

CLINE WILLIAMS

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***COVID-19 VACCINATION POLICIES:
CONSIDERATIONS FOR EMPLOYERS***

presented by

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OVERVIEW

- Introduction to vaccination policies
- Identify potential legal challenges and practical hurdles associated with vaccination policies for healthcare employers
- Discuss important policy considerations for healthcare employers
- Discuss key employee benefits considerations



INTRODUCTION TO VACCINE POLICIES

MANDATORY POLICIES

- Generally, healthcare employers *may* mandate the COVID-19 vaccine, subject to a few exceptions
- Mandatory = vaccination is a condition of employment
- Consider very carefully
 - Is a mandatory vaccination policy necessary?
 - How will employees react to the policy?
 - How will you deal with objections to the policy?

VOLUNTARY POLICIES

- As a healthcare employer, value your workforce's circumstances
- State the case for vaccination
- Consider policy elements:
 - Which vaccinations
 - Which employees
 - When/where administered*
 - Cost*
 - Procedures, forms, substantiation



NAVIGATING MAJOR LEGAL ISSUES

ADA CONSIDERATIONS

- Vaccine administration is not a medical examination
- However, pre-screening questions may implicate disability-related inquiries
 - Mandatory policy and employer administers vaccine → “job-related and consistent with business necessity” analysis
 - Voluntary policy → ok
 - Mandatory policy with vaccine administered by third party → ok
- Proof of receipt of vaccination is not a disability-related inquiry
 - But advise employees *not* to provide medical information as part of proof

ADA CONSIDERATIONS

- Healthcare employers must reasonably accommodate employees who have disabilities that prevent them from taking the vaccine
 - ADA standard for *denying* reasonable accommodation: undue hardship
- Reasonable accommodation might look like:
 - Safety equipment and PPE
 - Remote work
 - Moving shifts
 - Moving positions
- Follow CDC recommendations

ADA CONSIDERATIONS

- Denying an employee's request for reasonable accommodation
 - Undue hardship
 - Direct threat
- Direct threat individualized assessment
 - (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
- Workplace circumstances matter

GENETIC INFORMATION NONDISCRIMINATION ACT

- Mandated vaccination:
 - Requirement does not violate GINA
 - Vaccine administration does not violate GINA
 - Pre-screening questions *could* implicate GINA
- No mandate = (almost) no worries

TITLE VII CONSIDERATIONS

- Healthcare employers must reasonably accommodate an employee's sincerely-held religious belief that prevents the employee from being vaccinated
- Analysis:
 1. Religious belief
 2. Sincerely-held
 3. Reasonable accommodation

TITLE VII CONSIDERATIONS: “SINCERELY-HELD BELIEF”

- Generally assume an employee’s request for religious accommodation is based on a sincerely-held religious belief, UNLESS:
 - the employee has behaved in a manner noticeably inconsistent with the employee’s professed belief;
 - the accommodation is sought for particularly desirable and likely secular (non-religious) reasons;
 - the timing of the employee’s request is suspect; or
 - the employer otherwise has legitimate reason to believe the employee does not seek accommodation for religious reasons.

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QUESTION BREAK

QUESTIONS

Some COVID-19 vaccines use messenger RNA (mRNA) to teach our cells how to make spike protein, triggering an immune response.

Does that mean that employer-administered vaccinations, or requirements to provide proof of vaccinations, constitute an impermissible use of employee's genetic information under GINA?

QUESTIONS

Employee argues that they cannot get the vaccination because it is contrary to their religious beliefs. The employee has never discussed their religious beliefs previously. The employer has doubts on whether the employee's beliefs are sincere.

Can the employer require the employee to provide documentation of their religious beliefs for a Title VII religious exemption to vaccination?



ADDITIONAL CONSIDERATIONS

OSHA CONSIDERATIONS

- No COVID-19 guidance specific to vaccines, but past guidance suggests that employers can mandate vaccination
- Biden Administration will expand and strengthen COVID-19 workplace safety measures
- Watch for future guidance and developments

LABOR LAW CONSIDERATIONS

- Non-Unionized employers: Section 7 still applies
 - Nonsupervisory employees may engage in concerted activities for the purpose of mutual aid or protection
- Unionized employers: review collective bargaining agreements
 - Requiring vaccination may be a mandatory subject of bargaining

EMPLOYEE LEAVE RIGHTS

An employee gets a COVID-19 vaccination and experiences side effects shortly thereafter. What rights does the employee have to take leave?

- Paid Time Off or Sick Leave provided by employer
- Family and Medical Leave Act?
- Families First Coronavirus Response Act?
 - Credits (against employer Medicare tax) extended through 9/30/21
 - Must provide leave for vaccination, side effects

WAGE AND HOUR

- Healthcare employers who *mandate* the vaccine should consider whether employees' time spent getting the vaccine is compensable:
 - Vaccination during work time = likely compensable
 - Vaccination outside of work time = unclear, but likely compensable
- Healthcare employers with *voluntary* policies likely do not need to compensate employees for this time

STATE LAWS

- State law guidance could alter analysis under the ADA, Title VII, or other legal schemes
- Watch for developments
- Nebraska LB 643

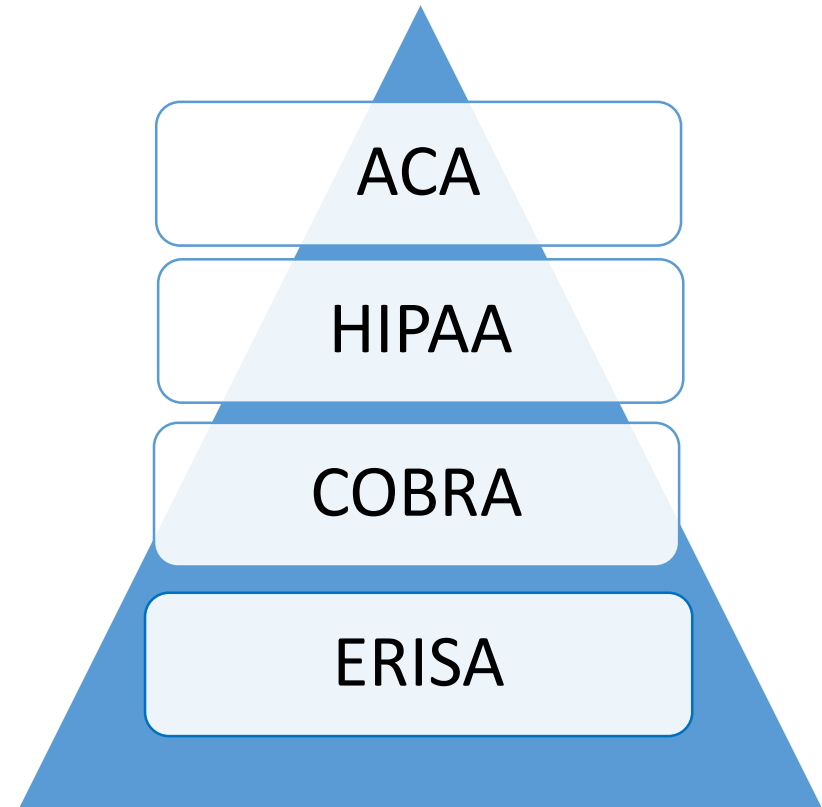


IMPLEMENTING A POLICY: EMPLOYEE BENEFITS

EMPLOYEE BENEFITS: GROUP HEALTH PLAN?

Compliance strategies:

- Part of group health plan
- On-site medical clinic (employee only)
- Employee Assistance Plan (employee + dependents)



EMPLOYEE BENEFITS: INCENTIVES

- Employer-provided incentives
 - Voluntary programs – ADA/GINA
 - “Frozen” guidance: only de minimis incentives
 - EEOC’s “de minimis” is not the same as the IRS’s “de minimis”
 - For tax purposes, cash/gift cards are never de minimis



IMPLEMENTING A POLICY: EMPLOYEE RELATIONS

EMPLOYEE RELATIONS

- Consider your special circumstances as a healthcare employer
 - Strongest case for vaccination
 - How will employees respond?
 - Take an employee relations approach
- Identify administrative hurdles
 - Protect medical data
 - Train management to consistently apply policies



QUESTIONS

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