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EMPLOYMENT LAW NEWSLETTER

EMPLOYER MASK AND VACCINATION MANDATES FOR EMPLOYEES. WHAT'S THE LATEST?

On May 14, 2021, following new guidance from the Centers for Disease Control, Governor Polis lifted the State mask mandate for *fully vaccinated* Coloradans. Thus, fully vaccinated people no longer need to wear masks outdoors or indoors. Unvaccinated people are still encouraged to wear a mask indoors, but it's not mandated. Although Gov. Polis lifted the State mandate, counties, towns and businesses are still able to implement stricter mask mandates.

So what does this mean for employers? Given the significant impact that the pandemic has had on workplaces, and with the rollout of COVID-19 vaccines, many employers are considering whether to impose mandatory vaccination policies. Indeed, employer-required flu vaccinations have been a common practice for years. The Equal Employment Opportunity Commission ("EEOC") recently issued guidance on COVID-19 vaccines indicating that employers generally (but subject to the limitations explained below) may mandate vaccines for their employees without violating federal anti-discrimination laws.

All employers with 15 or more employees are covered under the American with Disabilities Act ("ADA") and Title VII. The Colorado Anti-Discrimination Act ("ACT") covers employers of any size.

Disability Accommodations

Even though the EEOC guidance signals permission for employers to require employees to be vaccinated, there is still a concern that

administering the COVID-19 vaccine would trigger the ADA's provision prohibiting disability-related inquiries, particularly relating to pre-screening vaccination questions. If the employer administers the vaccine, it must show that the such pre-screening questions it asks employees are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and does not receive a vaccination, will pose a direct threat to the health or safety of her/himself or others.

The EEOC advises that there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, an employer could consider making vaccinations voluntary (i.e., employees choose whether to be vaccinated). In that event, the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. If the employee chooses not to answer the pre-screening questions, the employer may not retaliate against, intimidate, or threaten the employee. Alternatively, if the employer requires its employees to receive their vaccination from an outside provider, such as a pharmacy or other health care provider, which would be conducting the necessary pre-screening inquiries without any involvement of the employer, the ADA's restrictions against disability-related inquiries would not apply. Then, the employer can require

that its employees provide proof they received the vaccine without providing any other, additional medical information, as proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, accordingly, is not a disability-related inquiry.

The EEOC guidance also confirms that the ADA allows an employer to have a qualification standard for vaccinations that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” This requires an individualized assessment by employers with regard to individuals with a disability.

If a determination is made that the employee’s disability poses a direct threat to his own health, an employer may not exclude the employee from the workplace, or take any other adverse action, unless there is no way to provide a reasonable accommodation that would permit the employee to perform the essential functions of the job. If there are no accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

By way of example, **other** accommodations may include:

- additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace;
- additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and

coworkers/the public or increasing the space between an employee with a disability and others;

- elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position); or
- temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

Religious Accommodations

Generally, Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are “sincerely held” and the reasonable accommodation poses no undue hardship on the employer.

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. 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, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or

observance, the employer would be justified in requesting additional supporting information.

According to the EEOC, if an employee cannot be vaccinated and the employer cannot make a reasonable accommodation by changing their work environment (for example, if possible an employer can allow the employee to work remotely) and/or job duties, the employee may be terminated.

Paid Sick Leave to Get Vaccinated

Finally, in accordance with the new Healthy Families and Workplaces Act (“HFWA”), which went into effect in Colorado on January 1, 2021, all employers must provide paid leave for a range of health needs. That includes any time off required for “preventative care,” such as vaccination that prevents an employee from working due to a workday appointment and/or experiencing side effects afterwards. Vaccination side effects can be hard to distinguish from the wide range of possible symptoms of COVID-19 itself, and HFWA provides time off for anyone “experiencing symptoms of” COVID-19. The employee needs to notify the employer “as soon as practicable” — which, for vaccination side effects, may not be much time in advance — and the employer needs to keep the employee on payroll during the leave. Employers cannot require employees to obtain vaccination appointments outside work hours.

Should employers decide to start a mandatory program for vaccinations, employers will need to revise its policies addressing the issues such as payment for vaccines; PTO considerations for receiving vaccinations, and any time off needed as a result of any adverse reactions; requiring proof of vaccination; and whether an employee is to be terminated for refusing to obtain a vaccine.

Continued Masking for Those Who Don't Vaccinate

In the event an employer does not wish to impose a mandate that employees be vaccinated, and an employee does not wish to be vaccinated, an employer should consider issuing a company-wide notice that informs employees to (a) notify Human Resources or a supervisor that they do not wish to be vaccinated; and (b) that unvaccinated employees will be required to both wear a mask, and appropriately physically distance from others. Employers may want to consider requiring that employees present proof of vaccination in order to avoid wearing masks, but may instead want to utilize an honor system in which an employee affirms they have been vaccinated. Such requirements would be subject to change based upon guidelines issued by the CDC.