

The COVID Vaccine: Identifying and Handling the Legal and Practical Implications

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Roadmap to Inoculation

- Vaccine Background
- Relevant Legal Authority
 - EEOC
 - Title VII
 - OSHA/Other
- Key Issues
 - Required or Voluntary
 - Alternatives
 - Handling Objections
- Other Considerations
 - Liability, Logistics, Labor Unions, More

VACCINE BACKGROUND

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Vaccine Background

- Hundreds in development since Spring
- Operation Warp Speed (OWS)
- Some just completed Phase 3 clinical trials
 - Interim Results in two (Pfizer; Moderna) w/almost 75K total participants combined showed 90-95% effectiveness
- Emergency Use Authorization (EUA) from FDA expected (50% effective threshold)



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Vaccine Background

Key Issues for COVID Vaccine Distribution



Funding



Racial and ethnic disparities



Supply and logistics



Communication and trust



Federal, state, and local roles



Coverage and Costs



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Vaccine Background

- Even if approved, questions may remain
 - Effective on only mild/strong cases?
 - Differences between groups (elderly, others...)?
 - How long will it last?
- Timing
 - EUA expected mid-December, others into 2021
 - Rollout in phases, by state government determinations:
 - First Responders (Healthcare? Nursing homes? Elderly?)
 - By state population
 - Time until mass availability estimated mid-2021

RELEVANT LEGAL AUTHORITY

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Relevant Legal Authority

- EEOC
- Title VII
- OSHA/Other



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EEOC – General

- Current Guidance on COVID, but thus far silent on rights/obligations regarding a *COVID Vaccine*
- 2009 Guidance on Pandemic Preparedness following H1N1 did NOT bless the idea of a blanket influenza vaccine for all employees without exceptions
 - Translation: Employers can require flu vaccine, *but subject to accommodations*
 - Commission: employers should “**consider simply encouraging employee’s to get the influenza vaccine rather than requiring them to take it**”



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EEOC – Standards

- ADA is the primary EEO standard in world of vaccination
- Legally, a vaccine = medical exam
- That means a vaccine is permissible if it's job related and consistent with business necessity
- Hospital employers have been the obvious leaders in application of this concept

EEOC – Accommodations

- If EEOC authorizes administration of a COVID vaccine in the workplace upon FDA approval, it's likely to follow the agency's flu vaccine approach
- Thus, if employers want to mandate a vaccine, they need to be familiar with how accommodations in that realm have been applied



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EEOC – Accommodations

- Employees with a disability/medical concern in connection with receiving a vaccine may seek an accommodation exempting them from one
- One 3rd Circuit case in 2018 (Ruggiero v. Mount Nittany Medical Center) concluded anxiety over the side effects of a vaccine may be a disability
- Triggers interactive process:
 - Medical documentation
 - Review of essential job functions
 - Alternatives
 - Undue Hardship
 - Significant Difficulty/Expense
 - Impact on co-workers/customers



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EEOC – Direct Threat

- The Commission legally regards COVID-19 as something which presents a “direct threat” to the workplace
- Usually, employers are permitted to reject proposed accommodations if implementing them would cause a direct threat; here the question is whether an employee can be exempt from a vaccination as an accommodation because granting the exemption causes a direct threat

Title VII – General

- The main circumstance where Title VII rights arise in vaccine context is when employees seek an accommodation from a vaccine requirement due to religious beliefs
 - Belief must be “religious”
 - Belief must be sincerely held
 - Can’t pose an Undue Hardship
 - More than *De Minimis* cost





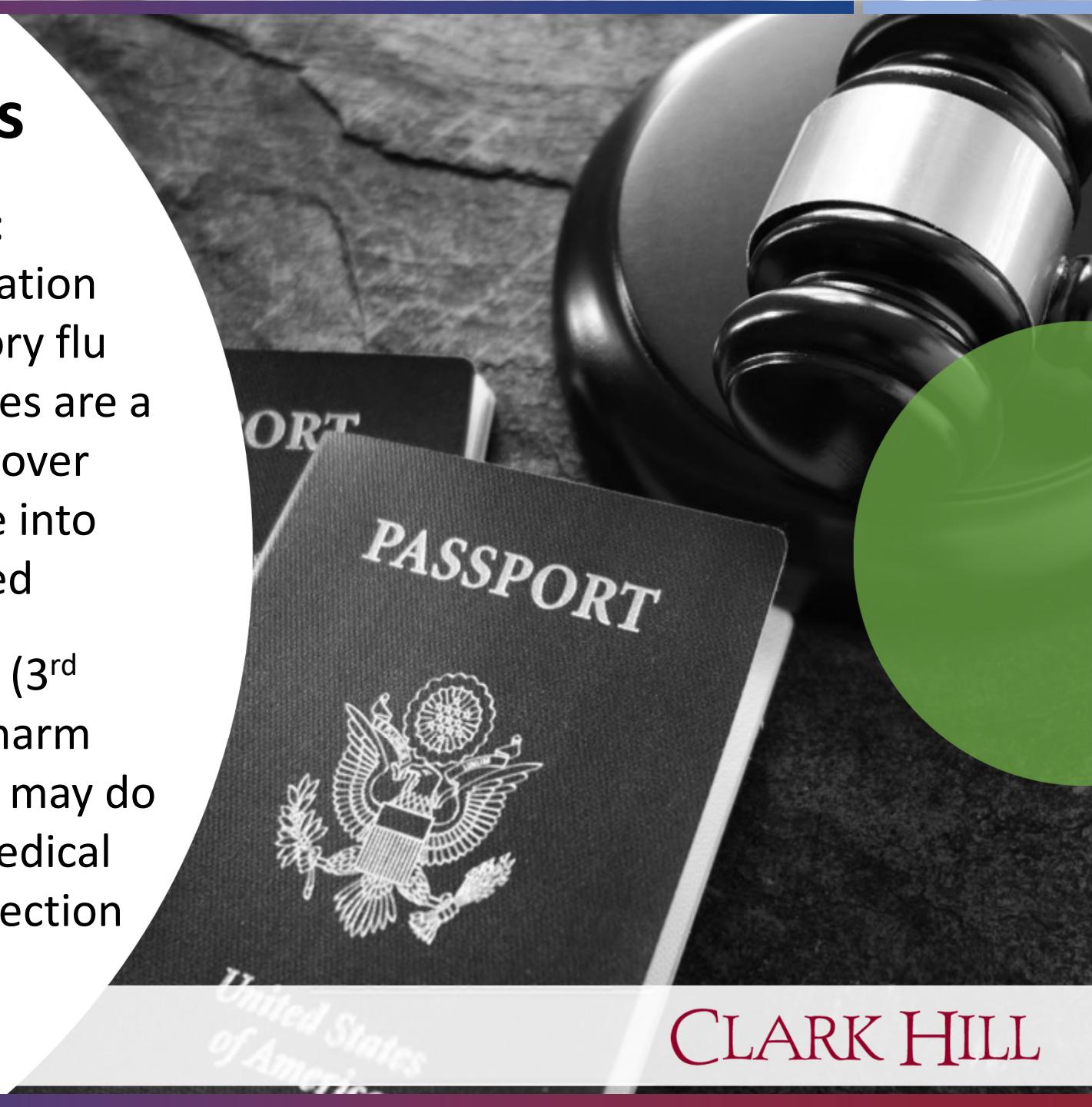
Title VII – Accommodation

- Beliefs must fall within traditional religious views – ultimate ideas about life, purpose, and death – but don't need to be widely practiced
- Religious beliefs generally don't include social, political, or economic views, nor do they include mere personal preferences

Title VII – Accommodations

- EEOC v Mission Hospital (D. N.C., 2017): Denied employer dismissal of discrimination claim when employee refused mandatory flu vaccine because she believed “our bodies are a temple and that God gave us dominion over our bodies” so “injecting the flu vaccine into the body is morally wrong” and was fired
- Fallon v. Mercy Catholic Medical Center (3rd Cir., 2017): Belief that “one should not harm their own body and that the flu vaccine may do more harm than good” was personal medical opinion and not legitimate religious objection

This line is THIN!



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Title VII – Accommodations

To consider whether an accommodation is being made consistent with a “sincerely held” religious belief, consider four factors:

- 1) Does the employee behave markedly consistent or inconsistent with the belief?
- 2) Is the accommodation sought desirable & likely to be sought for religious reasons?
- 3) Does the timing of the request render it suspect?
- 4) Is there some other basis to conclude the request is or is not sought for religious reasons?

Title VII – Accommodations

- Undue Hardship standard here – again, more than a *de minimis* cost – is LOWER for the employer to prove compared to the Undue Hardship standard used in the ADA
- Consider traditional “cost”/impacts:
 - Type of workplace & nature of duties
 - Cost relative to company size/operation
 - Infringe on other employee job rights or benefits, diminish efficiency, or decrease safety





OSHA / OTHER

- OSHA – Section 5(a)(1) [General Duty Clause]: In addition to compliance with hazard-specific standards, all employers must provide a work environment free from recognized hazards that are causing or are likely to cause death or serious physical harm
- 2009 OSHA Interpretation letter: An employee with a medical condition who refuses a vaccination because of the “reasonable belief” that the shot could lead to a serious illness or death may be protected from retaliation



OSHA/OTHER

- State laws pertaining to OSH generally
- State laws pertaining to vaccines specifically – including by industry – when they are released
 - Unique state laws pertaining to healthcare
 - Unique state laws pertaining to schools/children
 - Unique state EXEMPTIONS (medical, religious, personal, combinations)

KEY ISSUES

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Key Issues

- Required or Voluntary
- Considering Alternatives
- Handling Objections

Required or Voluntary

- Legal Authority TBD
- Likely result is employers WILL be able to mandate a COVID vaccine, if they choose to do so, subject to accommodations
- The real question in most instances will be: SHOULD YOU mandate the vaccine?



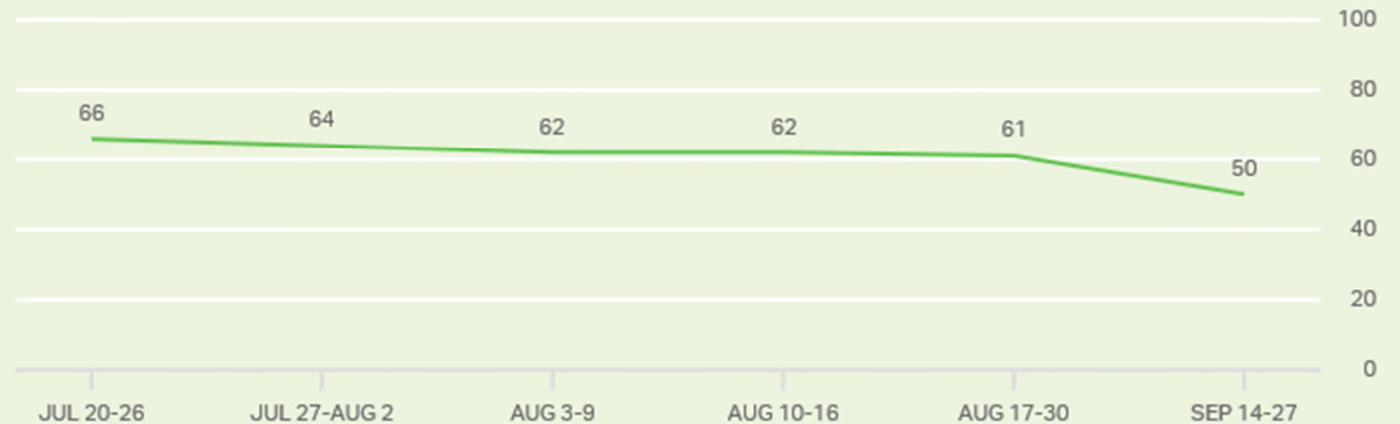


Required or Voluntary

Willingness to Be Vaccinated for COVID-19

If an FDA-approved vaccine to prevent COVID-19 was available right now at no cost, would you agree to be vaccinated?

■ % Yes



GALLUP, 2020

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Required or Voluntary

June study published by Nature Medicine involving almost 15,000 people from 20 countries reported a discrepancy between trust of a COVID-19 vaccine generally compared to trust of one if vaccination was mandated by one's employer. All respondents, regardless of nationality, reported that they would be ***less likely*** to accept trust of a COVID-19 vaccine if it were mandated by their employer.

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Required or Voluntary

Poll data has limitations like timing, size, accuracy, etc. (See, Elections, 2016/2020) but it remains a snapshot of the aggregate perspective about the reliability & safety of a vaccine generally, about the healthcare industry, about government representations, about personal liberty, etc.



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Considering Alternatives

Besides the law, the choice to require a COVID Vaccine might depend on where you do business, your industry, your employee demographic, and your alternatives



Considering Alternatives

- Reassignment to different position
- Telework
- Modification of duties
- Masks/Face-coverings
- Leave of absence

No one size fits all and more than one may apply!

A photograph of an industrial facility, likely a refinery or chemical plant. In the foreground, a large, white, cylindrical storage tank is visible. Above it, there are multiple levels of yellow-painted metal walkways and railings. The background shows more complex piping and structural elements of the plant. The lighting is somewhat dim, with some bright spots from industrial lights.

Handling Objections

Focus on the basics

- What's the basis for the objection?
- What does your policy say?
- Does a state law apply?
- Is an accommodation in play?
- Walk through interactive process and remember undue hardship

Handling Objections

- Once through the basics on policy, law, and potential accommodation, assess what you're left with:
 - Are there alternatives?
 - What about discipline/termination?





Handling Objections

- If *groups* of your employees band together and refuse, their action may be protected concerted activity under the NLRA
 - Group Activity
 - Terms and Conditions of Employment
 - Where is the NLRB going?

OTHER CONSIDERATIONS

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Other Considerations

Potential liability is a two-way street

- If you **don't** require the COVID vaccine, could you be liable to your employees for potential workplace exposure?
- If you **do** require the COVID vaccine, and an employee has a negative medical consequence as a result, are you responsible for the complications?
- OSHA Emergency Temporary Rule coming?

Other Considerations

- IF you require a COVID Vaccine:
 - Which one will you require, or will you permit different vaccines?
 - Will you require it throughout your organization at every location, or will there be exceptions?
 - Will you bear the cost, or have your employees do so?
 - How long will the vaccine last/be effective, anyway?



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Other Considerations

- What if you have a Union in your workplace?
 - Administration of a COVID Vaccine is almost assuredly a term or condition of employment which must be bargained
- Can you incentivize employees to take the Vaccine, via a wellness program?
 - Regulation here has been, and remains, in flux
 - For a period of time, you were only able to financially incentivize wellness initiatives up to a certain threshold (30%), or else they risked being compulsory (and thus, unlawful) under the ADA
 - Litigation led to portions of that rule being rejected
 - New regulations coming from EEOC in this area (again)



Other Considerations

- Be mindful of employee harassment in your workplace related to the Vaccine, whether you require it or not
- Consider your messaging/communications related to the Vaccine – again, whether you require it or not
 - Why you are doing what you are doing
 - Details of any program you may be establishing
 - Process of how to seek an exemption
 - Recordkeeping

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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time.

Please visit www.clarkhill.com/pages/covid-19 for access a wide range of resources related to coronavirus.

Thank You



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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information.
Employers facing specific issues should seek the assistance of an attorney.