rolling out an employee survey regarding vaccinations and thus want to explore best communication options. If the decision to employ a survey is reached, first and foremost, we suggest a platform where all employees have both 1) anonymity and, 2) ability to opt out. We recommend an overarching survey with broad based questions designed to help the company understand and support the needs of their employees. We recommend a brief introduction explaining how the survey results will benefit the employees, the employer and citizens alike. We sought the advice of employment specialists, attorneys and medical doctors when developing the following additional points:

- Prepare a message that is upbeat and positive in the delivery.
- Respect the privacy of your organization's employees and share in writing your commitment to confidentiality.
- Keep the comments and specific questions at a high level.
- Avoid questions that would upset feelings or drive emotional or political responses.
- Remind respondents that a voluntary survey will not request protected health information (PHI).
- Understand that some employees will be able to decline a vaccination based on medical, religious or other reasons. A question with this understanding may also be considered.
- Consider a pre-built survey through survey experts like Qualtrics.

Questions in a survey might include the following:

1. Would you have interest in obtaining the COVID vaccination if offered at the work site?
2. Have you already been vaccinated?

2 The Decision - To Mandate or Not to Mandate

Perhaps the key consideration lies in the basic question, "Can and should an employer mandate an employee vaccination process?"

The answer varies for each employer depending on several factors including but not limited to type of work performed as well as the possible impact on employees, operations and the public. We recommend fully reviewing our February webinar entitled: 'Vaccine Considerations in the Workplace' which includes education from experts Ryan Frazier, an employment attorney practicing in Salt Lake City, and Dr. Russell Vinik, a physician and COVID-19 expert at the University of Utah and the Medical Director for GBS Benefits.

Watch the Webinar >

Vaccine Considerations in the Workplace
Ryan Frazier, Kirton McConkie
Dr. Russell Vinik, GBS Medical Director
Joe Tate, GBS HR Consulting

https://gbsbenefits.com/covid19-vaccine-considerations/

Specifically, the medical viewpoint from Dr. Vinik includes an overview of available vaccines and their differences, the number of doses required, facts and myths related to vaccination, how the new vaccines work, efficacy, safety and possible side effects. The legal viewpoint from Ryan Frazier includes a discussion of the following:

- Employees with compromised immune systems, disability, pregnancy concerns or medical conditions may be protected in declining a vaccination.
- Protections under Title VII and EEOC laws on the basis of religion or other protected characteristics exist.
- Protections under HIPAA which if applicable, require a reasonable alternative standard to be offered if an employee is unable to get vaccinated
- Protections under GINA which prohibit requesting genetic information

One example of a company that will be requiring their employees to be vaccinated is United Airlines. They have communicated plans to mandate vaccines to each team member once the vaccines are readily available.

If you decide to mandate vaccinations in your organization, consider the following:

- The COVID-19 vaccination process requires certain medical questions as part of the process. The EEOC has concluded that asking these questions constitutes a medical examination under the definition used by the American's with Disabilities Act (ADA).
- Time spent for company-sponsored vaccinations should be paid time.
- Provide a clear, written policy with an explanation of the policy decision (example: safety-based language regarding employees and visitors).
- Provide a process and form for individuals seeking an exemption from the process.
- Ask for employee verification regarding completion of the vaccination process and remind employees that there will not be adverse employment actions taken against those who decide against vaccination.

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3 The Decision to Offer Incentives

Offering incentives may be a good way to encourage employees to support a vaccination policy without actually mandating it. However, even with incentives, an employer risks compliance issues similar to vaccination mandates because incentive programs also intersect with HIPAA, ADA and GINA rules.

- **HIPAA:** if the incentive program is considered a health-contingent program, (1) the program must comply with HIPAA's limits on incentives, and (2) employees who cannot receive the vaccine due to adverse health status factors must be provided a reasonable alternative method for earning the incentive.
- **ADA:** screening questions typically asked prior to vaccinations often include disability-related inquiries. If an employer asks why an employee did not receive the vaccine, that question may also be considered a disability-related question. In either circumstance, the incentive must comply with the ADA's voluntary wellness program rules. Thus, an employer may want to ask only for proof of vaccination and avoid any other questions.
- **GINA:** a request for proof of vaccination or pre-vaccination screening questions could inadvertently be a request for genetic information which is generally prohibited under GINA because "genetic information" is defined very broadly.

In addition, a vaccination incentive may also create an inadvertent ERISA plan. If this happens, an employer will need to take some additional steps in order to comply with ERISA rules.

Additional considerations regarding an incentive to receive the vaccine include:

- Consideration of employees with compromised immune systems or medical conditions which might preclude a vaccination.
- Consider how to apply incentives to those who cannot participate in the vaccination process due to any reason.

Companies in the U.S. which have communicated the intent to offer incentives to employees who choose to participate in a company-sponsored vaccination program include but are not limited to, *McDonalds, Chobani, Dollar General, Darden Restaurants, Trader Joe's* and more. Incentives include paid time off, cash incentives, company gift cards and bonuses.

4 Vendor Considerations

Contracting a third-party to procure and/or administer vaccines has its advantages to both employees and employers. Employees may be more likely to receive the vaccine in a timely manner by having convenient access, and employers benefit from reduced burden of managing, tracking, and reporting receipt of the vaccine. Screening labs and vendors with onsite screening capabilities are working through state approval processes for procuring and administering the vaccine, which will ultimately work much like a flu shot clinic.

Additional considerations when considering a third-party vaccination vendor include:

- Geographic Reach - as vaccine procurement and administration is regulated at the state level at this time, vendor capabilities may vary by state
- Cost - Administration fees have been pre-set, and are billed direct to the insurer (as is the fee for the vaccine itself); inquire about additional costs for contracting this service
- Site minimums - ask whether a minimum number of participants is required to come onsite
- Managing alternatives - consider need to accommodate various work shifts and schedules, and whether employees will be directed to an alternative location if unable to attend onsite
- Managing exceptions - if mandating and/or incentivizing vaccine, determine how to handle vaccine exceptions (medical, religious)
    - Note that third parties may offer this service to help protect individual privacy
- Reporting - approved vendors will be reporting back to local authorities (public health departments), check with your vendor on availability of reporting to the employer
- If contracting with a third-party, employers should recognize that when contracting with a third party to administer the vaccine, possible issues could arise due to the pre-screening questions. According to the EEOC, these questions could constitute a "medical examination" under the ADA. Under GINA, pre-screening questions could be considered a request for "genetic information". Discuss these concerns with your vendor to limit the screening questions to the minimum necessary and do not request access to the pre-screening information.

One third-party vendor has gained state-level approval for an end-to-end solution regarding onsite vaccinations. The company is Axum. They have recently been approved by the State of Utah to be a "mobile COVID-19 vaccination" partner with the ability to complete onsite COVID-19 vaccination clinics at employer groups. Their website is https://axum.co/.

5 Tracking Employee Participation - Considerations

What will you track and what steps should you take to protect the collected data? In addition, is there information that should not be tracked in the process of making the decision to mandate or incentivize employee vaccinations:

- Create guidelines and systems to prevent the tracking of HIPAA protected information.
    - If HIPAA may not come into play if the request is when employer is wearing "employer" hat and not "group health plan" hat
    - Must be firewall between the two "hats"
- GINA: a request for proof of vaccination could inadvertently be a request for genetic information (which is generally prohibited under GINA) because "genetic information" is defined very broadly.

In short, employers are encouraged to limit data and to not gather more data than necessary. Store it securely and confidentially guard it. Utilizing a third-party provider may also provide separation of data and full anonymity.

February 2021

The information herein is educational only and not intended as legal advice.

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