

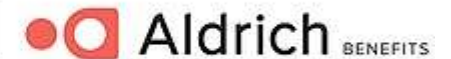
2021 - Employment Law Update

Managing Vaccines in the Workplace
State & Federal Developments
Litigation Risks

February 25, 2021

RANDALL SUTTON, JD

EMPLOYMENT LAW & LITIGATION PRACTICE GROUP



IT'S BEEN A YEAR ...

I gave several in-person trainings last February 2020.

Guess what topic I didn't talk about at all? Yes, it's the same topic that we've all talked about every single day since.

Sunday March 8, 2020 –

Declaration of State of Emergency:

“As of March 8, 2020, there are 14 presumptive or confirmed coronavirus cases in Oregon, 430 cases in the United States, and 101,927 cases worldwide, in a total of 94 countries. In the United States there have been 19 deaths ...”

Tuesday March 17, 2020 –

Onsite Dining Closed.

Prohibit Large Gatherings (25+)

Closure of Schools



AGENDA

- State & Federal Update
 - 2021 Oregon Legislative Session Teaser
 - FFCRA – Does it live on in 2021?
 - Workplace Fairness Act Reminder
 - Oregon Paid Family Medical Leave Insurance (PFMLI) Teaser
- Ok, now let's talk about COVID-19
 - Everything Vaccines –
 - Mandate, Encourage or Steer Clear?
 - Coercion? Bribery? Accommodation? Direct Threat?
 - COVID-19 Litigation Issues

DISCLAIMER

Although I'm a lawyer, this presentation does not provide legal advice and does not establish an attorney-client relationship.

The information provided is intended to educate about general rules and requirements. Unless I'm formally retained as legal counsel, I cannot advise as to the application of the law to your particular circumstances.



2021 OREGON LEGISLATIVE SESSION

aka - WHAT MORE COULD THEY DO TO US??

DISCRIMINATION CLAIMS – SB 477

This Is The One You Should Worry About

This bill would significantly limit the ability of an employer to defend harassment and discrimination claims. Under the bill, the employee need **not** prove:

- Severe or pervasive conduct that altered the employee's terms/conditions of employment
- That the employee was treated less favorably than other similarly situated employees who are not in the same protected class
- That the employee followed the employer's internal personnel policies / procedures to report or complain about the conduct.


The effect of this bill would be to allow employees to sue for insignificant or unintentional slights or grievances.

Essentially, this could create a “strict liability” standard, making the employer liable for virtually any wrongdoing, regardless of the steps made to prevent the alleged misconduct.



PRIVATE ATTORNEY GENERAL – HB 2205

Ok, so this one is also bad.

-
- Currently, only the victim of the alleged violation or the State of Oregon itself can take action.
 - This bill would allow individuals to bring an action in the name of the State of Oregon to pursue civil penalties and violations of state laws, including employment laws. California recently enacted a similar law, which applies only to employment issues.
 - This bill would open the door to unions, special interest groups and others to sue employers for perceived misconduct, even if the State of Oregon is not interested in taking action.
- 

TIGHTENING NONCOMPETITION AGREEMENTS - SB 13 / SB 169 / HB 2325

Several bills seek to further limit the enforceability of noncompetition agreements in Oregon.

Potential amendments to the law seek one or more of the following:

- To make an unenforceable agreement “void,” rather than “voidable.”
- States a specific minimum salary that the employee must make (\$97,311 or \$100,533)
- Allows a contract that only protects trade secrets and solicitation of customers

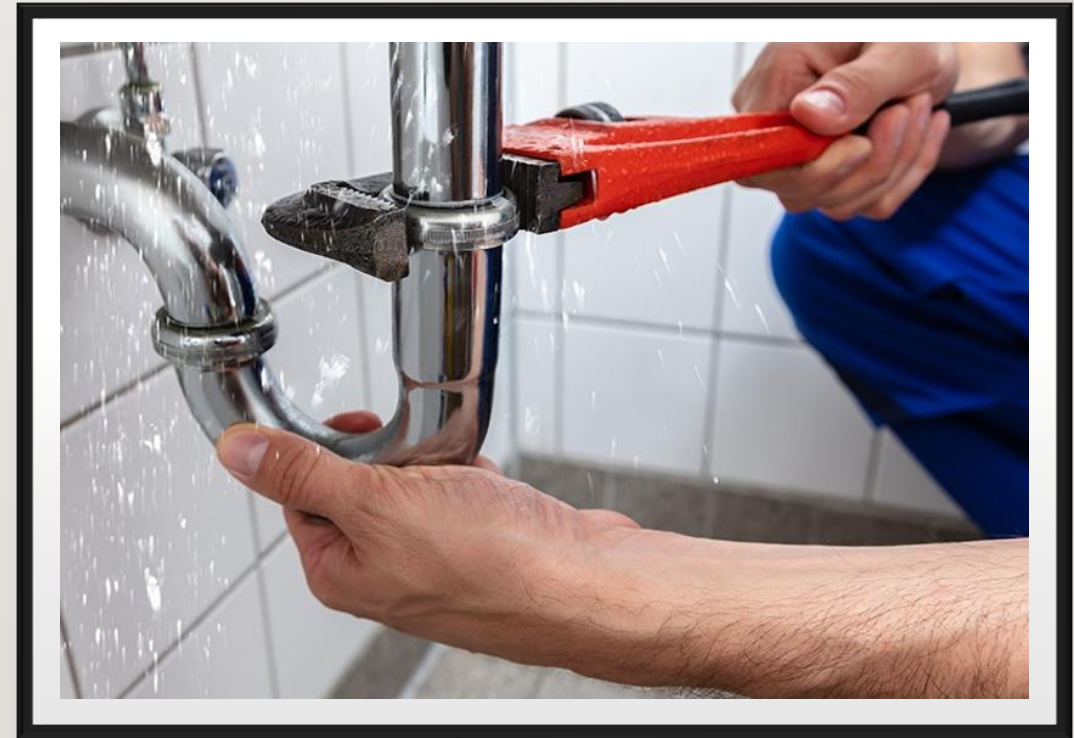
Remember - The law recently changed to require that an agreement is void unless the employee receives a signed written copy of the agreement within 30 days after termination of employment.

Also, remember the Workplace Fairness Act when you draft NDAs



INDEPENDENT CONTRACTOR OR EMPLOYEE – HB 2489

- It's already hard to hire a valid independent contractor under Oregon law.
- One must establish that the person is an independently established business.
- This bill would create a rebuttable presumption that an individual is an employee and not an independent contractor if the individual performs services or labor in exchange for remuneration and is economically dependent on the “employer.”



PRESUMPTION OF SAFETY COMPLAINT RETALIATION – SB 483

- This bill would create a rebuttable presumption that the employer has unlawfully retaliated if:
 - The employee has been discharged or otherwise discriminated against;
 - Within 60 days after opposing an unsafe practice or making a safety complaint.
- Already an inference under caselaw of retaliation if timing is bad



WORKERS COMP - COVID-19 - SB 488

A Covid-19 illness, impairment, death or disability of an essential worker would be deemed to be compensable if:

- The worker was exposed at work to a known or suspected source of COVID-19;
- Was required to remain away from the work site; and
- receives a confirmed or presumptive positive test.

“Essential Worker” includes public safety, medical providers, retail employees, school employees, childcare employees, agriculture workers, and janitorial workers.

OFF DUTY MARIJUANA USE – HB 2974

- Similar to a defeated bill last year
- This bill would prevent an employer from prohibiting the off-duty use of marijuana.
- Because there are no accepted tests for current impairment of marijuana, this bill would prevent employers from effectively testing for marijuana use



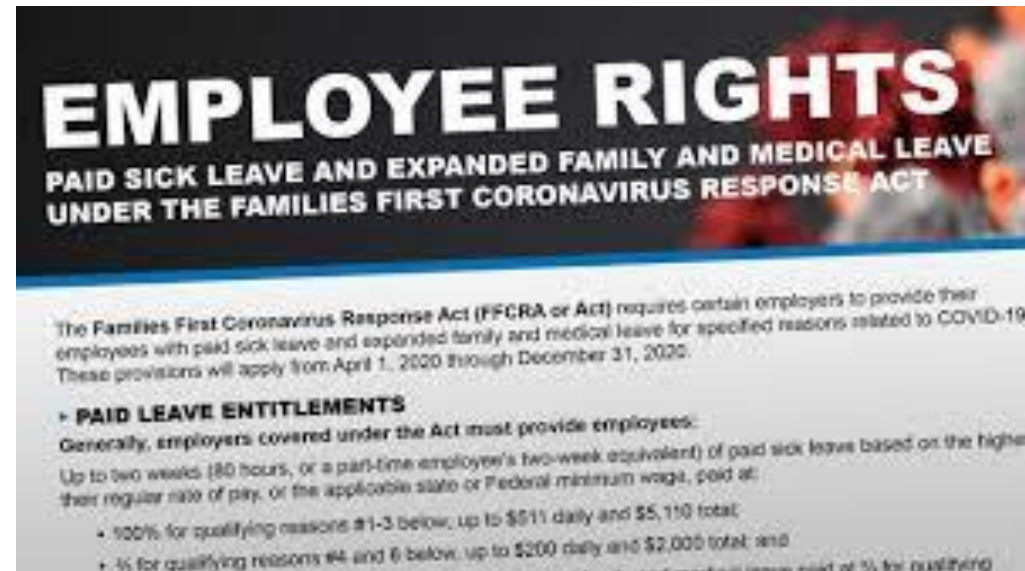
OREGON FAMILY LEAVE – HB 2474

- This bill would expand OFLA to any employer with at least one (rather than 25) employee and would trigger OFLA coverage once an employee works 30 days (rather than 180) for the employer.
- The bill also makes the rules regarding use of OFLA sick leave for public health emergencies permanent.
- The bill is designed to help make OFLA align with Oregon Paid Family Leave Insurance (PFMLI).

FFCRA 2021

YES, IT'S STILL HERE

(If you want it to be)



EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**
Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 5 below, up to \$200 daily and \$2,000 total; and
- ⅓ for qualifying reasons #6 and 7 below, up to \$66 ⅔ daily and \$666 total.

FFCRA IN 2021



-
- Hopefully everyone posted their posters and provided FFCRA leave last year
 - As the year evolved, small employer and healthcare exception proved to be limited
 - As of 12/31/2020, employers are not required to offer FFCRA leave
 - Employers can elect to continue to provide EPSL & EFMLA and will still get the tax credit through March 31, 2021
 - Only the original leave (80 hours EPSL & 10 weeks EFMLA) are available

WORKPLACE FAIRNESS ACT

THE TIME IS HERE. ARE YOUR POLICIES UP TO DATE???



WORKPLACE FAIRNESS ACT REMINDERS

- Notice and policy requirements have been in effect since October 1, 2020
- Policy -
 - Many specific requirements. Appoint specific primary and secondary contact & train them
- Mandatory Notice (*BOLI has a form or you can make your own*):
 - Provide at hire
 - Include in your policies
 - Provide at time of harassment or discrimination complaint
- Update your severance agreements and NDAs (confidentiality / no-rehire)

Paid Family and Medical Leave Insurance Timeline



PAID FAMILY MEDICAL LEAVE (PFMLI)

RULES STILL BEING FINALIZED. WE'VE GOT TIME PEOPLE, SO DON'T PANIC (yet).

Oregon Paid Family and Medical Leave Frequently Asked Questions



What is Paid Family and Medical Leave Insurance (PFMLI)?

It allows an eligible employee to take time away from work to:

- bond with a child during the first year after birth, adoption, or foster care placement.
- care for a family member who has a serious health condition.
- take medical leave for an employee's own serious health condition.
- take safe leave for an employee experiencing issues related to domestic violence, harassment, sexual assault, or stalking.

The medical conditions covered are similar to what is covered by the Oregon Family Leave Act (OFLA), but there are some differences.

Who is covered?

Employees who earned \$1,000 or more in the year prior to claiming their benefit are eligible. Independent contractors, employees of tribal governments, and federal government employees are not covered. People who are self-employed and tribal governments may opt into the program.

What are the benefits?

Eligible employees will receive a weekly benefit payment. The amount of the benefit payment will depend on the employee's average weekly wage, and can be up to 100 percent of their wage.

How much time can be taken?

Eligible employees may take up to 12 weeks in a benefit year to care for themselves or a family

member, and up to two additional weeks for pregnancy, childbirth, or related circumstances. In rare situations, up to 18 weeks may be taken in a benefit year, though four of those weeks may be unpaid.

How is PFMLI funded?

Through a payroll based contribution, of no more than one percent, shared by employers and employees.

- The contribution rate will be set annually by the Employment Department, and will be determined once program costs are estimated.
- Employees will contribute 60 percent and employers will contribute 40 percent of the required contribution. The employee's portion is withheld from their pay, similar to income tax withholding. Employers have the option to pay some or all of their employees' portion as a benefit.

How does Paid Family and Medical Leave Insurance work with other leave?

Family and medical leave runs concurrently with Oregon Family Leave Act (OFLA) and Family Medical Leave Act (FMLA) leave.

- PFMLI is separate from vacation, most paid sick leave, and other paid leave.
- Employers may allow concurrent use of other paid leave for benefits to equal 100 percent of an employee's normal wages.
- Employees may not receive PFMLI benefits while receiving workers compensation or Unemployment Insurance benefits.

Is my job protected while I take leave?

After taking family or medical leave, an employee has the right to return to their prior job, similar to OFLA protections.

- The employee must have worked for their employer for 90 days to have these rights.
- Employers with fewer than 25 employees do have more flexibility with reinstatement if the employee's position no longer exists.
- The employee will not lose seniority or other benefits such as pension while on leave. Healthcare benefits, if provided, must continue while on leave.

Paid Family and Medical Leave Insurance Statutory Timeline



When do payroll contributions begin?

Family and medical leave contributions are currently expected to begin January 1, 2022.

When can I start receiving benefits?

Family and medical leave benefits are currently expected to begin January 1, 2023, one year after payroll contributions begin.

What if I am self-employed or a tribal government?

Tribal governments and those who are self-employed are not required to participate in the PFMLI program. You may choose to opt into the program, though. More information about how to opt in will come later in the program's development.

What if I'm a small employer with fewer than 25 employees?

Employers with fewer than 25 employees are not required to pay the 40 percent employer contribution. However, if an employer does pay the 40 percent employer contribution, they are eligible to receive assistance grants.

Each calendar year, if an employee takes family and medical leave, a small employer who pays their share of contributions may apply for one grant per employee, up to a maximum of 10 grants per year. These grants cover:

- up to \$3,000 towards the cost of hiring temporary workers to replace employees on leave.
- up to \$1,000 to reimburse for significant additional wage-related costs incurred while an employee is on leave.

As an employer, what if we offer an equivalent family and medical leave program?

Employers are required to participate unless the employer has an approved equivalent plan. If it has such a plan, they and their employees will not pay into, nor receive benefits from the State's program, but instead get benefits from the employers plan.

- Equivalent plans must be approved by the Employment Department.
- Employers are permitted, but not required, to deduct from employees' pay money to fund their equivalent program. The amount cannot exceed what employees would pay into the State's family and medical leave program and must be used only for plan expenses.
- Employers must apply for re-approval annually for three years after initial approval, or if the plan changes.
- Upon review by the State, if an employer does not provide family and medical leave plan benefits that are at least equal to those under the State's plan, the State may terminate approval of their plan.

When will the State know more about the implementation of the Paid Family and Medical Leave Insurance program?

Initiation and implementation planning has begun. More details will be clear over the coming months and these FAQs will be updated periodically. Check our web page at: www.Oregon.gov/Employ/PMFLI

COVID-19 VACCINATION FAQS

COERCION?

BRIBERY?

ACCOMMODATION?

DIRECT THREAT?



THE FOUR WAYS TO GET A HORSE GOING THE WAY YOU WANT IT TO GO.



- “Think” a horse ...
- “Ask” a horse ...
- “Tell” a horse ...
- “Make” a horse ...

MANDATORY VACCINES - GENERAL RULE

- You can require that employees get a COVID-19 vaccination as a condition of employment or continued employment ...
- **EXCEPT IF:**
 - Job exempt under the law - health care workers, police, fire etc.
 - CBA or employment contract prohibits
 - Employee's disability, which can be reasonably accommodated without direct threat
 - Employee's sincerely held religious beliefs, which can be reasonably accommodated without direct threat

RECENT EMPLOYER STUDY*

Only 9% of respondents said they were considering requiring employees to take the vaccine as a condition of their employment, 64% said they were not thinking about mandating it.

27% said they were unsure what they would do.

Of those considering a mandate, agricultural and food production employers are far and away the likeliest to require it (18%).

Employers in the construction (13%), healthcare (12%), hospitality (11%), and retail (10%) industries also rank near the top.

Least likely to mandate the vaccine? Government employers (4%), and those in the finance and insurance (5%), professional services (5%), automotive (6%), manufacturing (7%), and education (9%) industries.

*Study Conducted by Fisher Phillips, LLP of 700 employers in late January 2021

STATUTORY HEALTHCARE WORKER EXCEPTION

- Per Oregon statute - ORS 433.416(3)
 - “A worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule or regulation.”
- “Worker” is defined to include a health care providers, employees of a licensed health care provider, and clinical laboratories.
 - Includes: Medicine, Nursing, Dentistry, Dental Hygiene, Chiropractors, Naturopaths



ADA ANALYSIS - A REFRESHER



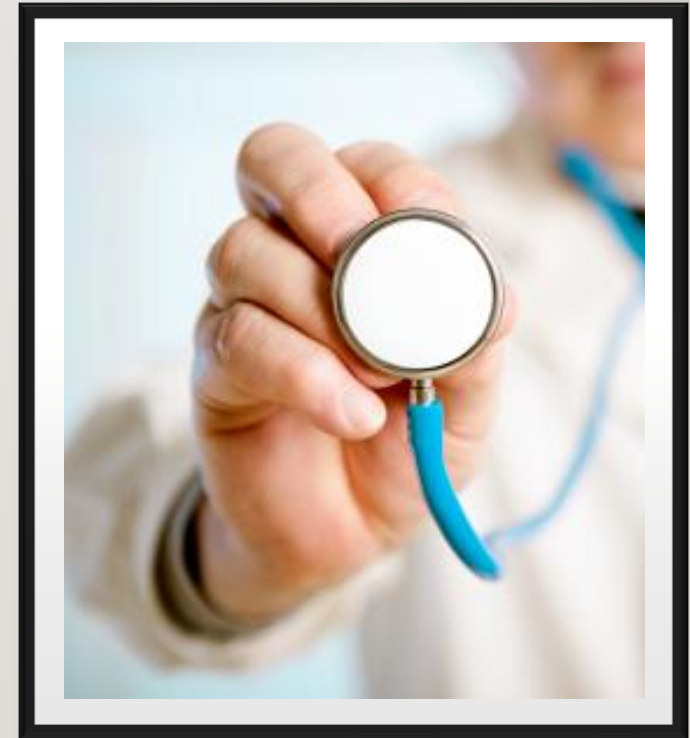
- **Disability** - An impairment that substantially limits one or more major life activities
- **Essential Functions** – The important parts of a job. What the employee is paid to do.
- **Reasonable Accommodation** – Something that allows the employee to satisfactorily perform all of the essential functions of their job even though he or she has a disability.
- **Undue Hardship** – Makes an accommodation unreasonable due to significant difficulty or expense
- **Direct Threat** – Allowing the employee to work at all (even with an accommodation) will pose a risk of harm to the employee or others
- **Interactive Process** – Dialog between employer and employee (and others) to figure out whether an impairment can be accommodated.

HOW THE ADA APPLIES TO MANDATORY VACCINATIONS

- ADA Regulates “Medical Examinations”:
 - Is getting a vaccination a “medical examination?” If so, it can only be required if “job related and consistent with business necessity.”
- ADA Requires Employers to Attempt to Accommodate an Employee’s Impairment.
Steps in the process:
 - Employee’s impairment makes getting the COVID-19 vaccination unsafe
 - Employee requests the accommodation of working without getting vaccinated
 - Employer must evaluate potential reasonable accommodations
 - Employer must rule out whether the employee poses a direct threat

“MEDICAL EXAMINATION” UNDER THE ADA

- The vaccination itself is not a medical exam
 - Pre-screening inquiry is. However, if 3rd party (hospital, pharmacy etc.) administers vaccine, then it is not the employer asking the questions, so no ADA exam.
 - BUT – Sending employee to an IME to verify whether employee is truthfully telling you that he/she can't be vaccinated would be an exam.
- It's ok (and best) to simply ask employee to provide documentation from health care provider re: whether the employee can be vaccinated
- Require a doctor's note verifying that the employee should not be immunized



DISABILITY AND COVID-19 IMMUNIZATION

Per The Yale University Covid-19 Vaccination Program

- Who should not get the vaccine due to a disability?
 - People with a severe allergic reaction (anaphylaxis) to any component of the COVID-19 vaccine
 - People who had severe allergic reaction to first shot
- What about?
 - Allergies – Food, oral medications, latex, pets, insects etc. - **OK!**
 - Pregnant or breastfeeding – **Sure!**
 - Autoimmune / immunocompromised – **You bet!**
 - Already had COVID-19? - **Why not?**
 - Recent positive test? – **Yep!** (Dose 1 - earlier of 4 weeks after onset or positive test / Dose 2 – after completion of 10-day isolation period and 24 hours with no fever)



ACCOMMODATION OF EMPLOYEE WITH DISABILITY

- Potential Accommodations:
 - Continued Remote Work
 - Employee cannot attend in-person work events
 - Distancing
 - Mask wearing
- Jobs with Good prospects for Accommodation
 - Office workers
 - Outdoor jobs
- Tricky Situations where Accommodation will be Difficult
 - Call centers
 - Restaurants
 - Brick & Mortar Retail
 - Manufacturing



WHEN IS AN ACCOMMODATION “REASONABLE”

- Employee can still satisfactorily perform all essential functions of the job
- Is there an “undue hardship” – Decide by reviewing:
 - The nature and cost of the accommodation needed
 - The overall financial resources of the facility & of the company
 - The type of operation of the employer
 - Structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation
 - The impact of the accommodation on the operation of the facility.
- Potential considerations:
 - Percentage of employees vaccinated in the workforce
 - Percentage of community vaccinated

ACCOMMODATIONS FOR SINCERELY HELD RELIGIOUS BELIEFS

- GENERAL RULE:
 - 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 or pose a direct threat
- Is the Belief Legitimate / Sincerely Held?
 - 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.
 - The key inquiry is whether the employee's belief is rooted in religion or a religious belief
 - A social, political, or economic philosophy or personal preference is not going to qualify as a "religion"

ACCOMMODATION OF RELIGIOUS BELIEFS

- What is an “Undue Hardship?”
 - Under federal law:
 - “Undue hardship” is more than a de minimis cost or burden on the employer.
 - Under Oregon law:
 - The standard is higher.
 - The belief must be accommodated unless it “imposes significant difficult or expense.”

DIRECT THREAT ANALYSIS

- Analyze in conjunction with “reasonable accommodation” analysis.
- 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 cannot be eliminated or reduced by reasonable accommodation.”
- Employer must rely on objective medical information.
- Employer must undertake an individualized assessment of the particular employee’s job:
 - the duration of the risk;
 - the nature and severity of the potential harm;
 - the likelihood that the potential harm will occur; and
 - the imminence of the potential harm
- **Remember** – If employees were safely able to do their job wearing masks or working remotely, why can’t they continue to do so?

WHAT ABOUT THE EUA?

Emergency Use Authorization

- Unlike most drugs, the FDA has authorized the COVID vaccinees for “Emergency Use Only”
- Per the EEOC, any vaccine issued under an Emergency Use Authorization, the FDA (and the vaccination provider) has an obligation to inform vaccine recipients about its potential benefits and risks, the extent to which such benefits and risks are unknown, whether any alternative products are available, and “**that they have the option to accept or refuse the vaccine.**” This language comes from the federal statute governing the EUA.
- So an employer cannot force an employee to be immunized, but the EUA itself does not prevent the employer from conditioning employment on immunization.

DIRECT THREAT SCENARIOS

Can / Must the Employer Accommodate?

1. Employee's future with the company will be much brighter if he is able to be in the office mingling with the boss. Employer adopts a "remote work until vaccinated policy"
2. Employee works at Widget company. The assembly line is distanced in some areas, but there are spots where employees work right across from one another all day. Breaks are taken in the lunch room
3. Employee works in a busy restaurant as a server
4. Employee works in a big box store. Sometimes works the register. Sometimes the warehouse.

CAN I BRIBE MY EMPLOYEE TO VACCINATE?

- - **EEOC's Proposed Rules – Wellness Programs**

- For many years, employers have offered incentives (or, alternatively, imposed penalties) to encourage employees to participate in health wellness programs.
- Participation typically required medical exams & disclosure of medical conditions.
- Various rules under consideration / challenge since 2016, with proposed rules issued in 2020.
- The proposed rules generally allowed employers to offer employees only de minimis incentives (e.g., a water bottle or gift card of modest value) for participating in a wellness program.
- Last week, the proposed rules were withdrawn, leaving no guidance whatsoever for employers.



CAN I BRIBE MY EMPLOYEE TO VACCINATE?

- **Individual Wellness Incentives**

- With the withdrawal of the proposed rules, still no guidance for employers
- Employers should be able to incentivize immunization.
- What about alternative accommodations for disability or religious beliefs?
- Perceptions –
 - PRO – May tip an ambivalent employee over to immunization?
 - CON – Implies that company is trying to bribe employees to do something unsafe / unwise

- **Oregon Pay Equity**

- Offering money to a person who vaccinates may create a disparity that's not covered by the pay equity bona fide factors. Is it a "certification?" Probably not. It's also not merit, experience, seniority.

- **Companywide Incentive Program**

- For example, a bonus to all employees once a certain percentage are vaccinated may be ok
- But be careful that employees don't retaliate through peer pressure if an employee is objecting due to disability or sincerely held religious beliefs.

- All of this is in flux, so best practice is to provide only de minimis incentives.



DO I PAY MY EMPLOYEE'S WAGES TO VACCINATE?

- Time Spent Getting Vaccinated
 - If you are directing an employee to get the shot during working hours, you need to pay for that time. If the employee chooses to go during non-working hours instead, you do not need to pay for it.
 - If you simply say that employees need to show proof of vaccination by a given date (they go get it on their own), the safest course is to at least let the employee use sick leave for the time spent getting the vaccine.
- Side Effects
 - If you are requiring or incentivizing employees to get vaccinated, decide whether you are going to provide paid leave if the immunization causes downtime.
 - Will this be an excused absence? Will you provide paid time or allow use of sick leave / PTO?



COVID-19 RELATED LITIGATION RISKS

MANY NEW CLAIMS HAVE
ARISEN OUT OF THE
PANDEMIC



COVID LITIGATION TRENDS

- **FFCRA:**

- Healthcare employers, due to erroneous DOL guidance re: non-direct care staff.
- Small employers who inappropriately applied small employer exemption.
- Failure to understand leave requirements.
- Denial based on inadequacy of documentation provided by employee.

- **Wage & Hour Claims:**

- Waiting time related to hygiene protocols, temperature checks etc.
- Unpaid wages or overtime for work performed at home.
- Furloughs affecting exempt status

- **Contract Claims:**

- Breach of employment contract. Furloughs, pay cuts, or layoffs result in compensation less than promised under the employment contract.

COVID LITIGATION TRENDS (continued)

- **Safety:**
 - Intentional harm due to failure to follow CDC/OSHA/OHA guidance
 - Retaliation due to status as OSHA whistleblowers
 - Retaliation for internal complaints re: masks or social distance
- **Concerted activities / NLRA protections:** For complaining about COVID safety
- **Discrimination:**
 - In selection of employees for layoff/termination during initial stay-in-place order or thereafter.
 - In failing to rehire after layoff
- **ADA:**
 - Failure to consider work-from-home as a reasonable accommodation
 - “Regarded as” ADA disability - Refusal to allow older worker or worker with health issues to keep working.
 - Disclosure of COVID diagnosis without permission of employee

QUESTIONS??

Randall Sutton

503.399.1070

rsutton@sglaw.com



Saalfeld Griggs PC

Sound counsel. Smart business.

www.sglaw.com