



# The Latest on COVID & Beyond: Future Workplace Considerations

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# OVERVIEW

- Vaccine Mandates
  - When Required
  - Accommodations
  - Additional Considerations
- Return to Work
  - Practical v. Legal Considerations
- Remote Work
- Hiring and Terminating during COVID
- Litigation

# **Vaccine – to Mandate or Not to Mandate?**



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# Vaccine Considerations

- **Washington State Mandate – required for:**
  - State employees
  - Higher education employees
  - Childcare employees
  - K-12 education employees
  - Most health and long-term care providers.
  - Must be fully vaccinated by October 18, 2021.
  - Employers must verify vaccinations status.
  - Unvaccinated employees will be terminated unless medical or religious accommodation

<https://www.governor.wa.gov/VaccineMandateFAQ>

# Vaccine Considerations

- **Federal Employees must be vaccinated by November 22**
- **Military requirement**
- **Federal contractors**
- **Health Care workers**
- **Mandate for large employers**

# Vaccine Considerations

- **Vaccine Mandate for Large Employers**
  - OSHA will issue rule....someday
  - Applies to companies with 100 or more employees
  - Testing alternative
    - Can your organization handle testing and reporting?
  - Accommodations
    - What is your process?
  - Tracking vaccination status
    - What is your process?
    - “Fully vaccinated” could include boosters down the road.

# Vaccine Considerations

- **If Allow Testing**
  - **Weekly**
  - **Types of tests allowed – efficacy**
  - **Reporting process – requiring documentation**
  - **Who receives documentation?**
  - **Where kept?**
  - **What are consequences of not producing documentation?**
  - **Who pays for it?**
    - **Insurance**
    - **Employee**
    - **Washington has no current requirement, other states might**

# Vaccine Considerations

- **Consequences for failure to comply with mandate**
  - Discipline
  - Leave of absence
  - Termination
  - Do you want to terminate?

# Vaccine Considerations

- **Medical accommodation**
  - Same process as current ADA requirements.
  - Interactive process.
  - Can (and should) require medical provider verification.
  - If allowing testing as accommodation, may have to pay for tests.

# Vaccine Considerations

- **Religious Accommodation**

- Ensure same process as prior requests.
- Treat similarly situated people the same.
- “Sincerely held” religious belief.
- How far can you go to determine if “really” a religious belief?

# Vaccine Considerations

**Please explain below why you are requesting an Exemption/Accommodation:**

In some cases, the Company will need to obtain additional information and/or documentation about your religious practice(s) or belief(s). We may need to discuss the nature of your religious belief(s), practice(s) and accommodation with your religion's spiritual leader (if applicable) or religious scholars to address your request for an exception.

**If requested, can you provide documentation to support your belief(s) and need for an accommodation?** \_\_\_\_\_ Yes \_\_\_\_\_ No

**If no, please explain why:**

## **Verification and Accuracy**

**I verify that the information I am submitting in support of my request for an accommodation is complete and accurate to the best of my knowledge, and I understand that any intentional misrepresentation contained in this request may result in disciplinary action.**



# Vaccine Considerations

In order to qualify for the exemption, employees are required to provide a written and signed statement below objecting to immunization due to sincere and genuine religious beliefs which prohibit immunization, in which case supporting documents may be required.

The statement must address all of the following elements:

- Explain in your own words why you are requesting this religious exemption.
- Describe the religious principles that guide your objection to immunization.
- Indicate whether you are opposed to all immunizations, and if not, the religious basis that prohibits particular immunizations.

Human Resources will notify you as to the approval or denial of your request.

# Vaccine Considerations

Supporting materials may be requested, which include any of the following:

- A letter from an authorized representative of the church, temple, religious institution, etc. that you attend, or literature from the church, temple, religious institution, etc. explaining doctrine/beliefs that prohibit immunization (Note: you need not necessarily be a member of an organized religion or religious institution to obtain a religious exemption);
- Other writings or sources upon which you rely in formulating religious beliefs that prohibit immunization;
- Any documents or other information you may be willing to provide that reflect a sincerely held religious objection to immunization.

# Vaccine Considerations

## ■ Accommodation, Generally

- Do not have to grant requested accommodation if:
  - not reasonable
  - it poses a direct threat to the health and/or safety of others in the workplace and/or to employee; or
  - it creates an undue hardship on the Company.
- Can require in-person work with testing, masks, social distancing, etc.
- Can accommodate using remote work
- NO retaliation
- NO discrimination
- NO treating differently for seeking accommodation

# Vaccine Considerations

## ■ Verifying Vaccination Status

- In Washington, L&I allows the following:
  - Vaccine card or photo of vaccine card.
  - Documentation from a health care provider.
  - State immunization information system record.
  - A hard copy or electronically signed self-attestation from the employee.
- Note: an employer is not required to make self-attestation an option to verify vaccination status.
- Must show process of verification, do not have to keep actual verification documents.

# Vaccine Considerations

- **Education**

- Work with employees to understand why resistant to vaccine
- Educate employees about benefits

- **Incentives**

- Okay to offer incentives for vaccinations
- Monetary
- Time off
- Other

# **Return to Work – How do I do this?**



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# Return to Work

- Determine business needs
- Understand employees' concerns
- Understand employees' current environment
- Communicate
- Communicate
- Communicate

# Return to Work

- **Employees' concerns**
  - Safety – workplace
  - Safety – public transportation, public spaces
  - Don't want to be forced to be vaccinated
  - Don't want to be in environment where coworkers are unvaccinated
- **Employees' current environment**
  - Settled into working remotely
  - Many don't understand why they can't work remotely forever

# Return to Work

## ■ Communicate

- What is lost with remote work.
- Why it is necessary to have workers in the office all/some of the time.
- Be prepared to answer why those who have been successful remotely need to come into the office.
- Are you prepared to terminate an employee (i.e. high performer) if they refuse to come back to the office?

# Return to Work

## ■ Legal considerations

- Can require employees to return to the office unless they are legally entitled to an accommodation of no in-office work.
- If legally entitled to an accommodation, need to work through what that is.
- Can deny accommodation if an undue hardship.
- What is an undue hardship?
- Can you support a denial of a request for accommodation to work remotely because of undue hardship if the employee has been working remotely for 18+ months?

# Return to Work

## ■ Practical considerations

- Survey employees regarding return to work
- Give plenty of advance notice for return to work
- Team-based and collaborative approach to understanding why some workers do not want to return to work and why it is important
- Consider flexible or phased approach to returning to work (ramp up over time to be full-time in office)

# Remote Work – All the Laws Still Apply



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# Remote Work

- **Employee Location**
  - **Laws/taxes of state where employee works**
  - **Ergonomic considerations**
  - **Company property**
  - **Company/client privacy, confidentiality, and security considerations**
  - **Company insurance**

# Remote Work

- **Wage/Hour Laws**

- How are you tracking hours for non-exempt employees?
- Are employees working after/before hours?
- Must pay for all time worked!
  
- Consider limiting access to work platforms/emails
- Policies – have and enforce policies regarding working outside hours, recording time, consequences

# Remote Work

- **Discrimination/Retaliation**

- Does everyone have equal access to resources?
- Still required to ensure no harassment, bullying, etc.
- Is there a difference between how remote workers and in-office employees are treated – promotions, better projects, etc.?
- Does that create an adverse impact on women (often primary caretakers) or other groups?

# Remote Work

- **Practical Concerns**
  - Company culture
  - Employee burnout
  - Productivity
  - Equalizing workload
  - Equalizing treatment
  - Be flexible – reassess and revise

# Hiring and Terminating During Covid



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# Hiring

- **Vaccine considerations**
  - Okay to post job as “vaccine required”
  - Can ask candidates about vaccine status
  - Tread lightly with follow up questions
  - Cannot discriminate
  - Will still need to accommodate
  - Keep all medical information confidential

# Hiring

- **Practical considerations**
  - Identify if work remote or not, or if remote now and will change
  - Onboarding
  - Integrate into company
  - Early reviews

# Terminating

- Yes, you can terminate (unless violating another law)
- Need to provide a safe work environment
- Be mindful of potential claims
- Document
- Focus on objective concerns, business reasons
- Be cautious and truthful
- Consider severance and release agreement

# Litigation



# Litigation??

- **It's happening... and increasing**
  - 3500+ covid-related cases in the U.S. from March 2020-September 2021
  - Summer 2021 big increase
  - 75%+ cases relate to remote work, accommodation, discrimination, retaliation
  - Most defendants are companies with 50 or fewer employees
- **You do not want to be a test case!**

# Litigation??

- **Mandatory Vaccines**
  - Consider allowing alternate weekly testing instead
- **Accommodation/Discrimination/Retaliation**
  - Position yourself to handle this
  - Train HR/managers
  - Have HR, not managers, handle accommodation requests
  - Keep vaccine status and medical information confidential
  - Policies to avoid discrimination/retaliation based on vaccinated status
- **Consistency – same treatment for similar circumstances**

# Thank you.

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