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COVID-19 Vaccine & Employee Safety

By SUNZ Holdings

Across the country states are slowly but steadily looking to make the COVID-19 vaccine available to all age groups. While many celebrate this development in the ongoing fight against COVID-19, the vaccine poses interesting questions for employers and staffing companies.

Can we mandate the vaccine for all employees?

According to the EEOC which released revised guidelines in December, an employer can mandate the COVID-19 vaccine. This ability is given through the ADA which allows employers to set qualification standards for employment or ongoing employment. One such standard outlined by the EEOC is “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” In other words, if you feel that an employee not receiving the vaccine would pose a risk to other employees then you can mandate the vaccine.

It is important to note that there are some exceptions to this rule. For employees with disabilities or health conditions which prohibit them from getting a vaccine, employers are expected to make alternative accommodations. Only when accommodations pose an “undue burden” or completely prevent an employee from fulfilling their job function is termination an option. The situation is similar in the case of employees who feel they cannot be vaccinated due to a sincerely held religious belief. It is important to remember that “religious belief” is a broad term and may be difficult to prove.

If you plan on mandating the vaccine, it is vital that you produce a written policy. This policy needs to outline the following:

- The deadline by which an employee must be vaccinated.
- Documentation required to prove vaccination.
- Deadline by which employees must notify you of their choice not to be vaccinated.
- Details on what accommodations can be made for those who cannot get the vaccine.
- Information on what the penalty will be for employees who are able to get the vaccine and choose not to.
- The contact information of a manager or leader whom employees can speak to regarding questions or concerns.

What is our liability if we do not require the vaccine?

Employers who choose not to mandate the vaccine can leave themselves open to potential worker’s compensation liability. During the height of the COVID-19 pandemic many employers found themselves facing worker’s compensation cases brought against them by employees

who caught the virus at work. In these cases, employees argued that their employer did not implement proper safety protocols or failed to provide the proper equipment to keep them safe.

For most of these cases, COVID-19 related illness was deemed an occupational injury and therefore covered under the individual state's statutes. While a COVID illness can be deemed an occupational injury, there still remains the possibility that lawyers can argue that these statutes do not provide enough coverage.

Keep in mind that worker's compensation statutes will not cover other stakeholders. This could include customers, contractors, volunteers, or vendors who catch the virus from a unvaccinated employee.

Many state governments are looking to institute limited liability measures for small businesses. A recent law passed in the Florida House of Representatives added that any suit brought against a company for COVID-19 related injuries would require an affidavit from a physician. If passed, an individual bring suit against a business would need a doctor to determine that their COVID-19 injuries or illness were directly connected to the business's negligence. While this does provide further protection of risk for businesses, it is important to remember that laws like this remain vague in determining the definition of negligence.

What happens if someone gets sick from a mandatory vaccine?

This is the dichotomy of the vaccine issue. In the event an employee was to have a negative reaction to the vaccine they could argue that they were injured or put at risk by their employer. The result could be a workers' compensation suit against the employer and a personal injury suit against the vaccine manufacturer.

What can we do if someone refuses to get the vaccine?

An employee who does not get vaccinated when it is mandatory and the reason is not a disability, medical condition, or religious reason, may be at risk of disciplinary action. This disciplinary action can include termination.

To protect from liability, it is important that disciplinary action is universal. Actions taken against those who refuse a vaccine must be the same regardless of the employee's position or work status. In the event that an employer wished to mandate the vaccine for only a specific class of employees, for example only those who interact with customers face to face, a review of the workforce would need to be conducted first. If the review found that a majority of the employees in the mandated class belonged to a protected group, it could be argued that the policy causes an "adverse impact" on a specific group and is therefore discriminatory.

Keeping employees safe from COVID-19 remains and will continue to be a core focus for businesses and organizations. The COVID-19 vaccine does bring with it the hope for a return to normal operations. However, implementing the vaccine within your business will take careful planning and thorough documentation. SUNZ is here to help you navigate this complex issue. Our Risk Management Center is an excellent resource as you being to look ahead at vaccination.