



# Employer's Legal Consideration for Vaccine Mandate in the Workplace

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Nelson Mullins Webinar

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# President Biden's COVID-19 Action Plan

(Announced September 9, 2021)

- Requiring all employers with 100+ employees to ensure their workers are vaccinated or tested weekly
  - The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule
- Requiring employers to provide paid time off to get vaccinated
  - To continue efforts to ensure that no worker loses a dollar of pay because they get vaccinated
- Momentum is moving toward vaccine mandate

# Legal Considerations

- Federal and state laws employers should consider
  - Federal EEO laws
  - Emergency Use Authorizations (FDA)
  - FDA approval of Pfizer Vaccine
  - Occupational Safety and Health Act
  - National Labor Relations Act
  - Other federal and state law issues



**EEOC**  
U.S. Equal Employment Opportunity Commission





## Recent Developments

- July 6, 2021 – U.S. Department of Justice (DOJ) issued an opinion letter that a vaccine's EUA status does not prevent private or public agencies from implementing vaccination requirements
  - <https://www.justice.gov/sites/default/files/opinions/attachments/2021/07/26/2021-07-06-mand-vax.pdf>
- U.S. District Court for the Southern District of Texas dismissed a lawsuit filed by over 116 hospital workers to prevent their employer from requiring the COVID-19 vaccine as a condition of employment
  - *Jennifer Bridges, et al. v. Houston Methodist Hospital, et al.*, Civ. Act. 4:21-cv-01774 (SD Texas, June 12, 2021)
- U.S. District Court for the Southern District of New York issued a temporary restraining order to stop N.Y.S. Dept. of Health from preventing employers to grant religious exemption for vaccine mandate
  - *Dr. A, et al. v. Kathy Hochul, et al.*, 1:21-Cv-1009 (SDNY, Sept. 14, 2021)



# EEO Laws/Issues Implicated by COVID-19 Vaccine Program

- Americans with Disabilities Act (ADA)
  - Disability-Related Inquiries
  - Medical Exams
  - Confidentiality of Medical Information
  - Reasonable Accommodation, including pregnancy-related condition
  - Retaliation
- Title VII of the Civil Rights Act of 1964
  - Religion
  - Retaliation

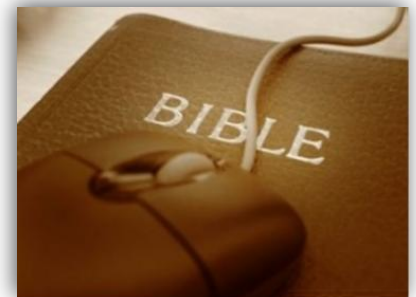
# ADA - Disability-Related Inquiries and Medical Exams

- No requirement to satisfy the “job-related and consistent with business necessity” requirement
  - **Optional / voluntary vaccine program**
  - **Require written certification of vaccine as part of a required vaccine program**



# Title VII – Religious Accommodations

- Religious Accommodation Requirements under Title VII
  - Does your company already have a policy and procedure for handling religious accommodation requests?
  - General obligation to accommodate an employee's... "***Sincerely held religious beliefs, practices, and observances***"
  - What does this mean?
    - Generally?
    - In the context of a COVID-19 vaccine?





# Accommodations

- Potential accommodations to consider
  - Telework
  - Implementing enhanced social distancing, personal protective equipment (PPE) (i.e., masks, face shields, gloves, etc.), additional sanitation requirements for employee/workplace
  - Changing job duties to allow for telework and/or enhanced social distancing, etc.







# Incentives for Vaccine

- Financial or similar incentive (EEOC Guidance, May 28, 2021)
  - Vaccination administered by employer or its agent: it is permissible to offer an incentive provided it is not so substantial to be coercive
  - Vaccine administered by third party who is not an employer: no limitation



## Incentives for Vaccine (cont.)

- Wellness program discount/surcharge based on getting a vaccination
  - Must be pursuant to a properly-designed wellness program
  - To comply with HIPAA and ACA rules for health-contingent, activity-only wellness program:
    - 1) Provide opportunity to qualify at least once per year
    - 2) Reward cannot exceed 30% of total cost (employer & employee) of coverage
    - 3) “Reasonably designed” to promote health or prevent disease
    - 4) Uniform availability and reasonable alternative standard
    - 5) Provide notice of availability of reasonable alternative standard



## Incentives for Vaccine (cont.)

- Wellness program discount/surcharge based on getting a vaccination
  - Additional rules under the ADA:
    - 1) May require documentation confirming vaccination
    - 2) Do not coerce participation
    - 3) Provide written notice of program
    - 4) Keep information confidential
  - GINA compliance considerations – best practice: use independent third-party
  - Other compliance considerations:
    - 1) Will this trigger mid-year cafeteria plan election changes?
    - 2) HIPAA privacy and ADA confidentiality
    - 3) Impact on ACA affordability calculation
    - 4) Potential loss of ACA grandfathered status?



# Employer Role

- Actively Encourage or Require
  - Decide company response and strategy
  - Facilitate access if possible
  - Consider PTO for vaccine (1<sup>st</sup> and 2<sup>nd</sup>) and side effects
- Incentivize
  - De-minimus incentives
  - Healthcare surcharge
- Accommodate
  - Decide potential accommodations for employees declaring disability or religious exemption
  - Devise accommodation procedure and documentation



# Communication About Policy

- Determine whether to mandate and, if so, issue written policy
- Media for your audience to convey the written vaccination policy
  - Emails, newsletters and postings
  - Small group meetings
  - FAQs
- Spokesperson with influence who employees trust
- Education for employees
  - Dispel perceptions about vaccines and their safety (differ by political party, race, age and geography)
  - Explain benefits
  - Avoid stereotypes and communications that appear judgmental



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# Thank you for attending!



## Contact Information



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