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GCT WORKS WEBINAR:
COVID-19 Issues Employers are Facing
for Return-to-Work post-Pandemic




Ashley L. Orler David J. Ben-Dov Brianna L. Golan M. Elysia Baker Analo

June 2, 2021
12:00 pm - 1:30 pm CT

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**COVID-19 VACCINATIONS: REQUIREMENTS,
INCENTIVES AND RETURN TO WORK**

JUNE 2, 2021

PRESENTED BY
DAVID J. BEN-DOV

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Can Employers Require Vaccinations?



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- Employers have broad discretion regarding what rules to impose for employees who are returning to work.
- Yes, employers can legally require employees to be vaccinated before returning to work – but this comes with two important caveats:
 - (1) First, employers will need to respond to employees who state they are **unable to receive a COVID-19 vaccination because of a disability**; and
 - (2) Second, employers will need to respond to employees **who state they are unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief**.

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Employees Who Claim Disability

- The ADA allows an employer to require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring a COVID-19 vaccination.
- However, if an employee cannot meet the standard due to a disability, the employer may not require compliance for the employee unless the employer's shows the unvaccinated employee would pose a **“direct threat” to the health or safety of the employee or others in the workplace.**

What is a Direct Threat?

- A direct threat is one which poses a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r).
- Employers should conduct an individualized assessment of the employee’s ability to safely perform the essential functions of the job and analyze four factors whether a direct threat exists:
 1. the duration of the risk;
 2. the nature and severity of the potential harm;
 3. the likelihood that the potential harm will occur; and
 4. the imminence of the potential harm.

What Does the EEOC Say?

- The assessment of “direct threat” should take account of the type of work environment, including: whether the employee works alone or with others; inside or outside; available ventilation; frequency and duration of direct interaction with other employees and non-employees; if other employees wear masks; and available social distancing.
- If the assessment shows the employee with a disability who is not vaccinated poses a “direct threat” to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate the threat.
- **Examples of reasonable accommodation:** requiring employee to wear a mask; working a staggered shift; improving ventilation systems; permitting telework; or reassignment.

Religious Beliefs or Practices Caveat

- Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer **must** provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.
- Courts have defined “undue hardship” under Title VII as having more than a *de minimis* cost or burden on the employer.
- Considerations relevant to undue hardship: proportion of employees vaccinated already and extent of employee contact with non-employees, whose vaccination status could be unknown.

What Does the EEOC Say?

- EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily **assume** that an employee's request for religious accommodation is based on **a sincerely held religious belief**.
- If an employee cannot get vaccinated for COVID-19 because of sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.
- This does **not** mean the employer may automatically terminate the worker. **An employer should consider all possible reasonable accommodations**, including telework and reassignment.

Recent Case Law

- At least one federal lawsuit has been filed challenging an employer's mandatory vaccination policy when only Emergency Use Authorization (EUA)-approved vaccines are available, claiming that the policy violates federal law. *Legaretta v. Macias*, 2021 WL 833390, at *1 (D.N.M. Mar. 4, 2021) (declining to issue an emergency order for a TRO and preliminary injunction enjoining defendants from terminating, demoting or taking any negative action against the plaintiff for refusing to take a non-mandatory, unapproved vaccine).
- But -- certain employers -- such as hospitals and other health care providers -- include vaccination requirements in employment contracts which condition employment on the employee agreeing to obtain a vaccine (i.e., the annual mandatory flu vaccine), unless an exemption is granted, see e.g. *EEOC v. Mission Hosp., Inc.*, 2017 WL 3392783, at *3 (W.D.N.C. Aug. 7, 2017).

Can Employers Incentivize Employees to Receive Vaccinations?



The current challenge for employers is that 30 to 35% of the workforce has indicated they do not plan to get vaccinated. Therefore, what steps have employers been taking to incentivize employees to receive vaccinations?

What Does the EEOC Say?

- Employers may offer incentives to employees to voluntarily provide written confirmation they received a vaccination; such a request is not a disability-related inquiry under the ADA.
- Employers may offer an incentive to employees to voluntarily receive a vaccination administered by the employer or its agent – so long as the incentive is not so substantial as to be “coercive.”
- For example, a very large incentive could make employees feel pressured to disclose protected medical information.
- EEOC updated this guidance as of Friday, May 28, 2021.

Companies Offering Incentives

Many companies are offering cash incentives, excused absences, on-site vaccination opportunities, paid time off.



What Should Employers Do?

- Employers should consider the following approaches:
 - One potentially safe approach is to offer paid time-off to allow employees who choose to be vaccinated sufficient time to make vaccination appointments, become vaccinated, and recover from potential side effects without worrying about missed work.
 - Paid time-off to employees who choose to be vaccinated would likely be considered a *de minimis* incentive, and those with disabilities who cannot get vaccinated for medical reasons would not need this time off.

Can employers create relaxed COVID-19 requirements for employees who are vaccinated?



CDC Guidance

- Based upon current CDC recommendations, even after employees have been vaccinated, preventative measures (social distancing and wearing masks) should continue to be followed.

10 After employees have been vaccinated, can they stop practicing other preventive measures such as social distancing and wearing masks?

No. CDC recommends that people continue to take these and other preventive measures after they are vaccinated. Even if employees have received the COVID-19 vaccine, it will be important for them to continue other preventive measures such as wearing a mask, staying 6 feet away from others, avoiding crowds, washing hands often, and cleaning high-touch surfaces frequently. It takes time for your body to build protection after any vaccination, and the COVID-19 vaccine may not protect you until a week or two after your second shot (dose). Together, getting vaccinated for COVID-19 and following CDC's recommendations for how to protect yourself and others (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>) will offer the best protection from getting and spreading COVID-19.

Do employers need to provide PTO for employees to receive a vaccine?




Vaccination Policies

- The Illinois Department of Labor (IDOL) has provided employers with guidance to provide employees with leave, time, and flexibility to get vaccinated, including the following:
- **MANDATORY VACCINATION PROGRAMS:**
 - Under the *Illinois Minimum Wage Law (IMWL)* and the federal *Fair Labor Standards Act (FLSA)*, if an employer requires employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time.
 - Mandatory vaccination requirements should be combined with paid leave for employees to receive the COVID-19 vaccine, or the employer should otherwise provide compensation for the time taken by the employee to comply with an employer-mandated vaccine requirement
- **OPTIONAL VACCINATION PROGRAMS:**
 - Employees who choose to obtain the vaccine voluntarily should be **allowed to use sick leave, vacation time or other paid time off** for employees to receive the COVID-19 vaccine.
 - Employers that do not choose and are not obligated to provide any paid leave, should consider offering the employee FLEX time to allow the employee to become vaccinated without having to take unpaid time.
 - If the employer does not wish to provide FLEX time, the employer should allow the employee flexibility to take the time off unpaid.

Employer Incentives

- Under the American Rescue Plan Act of 2021 (ARPA-21), covered employers may also be entitled to **payroll tax credits** under the Families First Coronavirus Response Act (FFCRA) for providing paid leave for qualifying reasons, including leave related to the COVID-19 vaccine.




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**TYPES OF PAID AND UNPAID LEAVE AVAILABLE
TO EMPLOYEES, WORKERS' COMPENSATION
BENEFITS, AND AVOIDING THE PTO "BOMB"**

JUNE 2, 2021

PRESENTED BY
BRIANNA L. GOLAN

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FAMILY FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- All employers with less than 500 employees are eligible.
- As of January 1, 2021, the FFCRA became optional.
- Employers receive dollar-to-dollar tax credits if opt into the FFCRA.
- Originally set to expire in March 2021 but the American Rescue Act Plan extended and expanded the FFCRA through September 30, 2021.

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Employees are eligible for FFCRA leave if:

- subject to Federal, State, or local quarantine order;
- told to self-quarantine by a healthcare provider;
- have Covid-19 symptoms and are waiting a medical diagnosis;
- caring for an individual subject to quarantine;
- caring for a child whose school or place of care is closed because of Covid-19; or
- experiencing substantially similar conditions as specified by the US Secretary of Health and Human Services.

Under the American Rescue Act Plan, employees are also eligible if:

- unable to work because employee is receiving the Covid-19 vaccine;
- unable to work because recovering from symptoms after receiving the Covid-19 vaccine; or
- seeking or waiting on test results.

Other FFCRA expansions under the American Rescue Act Plan:

- Family leave extended from 10 weeks to 12 weeks;
- FFCRA rights set back to zero as of April 1, 2021; and
- Employers may not discriminate in favor of highly compensated employees, full-time employees, or employees that have been with the employer longer.

How much does the employer pay the employee under the FFCRA?

- Two weeks (up to 80 hours) at regular rate of pay if employee is unable to work because quarantined and/or is experiencing Covid-19 symptoms and is seeking a medical diagnosis.
- Two weeks (up to 80 hours) at two-thirds of regular rate of pay if employee cannot work because employee needs to care for individual subject to quarantine, or a child due to Covid-19 closures, or is experiencing substantially similar symptoms.
- Up to an additional 12 weeks at two-thirds of regular pay if employee cannot work because of bona fide need to care for child due to Covid-19 closures.

Family and Medical Leave Act (FMLA)

- Employers with at least 50 employees in a 75 mile radius are covered by the FMLA.
- Employer is responsible for providing proper notice of FMLA rights to employees.
- To be eligible for leave, the employee must have worked for the employer for at least 12 months and at least 1,250 hours during that 12 month period.
- Eligible employees may take up to 12 weeks of unpaid leave in a 12-month period for the following reasons:
 - birth or adoption of child;
 - care for a spouse, child, or parent with a serious medical health condition;
 - if employee has a serious health condition that makes the employee unable to work; or
 - any qualifying need if employee's spouse, child, or parent is a military member on covered active duty or called to active duty.

FMLA and Covid-19

- Employee may be entitled to FMLA leave if employee has Covid or is caring for a family member with Covid-19.
- Employee may not use FMLA leave solely for the purpose of avoiding exposure to Covid-19.
- Doctor's note may be required.
- May run concurrently with FFCRA.

Illinois Employee Paid Sick Leave Act (EPSLA)

- This Act was first put into law in 2017 and generally requires employers to allow their employees to use employer-provided sick leave benefits for absences due to medical appointments of family members.
- On April 27, 2021, Governor Pritzker amended the Act to include “personal care,” which can include taking a family member to get the Covid-19 vaccine or caring for family members after receiving the vaccine.
- Employers should allow use of sick leave benefits by an employee for purposes of the employee taking a qualifying family member to receive the COVID-19 vaccine.

Cook County Earned Sick Leave Ordinance


- Employees accrue 1 hour of paid sick leave for every 40 hours worked.
- Employee cannot accrue more than 40 hours in a 12-month period.
- Employees can carry over up to 20 hours of paid sick leave per year.
- Employees can use paid sick leave:
 - to care for themselves;
 - to care for a family member;
 - if employee is the victim of domestic violence;
 - of place of business is closed due to public health emergency; or
 - employee needs to care for a child whose school or place of care is closed due to a public health emergency.

Illinois Worker’s Compensation Act

- There is a rebuttable presumption that if a **first responder** or **frontline worker** contracts Covid-19, that employee contracted Covid-19 at work and is entitled to worker’s compensation benefits.
- To rebut the presumption, employers must:
 - demonstrate employer compliance with CDC or IDPH guidelines in the 14 days prior;
 - establish Claimant contracted Covid-19 elsewhere; or
 - show Claimant worked from home or was off work in the 14 days prior to the diagnosis
- Unfortunately, there is no guidance on the extent of benefits the Commission could award the employee in addition to medical treatment expenses and temporary total disability benefits.

Avoiding the PTO “Bomb”

- Set clear guidelines regarding how much leave an employee is entitled to take each year.
- Impose fixed or conditional blackout periods – but do so early!
- Be clear on how much leave can carry over each year.
- Encourage employees to use their leave throughout the year.
- Require employee to obtain authorization from supervisor before taking PTO.
- Offer to pay out accrued but unused PTO.
- Treat all requests for leave fairly and equally – do not discriminate!




RETURN TO THE ACTUAL WORKPLACE

JUNE 2, 2021

PRESENTED BY
M. ELYSIA BAKER ANALO


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Remote Work: the New “New Normal”?

- Employers who shifted to remote work during the pandemic are likely to encounter reluctance or resistance to return to the office
 - According to a March 2021 survey by the American Psychological Association:
 - Nearly half (49%) of Americans report feeling uneasy about returning to in-person interactions once the pandemic ends.
 - Vaccination status has little effect: Adults who received a COVID-19 vaccine were just as likely (48%) as those who have not received a vaccine (49%) to say this.


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Remote Work: the New “New Normal”?

- Studies have shown that, even with the vaccine rollout, many employees say they want to continue working remotely because they *prefer* it
 - A recent Gallup survey found that if given the choice, over a quarter (26%) of remote U.S. workers would continue to do so after reopening
 - A February survey by workplace technology company Envoy found nearly half of respondents (48%) said they’d like to work some days remotely and some days from the office.
 - Many (41%) said they would be willing to take a job with a lower salary if their company offered a hybrid work model

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If employees refuse to return to the workplace, can they be disciplined or terminated?

- **Generally, yes.** Employers who temporarily shifted to a remote working environment during the COVID-19 pandemic are not automatically required to continue teleworking after the workplace reopens
- Employers can require an employee return to the workplace as long as 1) the workplace is safe and 2) the employer has a legitimate, nondiscriminatory reason for doing so

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OSHA: Employees' Right to a Safe Workplace

- At all times, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm
- Throughout the pandemic, OSHA has affirmed that “[i]mplementing a workplace COVID-19 prevention program is the most effective way to mitigate the spread of COVID-19 at work.”
 - As of June 1, OSHA is reviewing the recent CDC guidance but has yet to provide updated guidance of its own

OSHA: Employees' Right to a Safe Workplace

- Current OSHA Guidance for a Return-to-Work Plan:
 - Conduct a hazard assessment
 - Identify measures that limit the spread of COVID-19 in the workplace
 - Adopt measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace
 - Implement protections from retaliation for workers who raise COVID-19 related concerns

EEOC: Teleworking as a Reasonable Accommodation

- Employers must, at all times, comply with ADA and Title VII requirements to provide reasonable accommodations due to a medical condition, a religious belief, or pregnancy, absent undue hardship
- The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace for health and safety reasons, or otherwise chose to permit telework, does not mean:
 - Employer permanently changed a job's essential functions
 - Telework is *a/ways* a feasible accommodation
 - Telework does not pose an undue hardship

EEOC: Teleworking as a Reasonable Accommodation

- Nevertheless, EEOC has made clear that employer obligations to accommodate requests for a telework arrangement remain heavily fact-specific and must be addressed on an individualized basis
 - Pandemic telework “could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”
 - Be warned: employers may have more difficulty proving that working in the office is an essential function of the job if employees have been successfully working remotely

EEOC: Teleworking as a Reasonable Accommodation

- Continue to participate in the same interactive process for requests for telework as employer would in response to any other accommodation request
 - Generalized fear or anxiousness about return to workplace does not need to be accommodated, but an anxiety disorder might
 - Employer is always entitled to ask questions to understand whether the employee has a disability-related limitation, discuss how the requested telework accommodation would assist the employee, explore alternative accommodations, and request medical documentation if needed

Additional Return to Work Considerations


- Consider allowing flexible or hybrid telework arrangements as a “new normal”, depending on employee and company needs
 - Teleworking options could result in increased productivity, higher morale, talent retention, broader talent pool, etc.
 - Be mindful of caregiving needs – schools and daycares may still be operating on a hybrid or remote schedule
 - Review and understand tax implications of remote workforce (e.g. is company making appropriate payroll deductions for relocated employees?)

Additional Return to Work Considerations

- Send on-going communications to employees that establish expectations for return and recall to work
 - Consider an employee survey to gauge interest and concerns for returning to the workplace
 - Give as much as advance notice as reasonably possible of when employees will be recalled to the office and/or teleworking arrangements will end
 - Encourage employees with concerns or questions to reach out immediately
 - Be clear if policies and procedures have changed, or if essential functions and duties that were temporarily suspended are being reinstated

Additional Return to Work Considerations

- Communicate, Communicate, Communicate!
 - Assuage fears by educating employees about protective measures and enhanced safety protocols
 - Notify employees of vaccine and mask requirements
 - To prevent claims of discrimination or disparate treatment, inform employees prior to return that masks/face coverings must be workplace appropriate
 - Should adhere to dress code and not have patterns or messages that are substantially disruptive or overly provocative (e.g. no profanity, offensive or obscene slogans, or political messaging.)
- Continue to monitor updated agency and state/local legal requirements




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UPDATING POLICES AND PROCEDURES RELATED TO COVID-19

JUNE 2, 2021

PRESENTED BY
ASHLEY L. ORLER

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Have a Written Return to Worksite Plan

- A plan outlining returning to the worksite is a must, and should be in writing so management and employees are on the same page.
- Employers must make key decisions that are best for its business and workforce.
- The policy must be implemented consistently.
- Have employees acknowledge receipt of the written policy.

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Waivers – Should Employers Require?

- Idea of waivers is to protect employers from claims by employees who may become sick with Covid.
- Will waivers work if signed by employees?
- What are the benefits of waivers?
- Are waivers even that helpful, even if they are enforceable?

It's Handbook Review Time...

- Remote Work or Telecommuting Policy
- Travel Policy
- Job Descriptions (though not in the handbook)
- PTO, Leave, Attendance, Scheduling Policies
- Health and Safety Protocols
- I-9s (also not in the handbook)

Thank You!

Please contact any of us with additional questions.



Ashley L. Orlor

alorler@gct.law
(312) 696-2032



David J. Ben-Dov

djbendov@gct.law
(312) 696-1361



Brianna L. Golan

blgolan@gct.law
(312) 696-2636



M. Elysia Baker Analo

mebanalo@gct.law
(312) 696-1365