

Q&A 

WEBINAR

Vaccine Rollout: Workplace and Legal Implications

MARCH 9 | 10:30 A.M.

Answers provided by [Michael D. McKnight](#), Shareholder at Ogeltree Deakins

1. A question I have is regarding the vaccine and the duration in which it is affective. The CDC stated that fully vaccinated individuals who are exposed do not need to quarantine if they have had their vaccination within the past three months; what happens after that point or is that unknown at this time?

Answer: My recommendation would be to continue to follow the CDC guidance. This may be an issue that OSHA addresses in its Emergency Temporary Standard over the next few days.

2. Does NC have a choice as to whether it adopts an OSHA ETS, or is it mandatory if OSHA declares an ETS?

Answer: NC has a duty to administer its state OSHA program in a way that is as effective as the requirements under federal OSHA. I don't think it is clear what the requirement is for an Emergency Temporary Standard because there is no specific timeline by which it must be adopted. Since the ETS is only good for 6 months, if the state doesn't adopt it by then, it will be effectively mooted. Federal OSHA has to put out a permanent standard by that time but then the state would have 6 months to adopt that. So, I think the NC could choose to adopt an ETS right away or possibly drag its feet and see what happens. If it chooses the later option and federal OSHA doesn't like it, they could decide to take over the NC OSHA program but I would think that would be unlikely to happen and, if it did, unlikely to happen very quickly. It will be very interesting to see what the state plans do regarding adoption of the ETS particularly if it is a heavy lift.

3. What can we do in regard to employees that refuse free vaccination? Do we need to maintain safety protocols for non-vaccinated individuals if all other employees are vaccinated? You may answer this in the presentation.

Answer: You may have asked this before I got to this slide, but OSHA's position right now is that all employees must be treated the same from the standpoint of safety protocols regardless of whether they have been vaccinated or not. We may see that change in light of changing guidance from the CDC like that which we saw come out in the last couple of days.

4. What legal issues should be weighed if an employer considers issuing a moderately-sized vaccine pay-bonus, to incentivize getting the shot(s), instead of making them mandatory for non-direct, threat style roles?

Answer: You may want to consider whether offering such a bonus might discriminate against individuals who have a disability or might be pregnant or nursing and can't get the vaccine and therefore can't get the bonus which might be deemed to violate the ADA or Title VII. Under the circumstances, I think that risk may be fairly narrow, but it increases as the amount of the bonus increases. The bonuses may also affect overtime rates for hourly employees because they would be included in the employee's regular rate of pay.

5. If we are not requiring, but strongly encouraging EE's, to be vaccinated, should we still track whether EE's have been vaccinated or not?

Answer: I think that is entirely up to you as to whether you want to do that. Simply asking whether someone has been vaccinated is OK if you don't dig into the "why not" if they haven't been. If you do ask and decide to keep track of it, you want to be sure to keep that information separate from the personnel file and keep it confidential. Some employers may find that vendors or customers ask this or that they have to know for other reasons but I always recommend that you avoid asking employee anything health-related if there is not a specific business reason that you need the information.

6. How you handle staff that have read articles that question the impact of the vaccine on fertility, especially if the decision is made to make vaccination mandatory

Answer: I would encourage them to speak with their doctor about whether the vaccine is appropriate for them. I would always recommend trying to work with employees on this wherever possible. If people choose not to get the vaccine because of a personal objection that is not based on a sincerely held religious belief, you can exclude them from the workplace. It is possible that they could argue that doing this has a disparate impact on female employees and therefore violates Title VII but if there are strong business reasons for requiring the vaccine, that can serve as a defense to any claim like this.

7. If I have 80% of my staff vaccinated (voluntarily) I cannot ask the other 20% who aren't vaccinated to wear a mask? That's an OSHA violation? Seems like the opposite of safe. Can I at least encourage it?

Based on its current guidance, OSHA would say that you should ask all employees to wear a mask, regardless of whether they have been vaccinated or not. And, right now, the guidance I mentioned is just that, guidance, and is not a specific OSHA standard. It will be interesting to see if this issue is addressed in the ETS particularly in light of the recent CDC guidance that says non-vaccinated people can socialize with each other without masks.