



THE NEW FEDERAL VACCINE MANDATES: WHAT YOU NEED TO KNOW

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OSHA

COVID-19 Vaccination and Testing ETS



WHAT IS THE OSHA ETS?

- Emergency Temporary Standard issued by OSHA
- In response to President Biden's COVID-19 Action Plan
- Second ETS by OSHA relating to COVID-19
 - OSHA Healthcare ETS issued in June 2021
- Does it require vaccination? No.
- Employers with 100+ employees must ensure employees:
 - Are vaccinated, or
 - Provide proof of weekly COVID-19 testing

COURT CHALLENGES

- Saturday, Nov. 6, Fifth Circuit temporarily stayed the ETS
 - Government response due Monday, 11/8
 - Petition reply due Tuesday, 11/9
- Legal challenges also filed in:
 - 6th Circuit
 - 8th Circuit
 - 11th Circuit
- What does this mean for employers?



STATE PLANS

- What is a state plan?
 - Examples: California, Nevada, New Mexico, Utah, Wyoming
- OSHA state-plan states can adopt ETS or standards that are “at least as effective”
- Must adopt ETS or equally effective standard by December 5
- Refusal to comply
 - OSHA can move to revoke the state’s state plan
 - OSHA recently warned Arizona, South Carolina, and Utah relating to OSHA Healthcare ETS

OSHA ETS – APPLICATION

- Covers “all employers with a total of 100 or more employees”
- Does not apply to:
 - Workplaces under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
 - Settings subject to OSHA’s Healthcare ETS
 - Workplaces under MSHA jurisdiction
 - State and local public employers in states without state plans
 - Examples: Colorado, Idaho, Montana, North Dakota, Texas

OSHA ETS – APPLICATION

- ETS does not apply to the following employees (even if it applies to the employer):
 - Employees who do not report to a workplace where other individuals are present;
 - Employees while working from home; and
 - Employees who work exclusively outdoors.
- Hypothetical: What about truck drivers?

DETERMINING NUMBER OF EMPLOYEES

- 100+ employees at any time on or after 11/5/21
 - Even if number later drops to less than 100
- Count all employees across all U.S. locations
- Part-time employees included in count
- Not included in count: independent contractors and temporary employees supplied by staffing company
- Multi-employer Worksites: Only required to count your own employees
- Examples:
 - 150 total employees; 100 work from home
 - 80 employees plus 30 temporary staffing

OSHA ETS – REQUIREMENTS

- Implement policy requiring:
 - Mandatory COVID-19 vaccination, or
 - COVID-19 vaccination or weekly COVID-19 testing
- Determine employees' vaccination status
 - Obtain proof of vaccination
 - Maintain list of employees' vaccination status
- Provide time off for vaccination, including side effects
 - Up to four hours paid time for vaccination
- Require employees to provide notice of positive COVID-19 test or diagnosis

OSHA ETS – REQUIREMENTS

- Remove COVID-19 cases from workplace
- Ensure each unvaccinated employee wears a face covering
 - Indoors or in vehicle with another person
- Train each employee on requirements of ETS, employer's policies, and COVID-19 vaccine safety
- Report work-related COVID-19 fatalities and in-patient hospitalization to OSHA
 - Fatality – 8 hrs
 - Hospitalization – 24 hrs



DEADLINES TO COMPLY

- Dec. 6, 2021
 - All ETS requirements except COVID-19 testing for employees who are not fully vaccinated
- Jan. 4, 2022
 - COVID-19 testing requirements for employees who are not fully vaccinated (and all other ETS requirements)
 - Employees who completed primary vaccination do not have to be tested, even if they have not completed 2-week waiting period by Jan. 4



FAQS

- What COVID-19 tests are acceptable?
- Do employers have to pay for the weekly COVID-19 tests?
- What records are acceptable of vaccination verification?
- What if an employee has a religious or medical exemption from vaccination?
- Do we need to train vaccinated employees on the new ETS?

THANK YOU – ANY QUESTIONS?



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CMS VACCINE MANDATES

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WRITTEN MATERIALS

- CMS Rules, 86 FR 61555 (11/5/21), <https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23831.pdf>
- CMS Health Care Staff Vaccination Interim Final Rule FAQs, <https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>
- Stanger, *CMS Vaccine Mandate for Healthcare Workers: Resources for Preparing Your Policies*, <https://www.hollandhart.com/cms-vaccine-mandate-for-healthcare-workers-resources-for-preparing-your-policies>



PRELIMINARIES

- If you did not receive .ppts or written materials, please e-mail MRVarga@hollandhart.com.
- Submit questions using the “chat” feature or send e-mail to MRVarga@hollandhart.com or any of the presenters.
- This is an overview of the requirements.
 - Application and requirements depend on the facility type and circumstances.
 - Additional requirements may apply to certain facilities (e.g., Nursing Facilities per 9/20 regulation)
 - Facilities should review the specific regulations applicable to their facility type.

COVERED FACILITIES

Medicare/Medicaid certified facilities regulated by Medicare health and safety standards (CoPs, CoCs, Requirements)

- Hospitals and CAHs
- Ambulatory surgery centers
- Nursing facilities
- Rural health centers
- Federally qualified health centers
- Community mental health centers
- Hospices
- Home health agencies
- Home infusion therapy
- End-stage renal disease facilities
- Intermediate care facilities for individuals with intellectual disabilities
- Psychiatric residential treatment facilities
- Comprehensive outpatient rehab facilities
- Programs for all-inclusive care for the elderly
- Clinics, rehab agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services

COVERED FACILITIES

42 CFR	Facility Type	Regulatory Section
416.51	Ambulatory Surgery Services (ASC)	Infection control
418.60	Hospice Care	Infection control
441.151	Psychiatric residential treatment facilities (PRTF)	General requirements
460.74	Programs of All-Inclusive Care for the Elderly (PACE)	Infection control
482.42	Hospitals	Infection control
483.80; 483.430	Long Term Care Facilities (SNF and NF); Intermediate Care Facilities for Disabilities (ICFs-IID)	Infection control; facility staffing
484.70	Home Health Agencies (HHA)	Infection control
485.58, .70, .640, .725, 904	CAH, CORF, CMHC, Clinics and certain other providers of outpatient PT and speech-language pathology	Infection control; personnel qualifications
486.525	Home Infusion Therapy (HIT)	Required services
491.8	Rural Health Center (RHC), Federally Qualified Health Center (FQHC)	Staffing
494.30	End-Stage Renal Disease Facilities (ESRD)	Infection control

NOT COVERED

- Providers and facilities that are not subject to Medicare health and safety regulations.
 - Conditions of participation
 - Conditions of coverage
- Provider practices.
- Assisted living facilities or group homes.
- Medicaid home care services.
- Others

(<https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>)

But...

- CMS mandate may apply indirectly if they render services at covered facility
- May be subject to other mandate, e.g.,
 - OSHA (100+ employees)
 - Federal contractors
 - State mandates

WHAT MUST FACILITIES DO?

- **By December 6, 2021***

- Implement policies and procedures to vaccinate covered staff.
- Covered staff must receive the J&J vaccine or the first dose of the Pfizer or Moderna vaccine before they provide any care, treatment or other services for the facility or its patients unless exempted or person's vaccination is delayed due to contraindications.

- **By January 4, 2022**

- Covered staff must be fully vaccinated unless exempted or person's vaccination is delayed due to contraindications.
 - "Fully vaccinated" generally means receiving final dose + 14 days.
 - For purposes of January 4, 2022 deadline, staff who have received the final dose are deemed to be "fully vaccinated" without the 14 days.

(86 FR 61555)

➤ *No testing alternative.*

A vertical photograph on the left side of the slide shows several microcentrifuge tubes in a rack, each containing a small amount of bright blue liquid. The tubes are slightly out of focus, creating a sense of depth.

COVERED STAFF

- Policies and procedures for vaccine mandate must cover the following personnel (“covered staff”) regardless of clinical responsibility or patient contact:
 - Facility employees
 - Licensed practitioners
 - Students, trainees, and volunteers
 - Individuals who provide care, treatment, or other services for the facility and/or its patients under contract or by other arrangement
 - *Consider frequency of presence, services provided, and proximity to patients and staff*

NON-COVERED STAFF

- Policies and procedures for vaccine mandate do not need to cover:
 - Staff who provide telehealth exclusively:
 - Outside facility setting, and
 - Do not have any direct contact with patients or other covered staff.
 - Staff who provide support services for the facility
 - Performed exclusively outside the facility setting, and
 - Do not have any direct contact with patients or other covered staff.
- *Must be 100% remote and 0% direct contact with patients or other covered staff.*



APPROVED VACCINES

- Licensed or authorized for emergency use by the FDA.
 - Pfizer-BioNTech COVID-19 Vaccine (multi-dose)
 - Moderna COVID-19 Vaccine (multi-dose)
 - Janssen (Johnson & Johnson) COVID-19 Vaccine (single dose)
- Listed by the World Health Organization (“WHO”) for emergency use even if not approved or authorized by the FDA.
- Vaccines administered through participation in a clinical trial.

(<https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>)



BOOSTERS

- The current rules do not require boosters to be “fully vaccinated.”
- But the science is changing rapidly and this may change...
- Boosters or third doses of certain vaccines are recommended by the CDC, but not required by the CMS Rule.

<https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>

POLICIES AND PROCEDURES MUST ADDRESS:

- Process to ensure covered staff are fully vaccinated unless exempted.
- Process for staff to request exemption based on applicable federal law (e.g., Title VII and ADA).
 - Disability or medical condition + required documentation.
 - Sincerely held religious belief
- Additional precautions to mitigate spread of COVID-19 for staff who are not fully vaccinated.
- Track and document:
 - Vaccination status of covered staff.
 - Vaccination status of booster doses recommended by CDC.
 - Vaccination status of those whose vaccination was delayed due to contraindications recognized by CDC.
 - Information from those who have been granted exemption.
- Contingency plans for staff who are not fully vaccinated.



DELAY DUE TO CONTRAINDICATIONS

- May temporarily delay a person's vaccination if CDC recommends delay due to clinical precautions and considerations, e.g.,
 - Acute illness secondary to COVID-19
 - Received monoclonal antibodies or convalescent plasma for COVID-19 treatment.
 - Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to component of the COVID-19 vaccine.
 - Others?

See <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>.



PROCESS FOR REQUESTING EXEMPTION

- Employees may request exemption; facility should establish process for considering exception, including:
 - Written request with appropriate supporting documentation.
 - Knowledgeable persons authorized to review, approve or disprove the exemption.
 - Accommodations if exemptions granted.
 - Documentation.
- See EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

MEDICAL EXEMPTION

- Documentation supporting exemption must:
 - Be signed and dated by another licensed practitioner.
 - Not the individual requesting the exemption.
 - Practitioner acting within scope of practice as defined by, and in accordance with, all applicable state and local laws.
 - Include information specifying:
 - Which of the authorized vaccines are clinically contraindicated.
 - Recognized clinical reasons for contraindications.
 - Practitioner's statement recommending that the staff member be exempted from the vaccination based on the recognized clinical contraindications.
- For recognized contraindications, see <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>.

RELIGIOUS EXEMPTION

- Sincerely held religious belief, practice or observance.
 - “CMS requires facilities to ensure that requests for religious exemptions are documented and evaluated in accordance with applicable federal law and as a part of a facility’s policies and procedures.”
 - “CMS believes that exemptions could be appropriate in certain limited circumstances, but no exemption should be provided to any staff for whom it is not legally required (under the ADA or Title VII of the Civil Rights Act of 1964) or who requests an exemption solely to evade vaccination.”

(CMS FAQs, <https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>)

- See EEOC guidance
 - *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - *Compliance Manual on Religious Discrimination*, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

ACCOMMODATIONS AND PRECAUTIONS FOR UNVACCINATED PERSONS

- May include:
 - Masks and face coverings
 - Personal protective equipment (“PPE”)
 - Sterilization and washing
 - Periodic testing
 - Personal distancing
 - Quarantines
 - Telework or reassignment
 - Education
 - Others?
- CDC, Infection Control Guidance for Healthcare Professionals about Coronavirus (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control.html>
- OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, <https://www.osha.gov/coronavirus/safework>



TRACKING AND DOCUMENTING VACCINATION STATUS

- Must track and securely document vaccination status.
- Proof of vaccination may include:
 - CDC COVID-19 vaccination card
 - Documentation from a healthcare provider
 - Electronic health record*
 - Other?
- See CDC Vaccination Tracking Tool, <https://www.cdc.gov/nhsn/hps/weekly-covid-vac/index.html>

*Consider HIPAA implications discussed below.

CONFIDENTIALITY OF VACCINE INFO

- Vaccination info is protected under ADA.
 - Maintain in separate employee medical file.
 - Use and disclose consistent with ADA requirements.

See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- Vaccination info may be subject to HIPAA if (1) facility administered the vaccine, or (2) facility obtained info through its employee benefit plan.
 - Consider obtaining employee's authorization to access and use employee's protected health info ("PHI") for employment purposes.
 - Not clear if HIPAA exceptions would allow use or disclosure of employee's PHI without employee's authorization, e.g.,
 - Health care operations, e.g., quality assurance, qualifications of staff, and/or compliance.
 - OSHA surveillance if certain conditions are satisfied.
 - Other?

See <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html> and <https://www.hollandhart.com/employee-vaccine-information-privacy-concerns>



CONTINGENCY PLAN

- For staff that are not fully vaccinated:
 - Ensure they will soon be vaccinated, and
 - Ensure they will not provide care, treatment, or other services for the provider or its patients until they have:
 - Been fully vaccinated, or
 - At a minimum, have received the J&H vaccine or the first does of the Pfizer or Moderna vaccine.
- Address safe provision of services by staff who have:
 - Staff who have requested an exemption while their request is being considered, and
 - Staff for whom COVID-19 vaccination must be temporarily delayed due to clinical precautions and considerations per the CDC.

(86 FR 61573)

ENFORCEMENT

SNF, Hospice, HHA

- Civil monetary penalties
- Denial of payment on future admissions
- Termination of provider agreement
 - Complaint or re-certification survey
 - Attempts to bring into compliance
 - CMS to issue guidance to surveyors

Other facilities

- Termination of provider agreement
 - Complaint or re-certification survey
 - Attempts to bring into compliance
 - CMS to issue guidance to surveyors
- *Will CMS really terminate agreement of necessary providers?*

(<https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>)

OTHER POTENTIAL CONSIDERATIONS

If vaccinate

- Potential staff departures
- Conflict with state requirements or contracts

If fail to vaccinate

- Potential staff departures
- Loss of staff due to infection or quarantine
- Loss of business due to public concern
- Human and financial costs of continued pandemic
- Negligence claims if infection occurs due to failure to follow rules



LEGAL CHALLENGES

- Courts have consistently upheld vaccine mandates.
- CMS takes the position that its rules preempt contrary state or local laws.
 - Supremacy Clause of the Constitution
- CMS rule is a condition to participating in Medicare.
 - Courts usually uphold conditions associated with receipt of federal funds.
- CMS declared that if a Court enjoins a portion of the rules, the remaining portion of the rules should remain in effect.



CONFLICT WITH STATE LAW

“Q: What happens if State law prohibits vaccine mandates? How can CMS expect a facility to follow its requirements if its State prevents them from implementing this rule?”

“A: Under the Supremacy Clause of the U.S. Constitution, this regulation pre-empts any state law to the contrary. U.S. Const. art. VI § 2.”

<https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>



TO DO

- ✓ Consider application of other mandates, including:
 - ✓ OSHA
 - ✓ Federal contractor
 - ✓ Others
- ✓ Educate staff.
- ✓ Consider employee benefit incentives.
- ✓ Review, update, and/or create policies by December 6.
- ✓ Establish workplace vaccination program. See CDC *Workplace Vaccination Program*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>
- ✓ Consider application to facility personnel, vendors, contractors and others coming onto facility or in contact with facility patients or personnel.



TO DO

- ✓ Review and update contracts with contractors and vendors.
 - ✓ May already incorporate compliance with facility policies
- ✓ Review and update Medical Staff Bylaws, Rules and Regulations
 - ✓ May already incorporate compliance with facility policies
- ✓ Implement the policies beginning December 6.
 - ✓ Prohibit services unless persons receive first dose or are exempt.
 - ✓ Consider requests for exemptions.
 - ✓ Implement accommodations.
 - ✓ Implement other appropriate precautions to protect staff and others.
- ✓ Require “full” vaccination by January 4, 2022.
- ✓ Track and document vaccination status, exemptions, etc.
- ✓ Watch for further developments...

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The Healthcare Industry is poised to continue its rapid evolution. With this sector now making up close to 20 percent of GDP, our lawyers stand ready to help as changes unfold.

Issues such as rising healthcare costs, healthcare reform, data and privacy security, and innovations in healthcare delivery, device and pharmaceutical designs are forefront in the minds of many of our clients. We are here to guide our clients through the challenges and opportunities that arise in this dynamic industry.

Clients We Serve

- Hospitals
- Individual medical providers
- Medical groups
- Medicare organizations (MCOs)
- Inpatient centers
- Ambulatory surgery centers
- Medical device and life science companies
- Rehabilitation centers

Webinars and Publications

THANK YOU – ANY QUESTIONS?



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LABOR AND EMPLOYMENT LAW UPDATE

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AMERICAN WITH DISABILITIES ACT (THE ADA) AN OVERVIEW

- Americans with Disabilities Act (ADA) - enacted in 1990
- Federal Anti-discrimination Law
- Prohibits discrimination against qualified individuals with disabilities
- Requires employers to provide reasonable accommodations
- Requires employers to engage in a good faith interactive process regarding accommodations with eligible employees

KEY CONCEPTS

QUALIFIED INDIVIDUAL:

- Has the requisite skill, experience, education, and other job-related requirements of the position;
- and
- Can perform the essential functions of the job, with or without reasonable accommodation

ESSENTIAL FUNCTIONS:

- The fundamental job duties of the position
- Important to define essential job functions in job descriptions (and keep job descriptions up-to-date)
- Does not include the marginal functions of the position



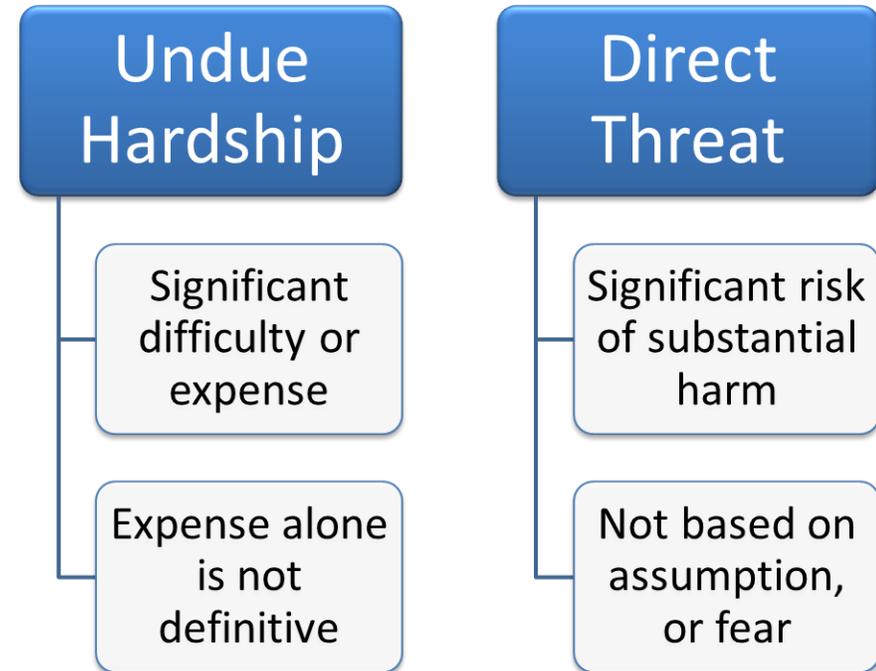
THREE PRONGS TO ADA COVERAGE

- Individual:

- Has a physical or mental impairment that substantially limits a major life activity;
- There is a record of the impairment; or
- The employee is regarded as having the impairment.

WHAT IS A REASONABLE ACCOMMODATION?

- Accommodation:
 - **Any** change in work environment or the way things are customarily done enabling an individual with a disability to enjoy equal employment opportunities



WHAT IS A “DIRECT THREAT”

- Pursuant to the EEOC’s Guidance, where an “employee cannot meet a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace.”
 - A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. 1630.2(r).
 - A direct threat determination is a two-step process:
 1. Determining if there is a direct threat and, if there is,
 2. Assessing whether a reasonable accommodation would reduce or eliminate the threat.
 - EEOC Guidance May 2021, Question K5
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.5>

DIRECT THREAT ANALYSIS

- The EEOC advises that when determining “if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job.”
- Employers are guided to consider the following factors:
 - (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.
- The determination should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.

WHEN IS AN ACCOMMODATION AN UNDUE HARDSHIP?

- Employers are not required to provide all/any accommodation requested by an employee.
 - Where a requested accommodation would cause an "undue hardship" to the employer, the employer may deny the request. However, the employer should work with the employee to settle on a reasonable alternative.
- Generalized conclusions will not suffice to support a claim of undue hardship. A claim that a requested accommodation will cause an undue hardship must be based on an individualized assessment of current circumstances showing that the requested accommodation would cause significant difficulty or expense.
- The EEOC advises that a determination of undue hardship should be based on several factors, including:
 - The nature and cost of the accommodation needed;
 - The overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
 - The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - The impact of the accommodation on the operation of the facility.
- See the EEOC's Guidance on Reasonable Accommodations / Undue Hardship for more information:
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue>

CAN AN EMPLOYER DISCIPLINE A DISABLED EMPLOYEE?

- Yes, but discipline must be based on non-disability related conduct. There is a significant risk of disciplining an employee for disability related conduct.
- That said, a disability will not excuse an employee from engaging in unacceptable (threats of violence specifically) behavior.
 - Employee is not “qualified” if unacceptable behavior threatens the safety of others, even if due to a mental disability
 - Example – *Mayo v. PCC Structurals* (2015)
 - Termination of employee was permissible because his stress led to death threats
 - He was unable to appropriately handle stress and interact with others – an “essential function” of his job

COVID-19 RELATED ISSUES

■ Treatment of Medical Information

1. Generally, the ADA restricts what an employer can ask an employee / applicant about related to their health / medical status. However, the EEOC's guidance provides an exception for COVID-19 related inquiries.
2. Does this mean an employer is not allowed to ask an employee to confirm whether s/he/they is/are experiencing symptoms of COVID-19?
 - No, the EEOC advises that employers may ask whether an employee is experiencing COVID-19 symptoms.
 - These include symptoms such as fever, chills, cough, shortness of breath, or sore throat.
 - Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
3. May an employer require an employee to provide proof of vaccination status?
 - Yes.
 - Vaccination status is not considered a medical record under the ADA, per the EEOC's Guidance as of June 2021.
 - That said, employers should maintain copies of vaccinations cards just like all other forms of medical information – confidentially.

COVID-19 RELATED ISSUES

Employer Imposed Vaccination Mandates

- May an employer impose a vaccination mandate?
 - Generally, yes, but the employer must have a legitimate / reasonable work related basis for instituting the requirement.
 - Additionally, employers must make sure their policies clearly establish paths for accommodation – where employees are subject to a religious or medical exemption. Just be mindful of the possible desperate impact that mandates have on different groups / classifications of employees.
 - Employers should keep in mind, if they mandates vaccination, they must provide employees paid time off to obtain their shots. Additionally, adverse reactions will likely be covered by worker's compensation and under the ETS, employers are to provide reasonable paid leave to cover time off related to a vaccination's side effects.
 - What is reasonable time will be determined on a case-by-case basis.
 - Employers need not provide time off related to a booster vaccination.

COVID-19 RELATED ISSUES

Employer Imposed Vaccination Mandates

- May employers incentivize vaccination?
 - Yes. However, this situation is fraught with pitfalls. If the employer provides the shots at work, or through a work-related program through a third party, they need to be careful that the incentive isn't too great because the information needed to administer the shot/s is protected health information. Therefore, the employer's incentive, if it's too great, could be seen as a coercive scheme to obtain protected health information.
 - Incentives should be consistent and available to employees who cannot be vaccinated for a legitimate accommodation reason.
- May employers mandate all new hires be vaccinated for COVID-19?
 - Yes, and we are seeing high-profile employers do this. HOWEVER, these policies are **extremely risky**. There is simply no good (think workplace safety) reason why an employee hired in 2019 isn't required to be vaccinated when his/her/their counterpart hired in 2021 is required to be vaccinated.

THANK YOU – ANY QUESTIONS?



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