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Post COVID-19 Return to Work: An Employer's Top Six

Although we are certainly not “out of the woods” and continue to experience the utter devastation caused by the pandemic, employers are beginning to consider whether mandating their employees to return to the office will address the economic hardships that continue to impact their businesses. Employers must assess whether their return to work policies comply with both federal and state law. Employers must also determine whether their plan accounts for the concerns of their workforce and community. While it is still too early to determine when employees will return to the office, it is very likely when they do, their workplace will look, feel and operate in a different manner than it did pre-pandemic. The below are six topics employers would be wise to consider as they begin navigating through post-pandemic return to work paradigms.

1. Can I Require My Staff Receive a Vaccine?

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued guidance clarifying that employers are lawfully permitted to require employees to be vaccinated before returning to work, subject to several exceptions. These exceptions include disability considerations and religious accommodations.

Many employers are currently encouraging, but not requiring vaccinations. This is especially the case in jurisdictions where vaccinations are not available to all adults. A policy of encouragement relieves the employer of the obligation to conduct disability and religious related accommodation analyses. Nevertheless, if employers offer incentives to employees to get vaccinated, like additional paid time off, gift cards, etc., accommodations may need to be made for those employees who are not eligible for the incentive due to a disability or religious belief that prevents them from receiving the vaccine.

Given the Emergency Use Authorization status of the vaccines, and the recent “pause order” pertaining to the Johnson & Johnson vaccine, we encourage employers not to mandate the vaccine at this time to avoid potential collateral liability issues arising from the vaccines.

Importantly, employers should be aware that the EEOC and OSHA guidance pertaining to vaccines only pertains to federal law. Employers must take into account counterpart guidance issued by *state* agencies when adopting return to work policies. Indeed, employers should note that the “rules” related to the pandemic are constantly changing and that each agency issuing directives at this time has different “authority” and jurisdiction over issues pertaining to COVID-19. Therefore, employers must note it is likely that a federal agency may “permit” an employer to take action that a counterpart agency will “prohibit.” This is precisely the issue with mandatory vaccine guidance issued by the EEOC and FDA regulations. Accordingly, in light of the varied directives issued by federal and state agencies, employers are strongly recommended to consult with an attorney to assist in navigating this fluid legal landscape.

2. Am I Required To Provide Paid Time Off For Employees To Receive The Vaccine?

On March 12, 2021, Governor Andrew Cuomo signed a bill into law, which requires both public, and private employers to provide their employees with up to four (4) hours of paid time off to receive the COVID-19 vaccine. Of particular importance, employees are entitled to receive up to four (4) hours of paid time off per injection. Thus, for the Pfizer and Moderna vaccines which require two (2) doses, these employees will be eligible for up to eight (8) hours of paid time off. However, this statute may be interpreted to require employers to compensate employees for only the time spent getting the vaccine during regular working hours. For example, if an employee is scheduled to work from 10:00 a.m. to 6:00 p.m., and comes into work late at 12:00 p.m. because of their vaccine appointment, that employee may only be entitled to two (2) hours of pay; not the full four (4) hours. Furthermore, employers should be aware the vaccine law expires on December 31, 2022. Finally, the paid time off to receive the vaccine is separate and distinct from other paid time off employees are entitled to under the NYS/NYC Paid Sick Leave laws as well as company policies.

3. Do Vaccinated Employees Need to Wear Masks?

Short answer is Yes in New York. Recent data pertaining to the vaccine’s effectiveness for not only preventing infection but also slowing the spread of COVID-19 is promising. The CDC and OSHA still recommend fully vaccinated individuals continue to wear a mask and practice social distancing around unvaccinated individuals. This is because vaccinated individuals may nevertheless spread the virus and recent reports are revealing an increase in cases of COVID-19 “vaccination breakthrough.” Employers should nevertheless note that certain states have loosened or altogether abandoned mask mandates. Accordingly, employers should make a state-by-state assessment relative to mask mandate guidelines.

4. Do We Continue To Perform Temperature Checks?

Generally, measuring an employee's body temperature is a (normally impermissible) medical examination pursuant to the ADA. However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may continue to measure employees’ body temperature.

According to the EEOC, Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills,

cough, and shortness of breath. The CDC has identified a current list of symptoms (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>).

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to the health or safety of others. As such, continuing to require temperature checks is probably both permitted as well as a prudent requirement for the near future. Nevertheless, employers should be aware that some individuals with COVID-19 may not experience fevers, which militates in favor of additional measures, such as continued employee self-certifications, prior to entering the workplace.

5. Do I Still Need To Implement a COVID-19 Prevention Program?

Employers in New York State are still required to implement policies to prevent the spread of COVID-19 at the workplace. In addition to COVID-19 screenings prior to entering the office (e.g., temperature checks) employers are required, amongst other things, to provide employees with approved face coverings (at no cost to the employee), and to provide and maintain hand hygiene stations in the office. Additionally, employers are required to practice social distancing where applicable, provide cleaning supplies to clean communal or shared spaces (such as office desks or the office kitchen), and perform a thorough cleaning of the entire office after each shift daily. Finally, employers are also recommended to stagger work schedules to limit the number of employees in the office at a time and allow for remote work (if possible). For a more comprehensive guide please see New York State's Office Based Guidelines <https://www.governor.ny.gov/sites/default/files/atoms/files/OfficesSummaryGuidelines.pdf> as well as OSHA Guidelines (<https://www.osha.gov/coronavirus/safework>).

6. Should I Revise My Employee Handbook?

Employers would be wise to review their employee handbook to determine which policies must be revised. As laws have changed since the beginning of the pandemic, the employee handbook should reflect and comply with those new laws. For example, the handbook should reflect recent legislative enactments such as the COVID-19 vaccination law, as well as, the New York State Paid Sick Leave Law. Additionally, if any other substantive workplace policy has been amended (e.g., vaccination incentives or requirements), it should also be reflected in the employee handbook.

Conclusion

Many of the answers to the foregoing critical questions remain outstanding given the numerous regulations at both the federal and state level. Thus, the answers are subject to both interpretation and legitimate disagreement. Nonetheless, these six (6) questions will set a foundation to success when employers start drafting their return to work policies. Should you have any questions regarding the above, please feel free to contact management-side Labor and Employment attorneys Gerald C. Waters, Jr., Esq. or Nicholas P. Melito, Esq. via email at gwaters@meltzerlippe.com, nmelito@meltzerlippe.com or by phone 516-747-0300.

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