



Legal Implications of Vaccine Policies for Staff December 21, 2020

A LeadingAge Oregon member asked Lane Powell to provide information on the legal implications of various potential policies concerning staff and the COVID-19 vaccine. Their questions and Lane Powell's answers follow.

Lane Powell: First, this is a complex issue that is still evolving. We received some guidance from the EEOC (Equal Employment Opportunity Commission) last week, but it did not offer the clarity we were hoping for as to the employment issues. As we learn more, we will provide updates.

1. What are the legal implications of requiring employees to take the vaccine as a condition of employment?

At this time, we recommend that you not require or mandate the vaccine as a condition of employment. First, ORS 433.416 specifically prohibits doing so.

- (1) An employer of a health care worker at risk of contracting an infectious disease in the course of employment shall provide to the worker preventive immunization for infectious disease if such preventive immunization is available and is medically appropriate.
- (2) Such preventive immunization shall be provided by the employer at no cost to the worker.
- (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.

This section applies to an employee of a health care facility which includes skilled nursing facilities. Based on this statute, we do not believe you can mandate vaccines in your SNF. Interestingly, this does not apply to residential care facilities or assisted living facilities, except as to its licensed staff such as nurses. With that said, we also do not recommend you mandate the vaccine for any of your employees at this time, including any of your non-licensed staff. The COVID-19 vaccine is approved under an Emergency Use Authorization (EUA) by the FDA, and not through the formal FDA process. For this reason, per the FDA, because the vaccine is approved under an EUA, people have the choice to accept or decline the vaccine. We believe this means you cannot mandate the vaccine of anyone.

Once the drug is fully approved under the FDA, then you may be able to require the vaccine of your non-licensed staff and non SNF staff. Please keep in mind you will need to

reasonably accommodate those with sincerely held religious beliefs and those with medical issues who do not want to receive the vaccine.

The EEOC recently provided guidance on this issue. In its guidance, instead of directly addressing whether an employer can mandate employees to get the vaccine when that vaccine has been approved under an EUA, it merely referenced the language in the EAU that individuals receiving the vaccine have a choice. It later did discuss how to address reasonable accommodations for medical reasons and those with sincerely held religious beliefs; however, it only referenced requiring the vaccine in the context of when the vaccine is available and what you can and cannot do regarding reasonable accommodations. The EEOC did not directly state an employer can mandate the vaccine as a condition of employment at this time under an EUA. In fact, by specifically mentioning the EUA requirement of having a choice and not directly allowing a mandate like the EEOC did with testing or in the case of the flu vaccine, implies that you probably cannot mandate the vaccine until we have more guidance.

There are also other business reasons for not mandating the vaccine related to the strong feelings employees have about vaccines in general and this emergency-approved vaccine in particular, that I would be happy to discuss with you. We have also heard anecdotal evidence that if staff are forced to take the vaccine, they could lose a significant part of their workforce—up to 30 to 40 percent.

The bottom line, we do not recommend you mandate the vaccine at this time.

2. What are legal implications of providing monetary incentives to take the vaccine (e.g., \$500 bonus)?

Yes, you can probably provide incentives, but there are some risks to doing so. Employees have the right to decline the vaccine as part of a reasonable accommodation under the ADA for medical reasons and under Title VII for sincerely held religious beliefs. If you only provide incentives to those employees who receive the vaccine and not also those who have legitimate reasonable accommodation requests, you may be opening yourself up to claims of discrimination based on disability or religion by those employees who legally have a right to decline the vaccine. For this reason, we recommend that you not offer incentives without taking into account those employees who legally do not have to receive the vaccine. However, in practice such an incentive program may be difficult to manage. Providing incentives to both those that vaccinate and those that aren't entitled to reasonable accommodations likely will result in more employees seeking reasonable accommodation than would otherwise have done so (rather than getting the vaccine), particularly since many individuals have a strong opposition to taking the vaccine at this time. This will present greater risk to the facility for discrimination claims, particularly if the facility does not grant all of these accommodation requests.

One possibility is to create an incentive where if 90% of your staff receive the vaccination then you offer a bonus to everyone. This could still be risky as you would need to ensure staff are not inappropriately pressuring or shaming staff members who do not participate, especially those

that do not participate due to medical or religious reasons. Such a scenario might also open you up to discrimination claims.

3. What are legal implications of having different policies about return to work, extra sick pay benefits etc. for vaccinated vs non vaccinated employees?

The return to work rules should continue to follow what is required or recommended by federal, state and local health authorities. Right now, they are not recommended a change to these recommendations. The recommendations may change in the future to include more favorable recommendations for those that are vaccinated.

As for other incentives like different sick pay benefits, the same issues as noted above apply here. That is, you will need to provide these same benefits to those employees who have legitimately requested a reasonable accommodation. Otherwise, you could have an employment discrimination claim.

4. What are legal implications of requiring different PPE of employees that aren't vaccinated?

Yes, possibly at a later time. For now, the CDC and local health authorities have not modified the protocols for wearing PPE. It is possible that individuals remain contagious even after receiving the vaccine. Once we have more guidance from the CDC and local health authorities about minimizing PPE use for vaccinated individuals, then you can provide these types of incentives.

5. If we do not require the vaccine, but incentivize the vaccine, is the employer liable for injury incurred due to the vaccine?

Generally speaking, if an employee is hurt on the job, Workers' Compensation covers the cost of that injury. If you do not mandate the vaccine any injury sustained from the vaccine may not be covered by Worker's Comp as it was not a necessary work requirement. That is, if an employee voluntarily chooses to be vaccinated and suffers an injury from the vaccination, the employer likely would not be held liable because it did not require the vaccine as part of the job.

We are also recommending that you obtain a simple acknowledgement from your staff as to whether they choose to vaccinate and documents their decision. This would be in addition to whatever informed consent the pharmacy provides to the staff member when they are vaccinated. This will help identify which of your employees are vaccinated or not.