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A. Kevin Troutman

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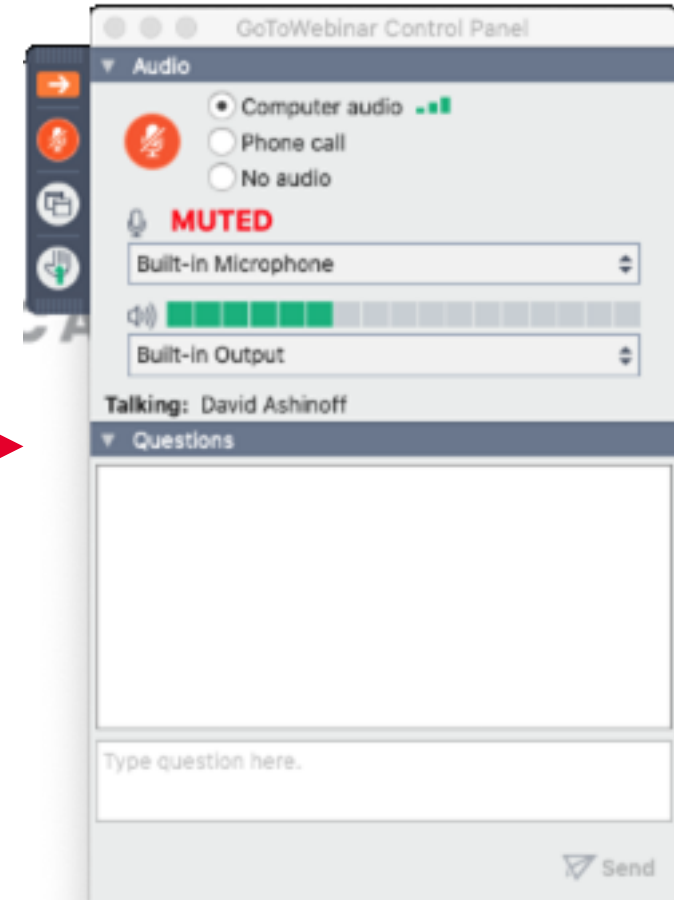
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Sticking Points: What Construction Employers Need To Know About COVID-19 Vaccines (and Flu Shots)

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Vaccines And The Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are very fact-specific.
- Always take state and local law into account.
- This situation is very fluid and could change rapidly due to a variety of factors.
- No approved COVID-19 vaccine *currently* available in the U.S.
- FDA is expected to approve some vaccines under Emergency Use Authorizations (EUA) phased distribution.



Vaccine Issues – An Overview

- Flu shots
 - Already mandated in some industries
- CDC comments regarding flu shots
- Possible exemptions?
 - Medical
 - Sincerely-held religious beliefs
 - Other?
- COVID-19 vaccinations – more guidance is expected



A Vaccine Conundrum?

- EUAs are pending
 - Over 90% effectiveness in clinical trials
 - Historically, more employees get vaccinated when they are *required*
- Is the workplace ready?
 - A Gallup poll showed only about 50% would take the vaccine
 - Is the public becoming more receptive?

Dr. Beth Bell, Federal Advisory Panel on Vaccinations: vaccines authorized under the FDA's *emergency authority cannot be mandated* – more than an opinion?

Legal Landscape

- Employer must keep workplace free of recognized hazards while respecting employees' individual rights
- Historically, with some critical limitations, employers can enforce mandatory vaccine policies (concentrated in the healthcare industry – protecting vulnerable patients)
- Always consider state and local law
- Contrast vaccinations with employee screenings (*inquiries* about symptoms are effectively “***medical examinations***”)



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Legal Landscape - Screening vs. Vaccinations

- Tests must be job-related and consistent with business necessity.
- COVID-19 poses a significant risk of substantial harm.
- Is testing, temperature-checking generally more intrusive or risky than requiring a vaccination?
- Current practices (*i.e.*, temperature checks, symptom screening, and COVID-19 tests) permitted due to severity of the pandemic & significant risk of substantial harm that virus would present in many workplaces.



OSHA's General Duty Clause

- Describes the employer's duty to maintain a workplace free of recognized hazards
- Expect OSHA to look at all applicable policies and practices, not simply whether vaccinations are required or encouraged



ADA – The American with Disabilities Act

- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits an employer’s rights to inquire/conduct medical exams
 - Must be job related, consistent with business necessity
 - Medical condition must pose a significant risk of substantial harm
 - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information
- **Similarly, Title VII** may require accommodation of an employee’s sincerely-held religious beliefs or practices.

What Has The EEOC Had To Say?

- *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (issued 2009, *updated* in response to the COVID-19 pandemic – March 21, 2020)
- Excerpt from response to Question No. 13, regarding whether employers covered by the ADA and Title VII may **require** flu shots:
- “Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. ***As of the date this document is being issued, there is no vaccine available for COVID-19.**”

What Has The EEOC Had To Say?

Watch for the EEOC to issue further guidance regarding the expected COVID-19 vaccination!



Mandatory Flu Shots – A Likely Roadmap?

- Subject to some limitations, employers *may* require employees to get the **flu** vaccine.
 - Tie to job duties and environment
- Some jurisdictions *require* flu shots for employees in certain positions, e.g., healthcare workers with patient contact. Others prohibit mandatory vaccines.
- CBA (collective bargaining agreements) may limit vaccine requirements; employer must communicate with the union.

A large, red, rectangular stamp with a distressed, ink-like texture. The word "MANDATORY" is written in bold, white, capital letters, slanted diagonally from the top-left to the bottom-right. The stamp has a double border and is positioned on the right side of the slide, partially overlapping the list of bullet points.

Limitations - What Are The Employer's Responsibilities?

- EEOC (Equal Employment Opportunity Commission):
 - An employee may be entitled to an exemption from mandatory flu shots due to an ADA-covered disability or other medical circumstance
 - An employee may be exempted from a flu shot requirement based on sincerely-held religious beliefs, practices, or observances
 - In either case – engage in and document communication with employee to determine whether a reasonable accommodation is needed and feasible
 - The process may be as important as the final decision
- Demonstrate consideration of possible reasonable accommodations

Anti-Vaxxers, Other Considerations?

- Some state laws expressly protect employees' rights to engage in legal outside activity, including political activity.
- Other state laws may affect employer's vaccination policies.
 - *i.e.*, Oregon – some vaccines must be *offered*, but generally may not be *required*
- Remain mindful of employees' Section 7 rights to band together regarding terms & conditions – this applies to all workplaces, not just unionized ones



May Employers Require A COVID-19 Vaccine?

- Probably, once approved by the FDA – subject to the same framework as the flu vaccine.
- Look for the EEOC to provide more guidance.
- Policy should explain expectations, rationale, job-relatedness and availability of exemptions as a reasonable accommodation.
- Always consider state laws.
- Safeguard employee medical information.



Adopt a Policy Regarding Vaccines

- Consider required v. *strongly encouraged*
- Any requirement should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.
 - Clearly describe expectations and rationale
 - Explain how to seek an exemption as an accommodation
 - Follow the *individualized* accommodation process diligently
 - Ensure no retaliation (or appearance of retaliation)
 - Safeguard all medical information - separate from general personnel files

Should An Employer Require Vaccinations?

- Good employee relations are vital for many reasons:
 - Clients, customers and the public take notice
 - Critical to maintaining focus, productivity and community relations
 - Consider possible susceptibility to union organizing efforts
- Follow availability of the vaccine.
- Employer pays for mandatory vaccines.
- Evaluate the likely response of your employees.
- Think through logistics (*i.e.*, on-site?)
- Do not underestimate the importance of effective communications with employees, customers, etc.

Summary

- CDC: Flu vaccines are important, to protect the workplace *and* reduce strain on nation's healthcare system. It's not too late!
- Develop vaccination policies now.
- Over 80% of employees get flu vaccines when required – almost twice the rate as when vaccines are strongly encouraged.
- Anticipate issues, questions and level of pushback when an FDA approved COVID-19 vaccine becomes available.

Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

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Final Questions?

Thank You!

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