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**COVID-19 VACCINATIONS**  
Factors that may create liability and potential problems for employers

Presentation to  
Capital Area Safety Council  
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Dinsmore



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## Vaccinations are coming; What are you going to do?

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### → **Should you;**

- Mandate vaccinations and provide them onsite.
- Mandate vaccinations and require employees to get them on their own.
- Incentivize employees to get vaccinated.
- Encourage vaccinations.
- Hope everything will just work itself out.

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## Employers who mandate vaccination

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**If you are considering or have already decided to mandate vaccinations, what do you need to consider to avoid creating unnecessary liabilities.**

- **ADA (Americans with Disabilities Act).**
- **HIPAA (Health Insurance Portability and Accountability Act).**
- **EEOC (Equal Employment Opportunity Commission – enforcement Title VII).**
- **OSHA (Occupational Safety and Health Administration).**
- **State laws and litigation.**
- **Workers' compensation.**

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## ADA - Americans with Disabilities Act

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- **Applies to employers with 15 or more employees (but similar state laws apply to employers with fewer).**
- **Protects individuals with a disability resulting in an inability to receive the vaccine.**

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## ADA

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- **Is administration of the vaccine a medical exam under the ADA?**
  - No.
- **Screening questions could be a problem.**
  - Keep them narrowly tailored to the vaccination and the job.
- **Who needs to be screened?**
  - Among others, individuals who are immuno-compromised, those with severe allergic reaction to vaccines, pregnant or breastfeeding females.

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## ADA

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### What if the employee has a legitimate disability concern?

- **Apply standard ADA analysis**
  - Does the individual pose a direct threat of significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
  - Direct threat considers duration of risk, nature and severity of potential harm, likelihood of harm, and imminence of the harm.
  - Exposure of others in the workplace to coronavirus is a direct threat.



## ADA

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### Reasonable accommodations

- **Look to CDC and OSHA.**
- **Consider PPE, limiting exposure, how many others in exposed workforce vaccinated already.**
- **Work from home.**
- **Time off of limited duration until herd immunity reached could be reasonable.**



## HIPAA – Health Insurance Portability and Accountability Act

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### Wait, I'm not a healthcare provider!

- If the testing or vaccinating is being done by the employer, it could be subject to HIPAA as a healthcare provider.
- If the employer is providing vaccination or even contracting with a 3<sup>rd</sup> party vendor, be aware of the secure handling of health information (screening). This also applies to positive test results and contact tracing.
- Even if not providing vaccinations, remember to treat medical information separately and securely.



## EEOC – Equal Employment Opportunity Commission: Title VII

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- EEOC enforces workplace anti-discrimination laws, including the ADA
- Title VII of the Civil Rights Act of 1964.
- Protects against discrimination based upon religion and pregnancy (sex) as relevant to COVID vaccinations.
- EEOC Guidance for employers updated December 16, 2020 [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus).

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## EEOC

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- **Religious exemption.**
- **Must be a sincerely held religious practice or belief.**
  - Assume it is valid but if the employer has an objective basis for questioning the sincerity or the religious nature, justified to request supporting information.
- **If valid, must look to reasonable accommodation unless it creates undue hardship (more than *de minimus* cost).**
- **If the employer cannot accommodate, may exclude but caution against termination.**

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## OSHA – Occupational Safety and Health Administration

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- **COVID-19 is a recordable illness.**
- **No real guidance from the agency as to vaccinations.**
  - General Duty Clause, Section 5(a)(1), requires employers to provide a workplace free from recognized hazards likely to cause death or serious physical harm.
  - Classified jobs into 4 categories based upon exposure risk; very high, high, medium, low.

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## OSHA

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### → **No guidance for coronavirus vaccine**

- For flu and other diseases, OSHA's position has been that employers do have the right to require employees to get vaccinated.
- OSHA cautions that employees "need to be properly informed of the benefits of vaccinations".

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## State law and litigation concerns

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### → **House Bill 606.**

- Section 3(B) states that Executive orders, county and local ordinances, orders of boards of health, do not create new tort liability.

### → **King v. Menorah Park Foundation, et al., Case CV 20 941131 (Cuyahoga County).**

- Filed in December 2020 by the director and assistant director of nursing terminated following complaints of testing and quarantine protocols for staff not adequate to protect staff and residents of senior care facility.

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## Workers' Compensation Issues

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### → COVID-19 claims by the numbers

- About 25-35 new COVID claims filed each day
- As of early January 2021:
- 2,832 total COVID claims
- About 1,800 from healthcare industry
- 601 state fund claims allowed
- 152 state fund claims denied
- 636 self-insured claims certified
- 232 self-insured claims rejected
- 6 death claims allowed

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## Workers' Compensation Issues

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- **COVID vaccine reaction claims could be compensable, especially if mandated.**
- **BWC has not made a decision regarding charging COVID claims to employers' experiences yet. No need for BWC to make this decision anytime soon as these claims will not impact experience until 2022.**

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## Practical Tips

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- **If mandating vaccinations.**
  - Properly trained people to handle objections.
  - Be consistent.
  - Narrow screening questions.
  - Keep medical information secure and private.
  - Properly handle requests for accommodation.
- **Union environment?**
  - Consult your CBA. Negotiation may be required.

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## Practical Tips

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- **Mandatory vaccinations:**
  - Onsite.
  - Employer performs vaccinations (not recommended unless employer is an actual, qualified health care provider)
  - ADA, HIPAA, EEOC, OSHA, WC all apply, as does a standard of care

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## Practical Tips

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### → **Mandatory vaccinations:**

- Onsite.
- Employer contracts with 3<sup>rd</sup> party vendor to provide vaccinations.
- ADA, HIPAA, EEOC, OSHA, WC all apply.
- Be sure to screen the screener questions.
- Make sure medical information is secure.
- Indemnification agreement in contract with vendor.

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## Practical Tips

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### → **Mandatory vaccinations:**

- Offsite.
- Employer requires the vaccination but allows employees to choose where they obtain it.
- ADA, EEOC, OSHA, will still apply.
- Require proof that both vaccinations received.
- Still maintain security of this as medical information.

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## Practical Tips

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### → Employer provides an incentive for vaccinations.

- If not required, then ADA, EEOC do not apply.
- OSHA General Duty clause does continue to apply.
- Monetary bonus or something of value is likely income so be aware of potential wage and hour issues (ex. Calculating regular rate for purposes of overtime compensation).

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## Questions?

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