



Giving the Industry a Shot in the Arm – What hospitality employers need to know about the COVID vaccine.

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SPEAKERS:



CHRIS BENTLEY
Partner
JOHNSON JACKSON



CHRIS JOHNSON
Partner
JOHNSON JACKSON



Giving the Industry a Shot in the Arm – What Hospitality Employers Need to Know About the COVID Vaccine

Presenters: Chris Bentley and Chris Johnson

COVID-19 Vaccinations

- With COVID-19 vaccinations being distributed throughout the United States, employers will eventually have to decide whether to implement a mandatory vaccination policy.
- In making this determination, employers will face various legal and practical considerations that may persuade or dissuade employers from rolling out an across-the-board vaccination mandate.
- Since each organization is different, there is no “one size fits all” answer.



ADA – Medical Examination Issue

- The ADA provides, in relevant part:
 - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
 - A “medical examination” is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health.



ADA – Job Related and Consistent with Business Necessity

When may an employer ask an employee a disability-related question or require an employee to submit to a medical examination?

- An employer may generally only seek information about an employee's medical condition when it is job related and consistent with business necessity.
- This means that the employer must have a reasonable belief based on objective evidence that:
 - an employee will be unable to perform the essential functions of his or her job because of a medical condition; or,
 - the employee will pose a direct threat because of a medical condition.



Can Employers Mandate the Vaccine?

- The EEOC issued updated guidance on December 16, 2020, to address questions about the COVID-19 vaccine.
- The Guidance clarifies that employers can mandate that employees receive the vaccination as a condition of working onsite.
- However, if an employee does not comply, the employer must engage in an individualized analysis of whether an exception is needed due to a disability or sincerely held religious belief.



Proof of a Vaccine?

- It is lawful for an employer to request proof of vaccination despite the ADA's restrictions on disability-related inquiries.
- Reason: Proof of a COVID-19 vaccination is not likely to elicit information about a disability.
- However, subsequent questions, such as why the employee did not receive the vaccine, may elicit information about the disability and would be subject to the pertinent ADA standard that the questions asked are job related and consistent with business necessity.



Pre-Screening Vaccination Questions

- Pre-screening vaccination questions may also implicate ADA's provision on disability-related inquiries.
 - Why is that important?
 - What happens if you violate that provision?
- Notably, the CDC recommends asking certain questions before administering a vaccine to ensure that no medical harm would occur from doing so. If employer asks these screening questions (or a third party hired by the employer), these answers will constitute a disability-related inquiry.



Two Exceptions to Pre-Screening Vaccination Questions

1. If employer offers vaccination to employees on a voluntary basis. ADA requires that an employee's decision whether to answer the pre-screening questions must also be voluntary. If employee declines to answer questions, employer may refuse to vaccinate, but may not retaliate.
2. If employee receives an employer-required vaccine from a third party not under contract with the employer (pharmacy/health-care provider, etc.).



Employee Declines Vaccination

- If the employer mandates COVID-19 vaccinations and an employee declines for a protected reason, the Guidance requires that the employer determine whether an unvaccinated employee poses a direct threat to others, and what accommodations are available to reduce or eliminate the threat.
- Employers cannot terminate employees who have disability-related reasons not to get vaccinated UNLESS the direct threat cannot be reduced to an acceptable level and no other legal protection applies.



What Constitutes a Direct Threat?

- To determine whether COVID-19 presents a direct threat, employers must conduct an individualized assessment. The four factors to consider are:
 - (1) Duration of Risk;
 - (2) Nature and Severity of Potential Harm
 - (3) Likelihood of Potential Harm will Occur
 - (4) Imminence of Potential Harm
- Requires a determination that unvaccinated employee will expose others to virus at work.
- A direct threat may be difficult to establish if workplace is following CDC and OSHA guidance and has no record of workplace outbreaks during the pandemic. EEOC has even hinted that the number of vaccinated individuals in a particular worksite might be taken into consideration.



Interactive Process

- Even if employee is deemed a direct threat, employers cannot exclude an employee from worksite (or terminate) until you go through interactive process to determine if any reasonable accommodations exist. A reasonable accommodation must be provided unless you can show undue hardship.
- Case-by-case determination.
- Management must be well-versed in recognizing accommodation requests.



Religious Exception

- Under Title VII, a “sincerely held religious belief” is a prerequisite to establishing an entitlement to a religious accommodation; personal or ethical objections are typically insufficient.
- The analysis under the ADA is similar to addressing religious discrimination. Although some standards are different (what constitutes an undue hardship), each situation requires its own input and discussion with your HR team and counsel.



Pregnant Employees

- CDC has acknowledged that observational data demonstrates that, while the changes for severe health effects are low, pregnant women with COVID-19 have an increased risk of severe illness.
- While there is no data (at this time) that suggests that pregnant women are more susceptible to adverse reactions due to the vaccine, employees may raise doubts about getting the vaccine.
- The Pregnancy Discrimination Act requires employers to treat pregnant employees the same way it treats employees with other non-pregnant employees.



Employees Who Refuse the Vaccine

- A mandatory policy puts employers in a difficult position of deciding what to do about employees who refuse to obtain the vaccine.
- Reports of polls in December 2020 reflect that between 27 percent and 40 percent of Americans indicated they would decline to be vaccinated.
- Issues employees may raise for why they don't want to be vaccinated:
 - Rushed timeline for development;
 - Safety concerns;
 - A general distrust of vaccines;
 - Doubts about the effectiveness.



Terminating the Relationship?

- Employers have the right to terminate employees if employees decide against vaccination and do not meet one of the discussed exceptions above.
- Consistency is key!
- Problems generally arise when you make exceptions and cannot explain the difference in treatment.



Educate and Incentivize

- Can an employer replace discharged employees quickly enough to operate seamlessly and effectively?
- If answer is no, then you may want to consider a policy that strongly encourages vaccinations rather than one that mandates it.
- Options:
 - Participation based awards;
 - Education workforce on the benefits of the vaccine;
 - Paying employees for time associated with getting the vaccine;
 - Providing PTO for employees who experience side effects;
 - Providing additional PTO.



GINA

Administering a COVID-19 vaccination does not implicate GINA. However, if the administration of the vaccine requires pre-screening questions that ask about genetic information, such as family members' medical history, it may violate GINA.



OSHA

- At the present time, there is no OSHA standard that would mandate employers to offer COVID-19 vaccine.
- Under OSHA's general duty clause, it provides that employers must provide "a place of employment...free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.
- Without any specific guidance, employers can look to how OSHA handled flu vaccinations. In a 2009 letter of interpretation, OSHA stated that employers who wished to require employees to receive a seasonal flu vaccine could do so, subject to certain exceptions.



NLRA

- Employers with unionized workforces must also be mindful of the National Labor Relations Act and any labor contract obligations.
- Absent a “legal” mandate by the government that employees be vaccinated, a vaccine requirement would be considered a mandatory subject of bargaining giving rise to the employer’s duty to bargain.
- Even in a nonunionized setting, the NLRA will protect employees who engage in concerted activity with regards to mandatory workplace vaccine – such as protesting against a mandatory vaccination policy or even simple coworker discussions about the vaccine.



Worker's Compensation

If mandated as a condition of continued employment, complications likely to be considered a compensable injury. More so if vaccine received on worksite and/or by employer or contracted third party.





Questions?



JOHNSON JACKSON PLLC

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Contact Information

Chris Bentley and Chris Johnson
Johnson Jackson PLLC
100 N Tampa St., Suite 2310
(813) 580-8400
cbentley@johnsonjackson.com
cjohnson@johnsonjackson.com

