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Vaccine Nation: Return to Work & Employer Obligations

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NPFM Meeting
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Introduction

- COVID-19 Vaccines
 - Key Legal Considerations
 - Employer Best Practices
- Adapting to the “New Normal”

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Eligibility

- Differs state to state
- Massachusetts

For more details on each group and phase visit mass.gov/COVIDvaccine

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Benefits of Vaccination

- Keep workforce healthy by preventing employees from getting COVID-19;
- Reduce absence due to illness;
- Reduce time missed from work to get vaccinated (if you provide it on-site);
- Improve productivity;
- Improve morale.

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Can Employers Require Employees be Vaccinated?

- Possibly (but not clear)
 - Employers are legally required to provide certain reasonable accommodations to persons with:
 - Disabilities;
 - Sincerely held religious beliefs.
 - Better practice is not to require but to encourage
- Key considerations:
 - State and local vaccine mandates
 - Emergency Use Authorization
 - Reasonable Accommodations
 - Liability Concerns

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State and Local Vaccine Mandates

- States can, under their police powers, enact reasonable regulations to protect public health, public safety, and the common good
- Certain industries may also be subject to state and local vaccine mandates, such as:
 - Health care workers
 - Schools
- If you are an employer falling within a state/local mandate, than you must follow that mandate

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Employer Vaccination Mandates

- In general, employers can and have implemented vaccine mandates as a condition of employment
 - E.g., influenza vaccines for healthcare workers.
- Why should employers be hesitant to do so now?

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Emergency Use Authorization (EUA)

- EUA allows for the use of unapproved medical products during public health emergencies.
- EUA status is not the same as FDA approved.
- For vaccines granted an EUA, the FDA has an obligation ensure that recipients of the vaccine under an EUA are informed:
 - That FDA has authorized the emergency use of the vaccine
 - Of the known and potential benefits and risks, and the extent to which such benefits and risks are unknown
 - That they have the *option to accept or refuse the vaccine, and to be informed of the consequences, if any, of refusing, and of the alternatives available.*

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Accommodations

- Employers are legally required to provide certain reasonable accommodations to persons with:
 - Disabilities
 - Sincerely held religious beliefs
- December 2020 EEOC guidance sets forth that employers may be required to make exceptions to a mandatory vaccination policy in relation to an employee's request for an accommodation based upon a disability or a sincerely held religious belief

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Accommodations: Disabilities

- The ADA permits employers to exclude employees that pose "a direct threat to the health or safety of individuals in the workplace."
- However, to exclude an employee who cannot be vaccinated due to a disability from physically entering the workplace, an employer must show that an unvaccinated employee would pose a direct threat due to 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."
- Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists.
- If an employer determines an employee does pose a direct threat, the employer should then assess whether the employee can be provided a reasonable accommodation that would eliminate or reduce the risk, without causing an undue hardship.

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Accommodations: Sincerely Held Religious Belief

- Once an employer is on notice that an employee's sincerely held religious belief, practice or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation unless it would pose an undue hardship under Title VII of the Civil Rights Act.
- A religious practice or belief is defined as "moral or ethical beliefs as to what is right and wrong which are sincerely held."

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Additional Considerations

- Liability Concerns
 - OSHA, Negligence, Workers' Compensation claims
 - Public Policy and Civil Rights claims
- Industry
 - Healthcare
 - School/Daycare
 - Eldercare
- Workforce
 - Union (duty to bargain)
 - Payment for time
- Vaccine Availability
- Employee Buy-In

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Alternatives

- The legal and practical risks posed by mandating the vaccine may outweigh the potential benefits
- Consider *encouraging* rather than mandating employee vaccination by:
 - Implementing vaccination education campaigns;
 - Covering any costs associated with getting the vaccine; and/or
 - Providing incentives to employees who get vaccinated, like paid time off.

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FAQs

- Is there any issue with an employer proactively asking employees if they intend to get a vaccine?
- Can an employer ask an employee if they have been vaccinated?
- Do I need to wear a mask and avoid close contact with others if I have been vaccinated?

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Privacy Concerns

- ADA requires employers to keep confidential any medical information they learn about an applicant or an employee.
- This information must be stored separately from the employee's personnel file, thus limiting access to this confidential information.
- This includes any employee medical information obtained in the course of a vaccination program.

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References and Additional Resources

- CDC Guidance:
 - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>
- EEOC Guidance:
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- MA DPH Guidance:
 - <https://www.mass.gov/info-details/covid-19-vaccine-frequently-asked-questions>

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Adapting to the “New Normal”

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Returning to Work Considerations

- Communication is critical
- Flexibility encouraged if possible
- Work with employees to develop solutions
- Be mindful of workplace safety

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OSHA – New Guidance for Employers

- Updated 3/12/2021
 - National Emphasis Program
 - Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)
 - <https://www.osha.gov/coronavirus/safework>

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Thank You!

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