

Vaccination and Employment: Who is Protected?

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1



Employer Legal Duty

Employee Legal Rights

Workplace Safety Issues


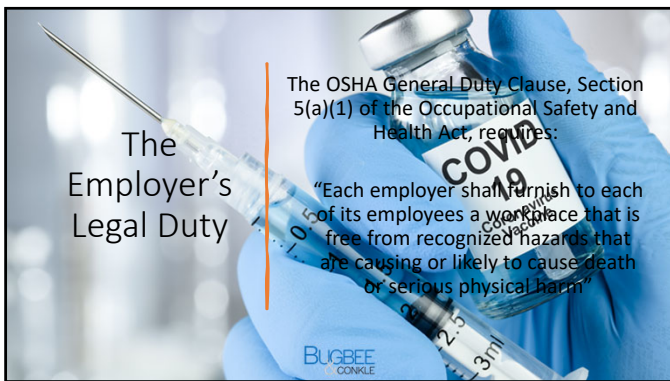


2

The Employer's Legal Duty

The OSHA General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, requires:

“Each employer shall furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.”



3

The Employee's Legal Rights

Equal Employment Opportunity is The Law

Title VII of the Civil Rights Act of 1964 and amendments protects employees from discrimination based on race, color, religion, sex, and national origin


1964

The Americans with Disability Act of 1990 (ADA) and amendments protect employees from discrimination on the basis of disability

- Concept of "reasonable accommodation"




4



Employers generally are required to provide workers' compensation insurance coverage for employees injured in the course of and arising out of employment.

Workers' Compensation

5



The employer's legal duty and the employee's legal rights may coincide and even conflict regarding COVID-19 and the Vaccines

6

COVID-19

COVID Generally

What it does to the body

- A virus infects your body by entering healthy cells. There, the invader makes copies of itself and multiplies throughout your body.
- The new coronavirus latches its spiky surface proteins to receptors on healthy cells, especially those in your lungs.

→

Specifically, the viral proteins bust into cells through ACE2 receptors. Once inside, the coronavirus hijacks healthy cells and takes command. Eventually, it kills some of the healthy cells

→

The virus moves down your respiratory tract. That's the airway that includes your mouth, nose, throat, and lungs. Your lower airways have more ACE2 receptors than the rest of your respiratory tract.

7

Vaccines Generally

How they typically work	Covid vaccine	Companies	Storage	Distribution
<ul style="list-style-type: none"> Weakened form of a virus 	<ul style="list-style-type: none"> mRNA 2 doses Blocks the spiky surface that attached to the ACE2 receptors 	<ul style="list-style-type: none"> Pfizer <ul style="list-style-type: none"> 95% efficacy Moderna <ul style="list-style-type: none"> 94.5% efficacy 	<ul style="list-style-type: none"> Both required refrigeration 	<ul style="list-style-type: none"> Varies by state Check local health department websites Introduction of AZ and JJ will increase output

8

Employment Law
Considerations

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Mandatory or voluntary

- Policies in writing

What if employees object

- Disability or religious grounds

3rd Party chosen by employer or employees' choice

Questions by 3rd party

- Privacy or HIPAA

Labor/management contract

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Are unvaccinated employees a “direct threat” to themselves or the workplace under the ADA?

The EEOC defines “direct threat” as 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.

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Factors to Consider for Direct Threat Analysis

The duration of the risk

The nature and severity of the harm

The likelihood that the potential harm will occur

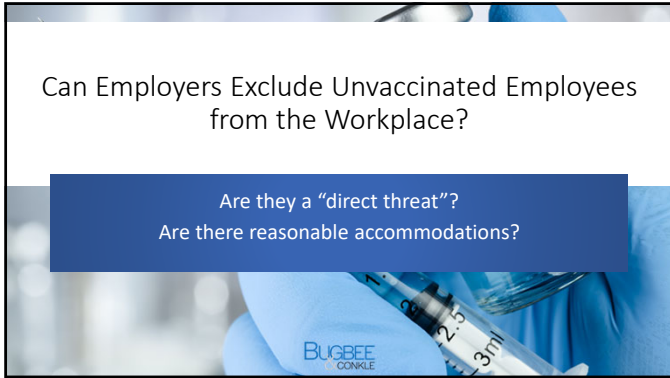
The imminence of the potential harm

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Can Employers Exclude Unvaccinated Employees from the Workplace?

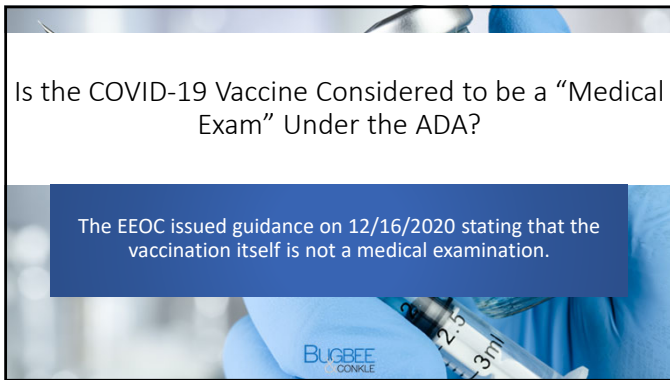
Are they a "direct threat"?
Are there reasonable accommodations?



13

Is the COVID-19 Vaccine Considered to be a "Medical Exam" Under the ADA?

The EEOC issued guidance on 12/16/2020 stating that the vaccination itself is not a medical examination.



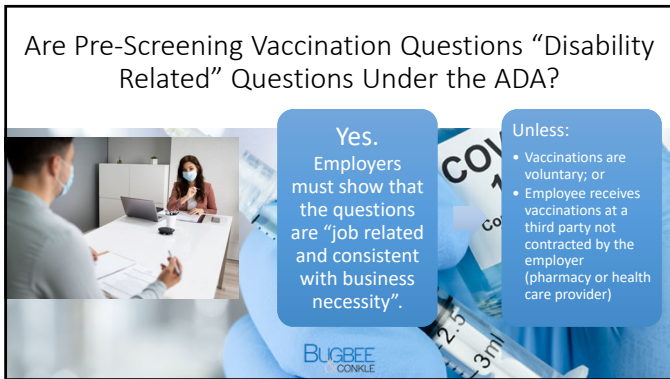
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Are Pre-Screening Vaccination Questions "Disability Related" Questions Under the ADA?

Yes.
Employers must show that the questions are "job related and consistent with business necessity".

Unless:

- Vaccinations are voluntary; or
- Employee receives vaccinations at a third party not contracted by the employer (pharmacy or health care provider)



15

Proof of a vaccination is NOT a disability-related inquiry per EEOC Updated Guidance

Beware of asking supplemental questions such as why they didn't get the vaccine.

Simply ask for the proof!

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Delivering the Vaccine

Mandatory or voluntary?

What if employees object?

Employer administered or 3rd party?

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Mandatory

Business necessity

Health care, schools, residential care

Develop written policy outlining

The purpose Procedure Reasonable accommodation

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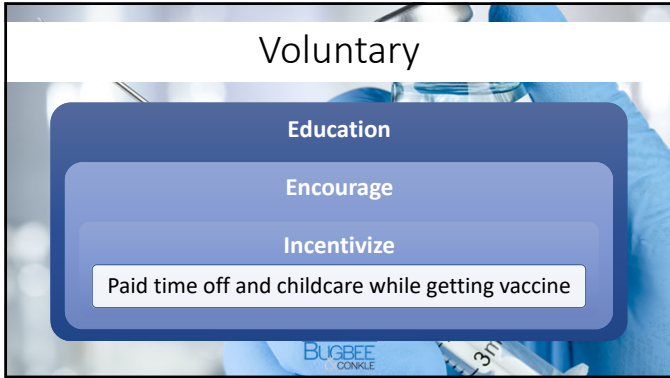
Voluntary

Education

Encourage

Incentivize

Paid time off and childcare while getting vaccine



19

What if Employees Object to Getting the Vaccine?

Disability related?		
Investigate	Direct threat analysis	Reasonable accommodation
Religious Accommodation?		
Investigate	Sincerely held religious belief?	Accommodation requested?



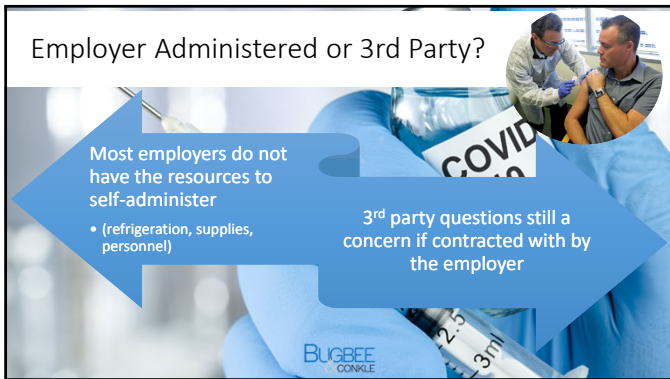
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Employer Administered or 3rd Party?

Most employers do not have the resources to self-administer

- (refrigeration, supplies, personnel)

3rd party questions still a concern if contracted with by the employer



21

Is the COVID-19 vaccine considered mitigation or abatement of a “recognized hazard” under OSHA General Duty Clause?

If so, are employers required to implement the vaccine?

22

Ohio Workers' Compensation Considerations

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W.C. Law for Allowance of Claim

Statutory- R.C. 4123

Definition of “injury”

- “Injury” includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment

24

Transmitted Illness W.C. Claims

- Flu, colds
- Typically- not allowed
- Burden of proof showing it was contracted in the workplace
 - Very hard burden to overcome

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COVID Allowances

<p>Should in theory have same limitations as the other "illness" allowances</p> <ul style="list-style-type: none"> • Prove that it was contracted in the workplace 	<p>What would the injury be?</p> <ul style="list-style-type: none"> • Obvious symptoms • Is testing positive enough of an "injury" • Through the commission, so far, yes. 	<p>Potential future issues</p> <ul style="list-style-type: none"> • Myocarditis • What else? • Similar to asbestos claims
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W.C. Claim for Vaccine

Side effects

- Soreness at injection site most common
 - headache, chills, fever, fatigue, joint and muscle pain
- More prevalent after second dose.

If mandated and/or provided by the employer and have side effects

- Yes, potentially
- Typically, any side effects are mild, and last 1 day or so

Unvaccinated employees?

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Conclusion

Draft a vaccination policy Anticipate accommodations Train HR and supervisors

28

Questions?

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29
