

The COVID-19 Vaccine – Legal and Practical Implications For North Carolina Employers

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Presented by



**STEPHEN D.
DELLINGER**

Office Managing Shareholder

Littler Charlotte

SDellinger@littler.com

704.972.7010



JENNIFER STAPLES

Associate

Littler Charlotte

JStaples@littler.com

704.972.7019

Agenda

- Setting the Stage
 - COVID-19 Vaccination Overview /Update
 - The Key Question: To Mandate or To Recommend?
- EEOC December 16 Guidance and EEO Related Issues
- Third Party and Contingent Workforce Issues
- Wage and Hour Issues
- Incentives Tied to Vaccinations (e.g. Wellness Plans)
- Vaccinations in a Unionized Environment
- Impact of the Anti-Vaccine Movement
- Workplace Safety & Health / Workers' Compensation / Privacy
- Employee Relations Issues
- Takeaways for U.S. Employers



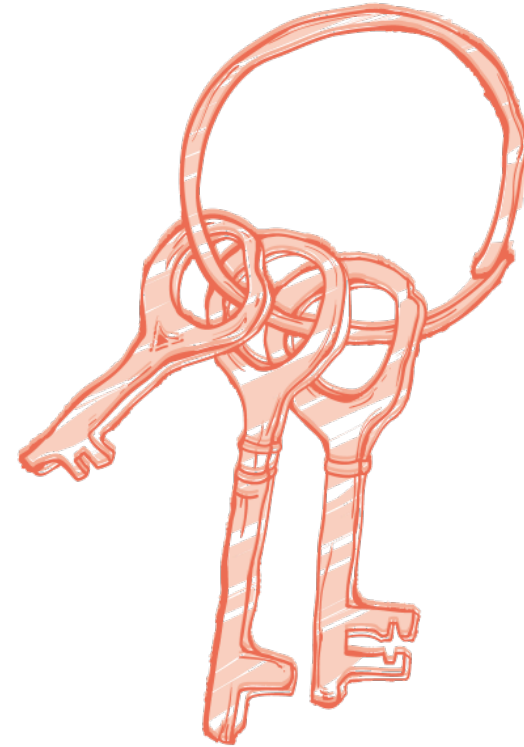


Setting the Stage

Setting the Stage

Key Issues:

- North Carolina Health Orders
- The Available COVID-19 Vaccines
- Evolving Priorities for Vaccine Access
 - Federal Recommendations
 - Avenues for Employer Involvement
- The Key Question - To Mandate Or To Recommend?



North Carolina Health Orders

- NC's limited COVID-19 Immunity statute Senate Bill 704: the COVID-19 Recovery Act
- NC's COVID Information HUB
 - <https://www.nc.gov/covid19>
- There are no travel restrictions in place for NC and visitors do not have to quarantine upon arrival
- Current safety restrictions as of March 26 – at least April 30
 - Face coverings still required in all public indoor settings
 - Increases the indoor mass gathering limit to 50 people and the outdoor mass gathering limit to 100
 - Increases maximum occupancy limits to 100% for retail businesses, 75% indoors and outdoors for restaurants, breweries and 50% indoors and outdoors for bars and conference centers,
 - <https://www.nc.gov/covid-19/staying-ahead-curve>

The Available COVID-19 Vaccines

- Impact and Significance of Emergency Use Authorization (“EUA”)
- Medical Issues Tied to Vaccines
 - Potential Allergic Reactions
 - Contraindications
 - Exclusions from Clinical Trials
- What’s Known About the Effectiveness of Vaccines
 - Preventing COVID-19 Infection
 - Preventing Transmission
 - Maintaining COVID-19 Safety Protocols
- FDA’s Continuing Role in Updating EUA and the Eventual Process for Approval



Evolving Priorities for Vaccine Access – State Prioritization Plans

- (1) Federal government allocates doses based on state and local population
- (2) “...pandemic vaccination planning is a combined state, territorial, tribal and local responsibility that requires close collaboration between public health, external agencies, and community partners
- (3) North Carolina is a Phase 7 – as of April 7, 2021 (everyone over the age of 16)



Getting Your Employees Vaccinated

- Can employers help their employees move up in priority?
 - **No**
- What can employers do?
 - Partner with a health care provider or pharmacy to host an onsite clinic
 - Stay informed → Littler Statewide Vaccination Plan Survey

<https://www.littler.com/publication-press/publication/giving-it-our-best-shot-statewide-vaccination-plans>

The Key Question: To Mandate or to Recommend? Consider the Employee Perspective

- Acknowledge what employees have already experienced:
 - Continued risk of contracting COVID-19
 - Exhaustion with COVID-19 protocols
 - Lasting health consequences
 - Financial insecurity
 - Changed family/living circumstances
 - Bereavement
 - Effects of isolation
 - Political polarization
 - Misinformation - about the virus *and* the vaccine



The Key Question: To Mandate or to Recommend?



Decision must be informed by:

- Logistical issues: Supply, distribution and administration challenges
- Public health policy and ongoing federal transition
- Community considerations
- **Legal and employee relations considerations affecting each workforce**
 - Wage and Hour Issues
 - ARPA
 - Exemptions
 - Privacy Issues
 - Incentives



EEO Issues and EEOC's December 16, 2020 Guidance

EEOC Approach to COVID-19

EEOC Perspective Prior to Focus on COVID-19 Vaccine

- EEOC's approach to Coronavirus
- Focus on ADA-Related Issues
- Flexibility for Employers Based on "Direct Threat" Standard
- Examples of Permitted "Medical Inquiries" (e.g. permitted inquiries re symptoms of COVID-19) and "Medical Examinations" (e.g. COVID-19 tests)
- March 2009 Guidance on Vaccinations Based on H1N1 and EEOC Approach to Mandates Involving Influenza Vaccine



Key EEOC Questions Dealing with Employee Vaccinations

Question #1: Does the EEOC encourage mandatory vaccinations?

Question #2: Can an employer mandate that employees be vaccinated against COVID-19?

Question #3: If so, are there any “thresholds” that must be met before imposing a mandatory vaccination requirement for applicants or employees?

Question #4: Even assuming an employer can pass the “threshold,” are there EEO implications if an employee requests to be excused based on a disability (i.e. ADA implications), other medical reasons (e.g. pregnancy) or religious practices/religious beliefs (i.e. Title VII)?

Question #5: Even in the absence of a mandatory vaccination requirement, are there potential EEO implications based on any employer vaccination program?

EEOC View on COVID-19 Vaccinations – Are there Any Prerequisites that Must Be Met Before Requiring Vaccinations – The “Threshold Question”

Point #1: EEOC is **not** a medical examination. **Impact**:

- Employer ***does not*** have to demonstrate vaccination is job related and consistent with business necessity
- Employer can mandate vaccination
- Employer can request “proof of vaccination” (*Note: ADA risks if ask “why” individual did not receive vaccination*)
- **Caveat**: *This only eliminates the “threshold question” of requiring the vaccine, but does not eliminate the potential exceptions and ground rules based on EEO grounds, regardless of whether the vaccine is “recommended” or “mandatory”*

EEOC View on COVID-19 Vaccinations – “Recommended” Vaccinations

Point #2: “If a vaccination is offered to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary.”

“If an employee chooses not to answer these questions, the employer may decline to administer the vaccine, but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.”

Caveat: The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.” (Query: Do you have to keep fact that employee did not take vaccination confidential?)

Caveat: Care must be taken regarding potential disparate treatment /hostile work environment claims.

EEOC View on Mandatory Vaccinations and Impact of ADA

Point #3- Mandatory Vaccinations are permissible, but care must be taken based on excluding an employee from the workforce who indicates that he/she cannot receive a COVID-19 vaccination due to a disability.

“The ADA allows an employer to have a qualification standard that includes ‘a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.’ However, if a safety based qualification, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, ***the employer must show that an unvaccinated employee would pose a direct threat due to a ‘significant risk of substantial harm to the health or safety of the individual or others that could not be eliminated or reduced by reasonable accommodation.’***”

Step #1: Per the EEOC, this requires an ***individualized assessment*** 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.

EEOC Views on Mandatory Vaccinations – Obligation of Reasonable Accommodation and Interactive Process under ADA

Step #2: “If an employer determines that an individual who cannot be vaccinated due to disability poses a **direct threat** at the worksite, the employer **cannot exclude** the employee from the workplace- or take any other action- **unless there is no way to provide a reasonable accommodation** (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.”

Step #3: Employer needs to determine if any other rights apply.... “For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely...or if not, [the employee] may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies.”

Step #4: “If an employee cannot get vaccinated for COVID-19 because of a disability....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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.**”

EEOC Views on Mandatory Vaccinations and Religious Accommodations

Point #4: If an employee indicates that he/she is unable to receive a vaccination because of a sincerely held religious belief or practice, care also must be taken in excluding an employee from the workforce.

- “EEOC guidance explains that because the definition of religion is broad and protects religious 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 sincerity of a particular belief, practice or observance, the employer would be justified in requesting additional supporting information
- Practice Pointer: Although there is a lower burden to establish “undue hardship” dealing with religious accommodation, employers should consider the same approach to reasonable accommodation through the interactive process. The EEOC used identical language grouping religious accommodation with ADA issues in stating, “If an employee cannot get vaccinated for COVID-19 because of a ...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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.**”
- *Note: Littler has reviewed/monitored EEOC litigation involving employee vaccinations, pre-COVID, and most of the litigation focused on the failure to accommodate based on religious beliefs, practices and observances.*



Third Party Implications – Site Visits/Use of Contractors

Third Party Implications

- **Can a customer/client request that your employees provide proof of vaccination when visiting their site?**
 - ADA compliance – asking about vaccination, standing alone, is not a medical examination
 - However, state privacy or other laws may prohibit or constrain disclosure
 - Maintaining appropriate confidentiality of the information
 - Problems around the follow up question (“why not?”)
- **What are the implications of requesting or not requesting this proof?**
 - *Not* requiring vaccination or proof may undermine the customer’s own workforce mandate/direct threat analysis, if contingent onsite personnel are not vaccinated
 - Potential ADA/Title VII implications within the contingent workforce, if individuals are being denied job opportunities/assignments based upon their vaccination status
 - Practical issues related to the availability and prioritization of vaccines, given limited supply



Wage and Hour Issues

Wage and Hour Issues

Must an employer pay for time spent getting a vaccine?

- FLSA states: If employer recommends, but does not require vaccination, time spent getting the vaccine *most likely* need not be compensated, unless vaccination occurs on premises during working time
- If mandatory, even if non working time, under FLSA, it may be *‘compensable if vaccination is “integral and indispensable” to employee’s “principal activity.”*
 - *See Busk v Integrity Staffing Solutions*, 574 U.S. 27 (2014). “Integral and indispensable” to a “principal activity” may tip in favor of compensability if the “principal activities relate to physical health, care must be taken (e.g. health care).
- Remember the “continuous workday.”
- Business sense: Incentives achieve goals.

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American Rescue Plan Act

American Rescue Plan Act (ARPA)

- Employers with 499 employees or less may *voluntarily* provide leave for COVID-19 related reasons— including leave to obtain the vaccine and leave for recovery from vaccine side effects.
- The ARPA provides a new bank of leave of up to 80 hours from April 1, 2021 through September 30, 2021— old FFCRA hours do not carry over.
- Tax credits for eligible employers offering benefits voluntarily.
- ARPA is entirely voluntary – so, the employer can choose to provide leave and paid benefits, one or the other, or none.
- The employer can choose how much leave will be provided and how long the employer will offer leave.



Incentives Tied to Vaccinations (e.g. Benefits Related Issues)

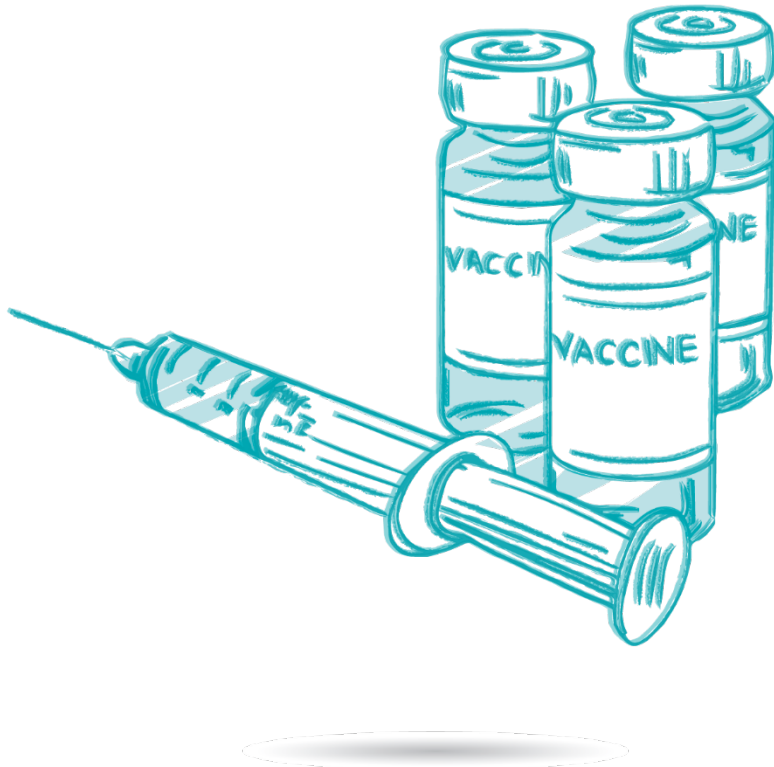
Incentives Tied to Vaccinations (i.e. Wellness Programs)

- Employer regularly provide cash awards to incent employees to engage in certain behaviors
- When the award is health-related, a “wellness plan” is generally established
- Regulations issued under HIPAA statute generally govern wellness plans that are part of a group health plan.
- EEOC regulations govern programs which require a medical examination or disability related inquiry
 - Under these types of programs, any award provided must be de minimus
 - Most vaccine incentive programs will not fall within this category.
- Programs that are not subject to EEOC regulations will permit larger incentives but ADA rules protecting disabled employees are applicable
 - Fundamental issue: There must be some accommodation available to assure disabled can participate:
Is there a reasonable alternative available for those not able to be vaccinated?
 - Accommodation also will be required for those who object to vaccination on religious grounds



Vaccinations in a Unionized Environment

Vaccinations in a Unionized Environment



Vaccine-Related Bargaining Issues for Employers to Consider:

- Is there a state or government order requiring vaccines for this workforce?
- Review terms of CBA (e.g. management rights clause or other pertinent clauses)
- Even with mandate or favorable CBA, are there discretionary or “effects” issues that require bargaining?
- If no government mandate and/or CBA provision expressing authorization, consider mid-term collective bargaining
- Expect Requests for Information (RFIs)
- Regardless of bargaining obligations, importance of buy-in from union to make program successful



Impact of Anti-Vaccination Movement

Impact of Anti-Vaccination Movement

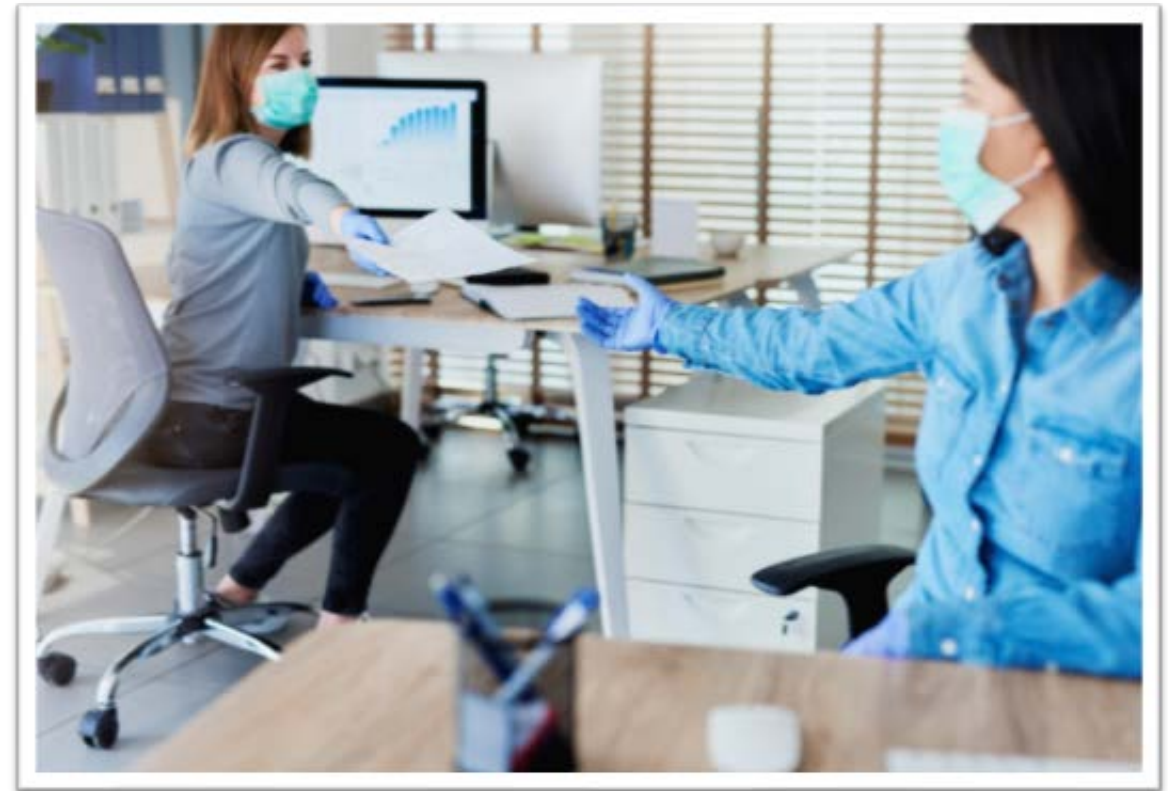
- Even absent a union, a group of co-workers protesting mandatory vaccination could be viewed as “protected concerted activity” under Section 7 of the NLRA
- Section 7 provides that employees may engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- NLRB may view employee speech related to vaccination mandates as having direct nexus to employees’ interest, as vaccinations may be considered a term or condition of employment
- Given EUA status, concerns have been raised regarding safety of the vaccine (regardless of scientific data)
- Add in potential protection “political activities” in some jurisdictions



Other Selected Issues

Other Selected Issues

- Occupational Safety and Health
 - Whether duty to provide a safe workplace includes an EUA vaccine
 - Likelihood of new federal OSHA COVID-19 standards with the new administration
- Worker's Compensation and Related Risks
 - Whether workers' compensation reaches injuries related to an EUA vaccine
- Privacy Related Issues
 - How individual medical privacy bears on employer vaccination programs
 - How information is collected and disclosed in relation to vaccination or non-vaccination
 - Wisconsin's Right to Privacy Law





Additional Employee Relations Issues

Vaccine Prioritization Schemes Will Segment the Workforce

- Different categories of workers will be eligible at different times, based on:
 - Geography and availability
 - Impact of NC's Phase 7
- Demographics may influence willingness to get the vaccine:
 - Race/ethnicity
 - Age
 - Pregnancy and family planning
 - General perceptions on effectiveness



A Successful Vaccination Program Requires Engagement

- Recognize that COVID-19 vaccines are authorized but experimental
- Assume there will be hesitation, and focus on broad, fact-based messaging
 - Link in with public campaigns as they develop
- Be conscious of appearing to “lead from the back”
- Consider how peer engagement can play a role
- Evaluate how to remove or simplify possible barriers to getting the vaccine





Takeaways

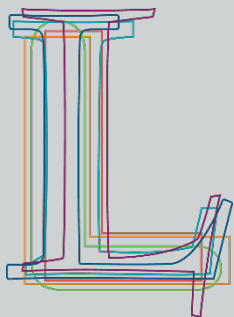
Takeaways – What Can Employers Be Doing *Now*?

- Engage government relations, industry associations, community ties to support the public health effort
- Assess how portions of the workforce may fit into different prioritization schemes
- Ensure that benefits plans will not include hidden costs related to getting the vaccine
- Consider options to ease burden for non-exempt employees
 - Onsite programs
 - Recording as hours worked
 - Account for time off in the event of side effects
- Reinforce existing COVID-19 protocols and prepare for additional guidance
- Develop positive, specific and fact-based messaging

Littler's COVID-19 Vaccination Toolkit

- COVID-19 Vaccination Toolkit for U.S. Employers
 - (1) A practical overview on availability and distribution of the vaccine.
 - (2) A Q & A Guide to help address a myriad of COVID-19 vaccination related issues, which includes discussion of EEOC guidance on employee vaccinations issued on December 16, 2020.
 - (3) Sample policies with helpful annotations.
 - (4) A comprehensive review of the legal issues tied to the COVID-19 vaccine.
 - (5) State-level COVID-19 vaccine distribution guidance.

To purchase the toolkit, email servicesolutions@littler.com.



Thank You!

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