



Presented by Ethan
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THE ROAD TO RECOVERY: NAVIGATING THE LEGAL PITFALLS OF COVID-19 VACCINES

HOT OFF THE PRESS! THE NEW (BUT OLD) FFCRA

- Extended through September 30, 2021, but remains voluntary (and <500 employees).
- Each employee gets reset to 10 days of available paid sick leave (whether they used any time up through March 31st or not).
- In addition to the old qualifying events, FFCRA now covers employees who (1) are getting the vaccine (or recovering from the side effects); or (2) are awaiting the results of a test due to exposure or employer request.
- The tax credit limit for emergency paid family leave gets bumped from \$10,000 to \$12,000.
- Employers may not discriminate in favor of highly compensated employees, full-time employees, or on the basis of employment tenure.

EEOC ON COVID-19 VACCINES

- General Rule – Employer’s may lawfully mandate that their employees receive COVID-19 vaccinations.
- This is made possible via the ADA’s “direct threat” rule, which allows employers to impose standards that would otherwise be unlawful if not for the COVID-19 pandemic.
- Pitfalls – ADA, Title VII, GINA, and Wellness Plans/Incentives

EEOC: COVID-19 VACCINE IS NOT A “MEDICAL EXAMINATION” UNDER THE ADA, BUT...

- Pre-screening vaccination questions may trigger the ADA’s provisions regarding disability-related inquires.
- If an employer is administering the vaccine (or contracting with a third party to administer the vaccine), it needs to ensure that its pre-screening questions are “job-related and consistent with business necessity.”
- This requires the employer to have a reasonable belief, based on objective evidence, that an employee who doesn't answer the questions and doesn’t receive the vaccine will pose a “direct threat” to the health or safety of himself/herself or others.
- This doesn’t apply if an employee receives an employer-mandated vaccine from a third party that does not have a contract with the employer.

MORE ADA AND COVID-19 VACCINE ISSUES

- Asking or requiring employees to show proof of a COVID-19 vaccine is ***not*** a disability-related inquiry (but an employer can't ask things like: "Why did you not receive a vaccine?").
- The EEOC advises that if an employer requires employees to show proof from a pharmacy or the employee's own health care provider, the employer should warn the employee not to provide any medical information as part of the proof so that the ADA is not implicated.
- The ADA requires employers to keep all employee medical information obtained in the course of a vaccination program confidential.

ADA AND COVID-19 VACCINE ACCOMMODATIONS

- The ADA generally requires employers to provide employees with disabilities a “reasonable accommodation.”
- It is important to engage in the “interactive process.”
- There are exceptions for “undue hardship” or “direct threat”
- Does a stool or small stepladder for a Starbucks barista with dwarfism pose a direct threat?

ADA AND COVID-19 VACCINE ACCOMMODATIONS (CONTINUED)

- If an employer's vaccination requirement screens out or tends to screen out an individual with a disability, the employer must show (1) that an unvaccinated employee would pose a direct threat to the safety of the employee or others, and (2) this threat cannot be eliminated or reduced by reasonable accommodation.
- An employer must conduct an individualized assessment to determine whether a direct threat exist.
- If a direct threat exists, the employer cannot exclude the employee with the disability from the worksite (or take any other adverse employment action against the employee) unless there is no way to provide a reasonable accommodation that would eliminate or reduced the risk so that the employee does not pose a direct threat.

FEDERAL COURT ON MASK MANDATE

“[T]he Court need not evaluate Giant Eagle's well-taken defenses that its face covering policy is a legitimate safety requirement during the COVID-19 pandemic and that [plaintiff] presented a direct threat to the health and safety of others, including customers and employees.” *Pletcher v. Giant Eagle Inc.*, No. 2:20-754 at *16 (W.D. Pa. Oct. 23, 2020).

AT WHAT POINT IS IT NOT A DIRECT THREAT?

Daily new confirmed COVID-19 cases

Shown is the rolling 7-day average. The number of confirmed cases is lower than the number of actual cases; the main reason for that is limited testing.



Source: Johns Hopkins University CSSE COVID-19 Data

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TITLE VII AND COVID-19 VACCINES

- Like with the ADA, an employer is permitted under Title VII to require its employees be vaccinated.
- But if an employee refuses to be vaccinated because of a sincerely held religious belief or practice, the EEOC requires the employer to reasonably accommodate the employee, unless the accommodation would pose an undue hardship.

TITLE VII AND COVID-19 VACCINES (CONTINUED)

- The EEOC broadly interprets the term “religion,” so employers should assume that the employee’s request is legitimate.
- If the employer has an objective basis for questioning the employee’s religious belief or practice, the employer may request additional supporting information. And if the employee cannot establish the religious nature or sincerity of his or her objection, the employer can deny the request for an exemption.
- For example, in *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487 (3d Cir. 2017), the Court denied an employee’s request for an exemption from a mandatory flu vaccine because the employee’s concerns were really about the side effects of the flu vaccine.

TITLE VII AND COVID-19 VACCINES (CONTINUED)

- If an employee cannot get vaccinated because of a sincerely held religious belief or practice, and there is no reasonable accommodation without undue hardship, then the employer may exclude the employee from the work place.
- “Undue hardship” under Title VII is less stringent than under ADA. Under Title VII, undue hardship is “more than a *de minimis* cost or burden on the employee” – so even small costs and burdens usually qualify as an undue hardship.

GINA AND COVID-19 VACCINES

- Genetic Information Nondiscrimination Act (GINA) generally prohibits employment discrimination based on genetic information and collection of genetic information (including family medical history).
- EEOC says that administering a COVID-19 vaccine to employees or requiring them to provide proof that they received one does not implicate GINA because neither involve the use of genetic information to make employment decisions.

GINA AND COVID-19 VACCINES (CONTINUED)

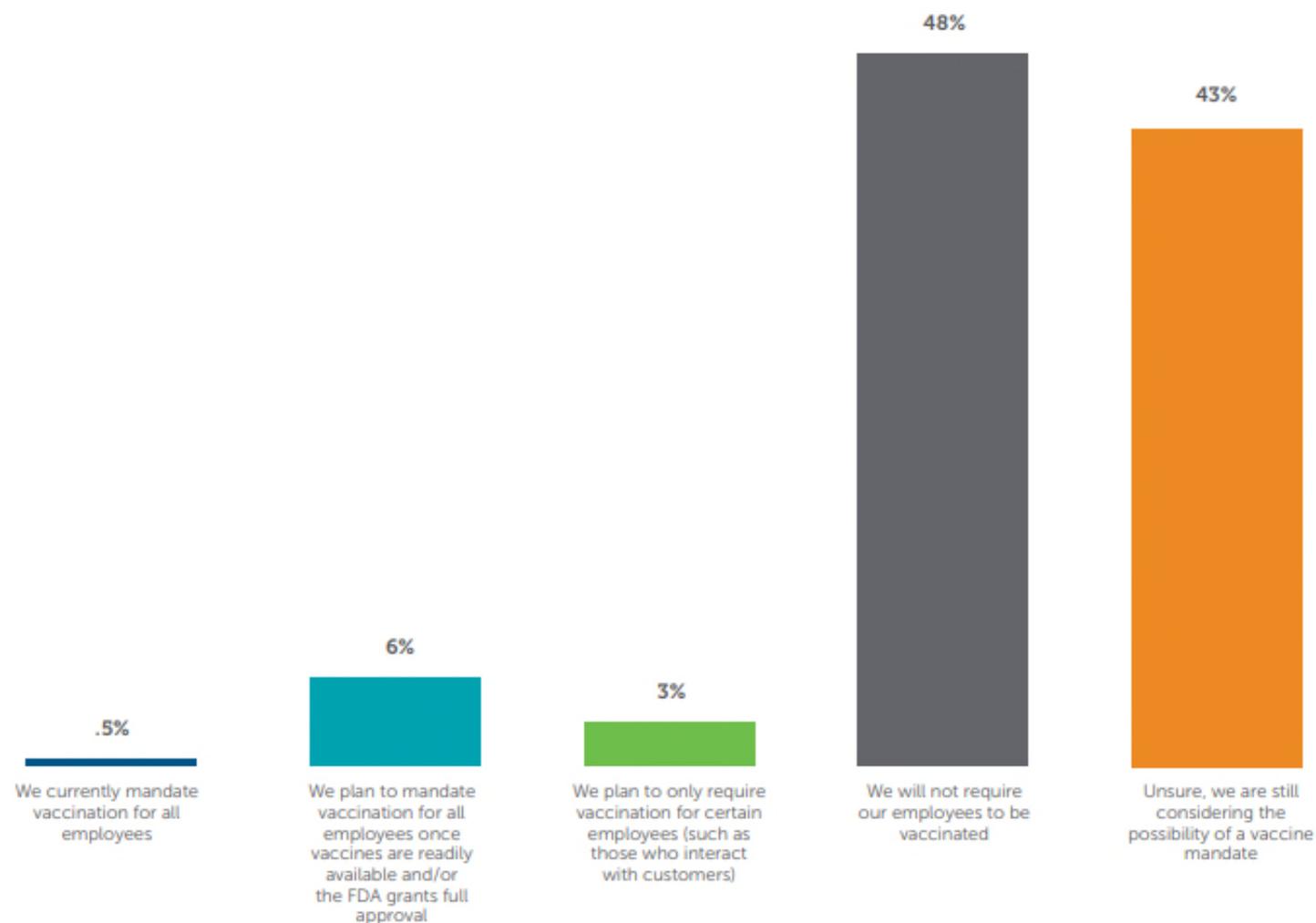
- Simple way to avoid GINA – request proof of vaccination from employees rather than administering them yourself. And tell employees not to provide any genetic information as part of the proof. If you provide this warning, any disclosure of genetic information by the employee will put you within the “inadvertent” safe harbor.

INCENTIVES/WELLNESS PROGRAMS AND COVID-19 VACCINES

- On February 1, 2021, SHRM and 41 other business groups asked the EEOC for guidance concerning the extent to which an employer may offer employees incentive(s) to vaccinate without violating the ADA, Title VII, or other laws enforced by the EEOC.
- Not much guidance at this time. Wellness plans are subject to regulations and guidance published by the EEOC. The question is whether incentives for COVID-19 vaccines would be considered a wellness program.
- Issues may arise if the value of the incentive is too great, because the question will then be whether getting the vaccination was really “voluntary.” If the program is not voluntary, that violates the ADA and other discrimination laws.
- Generally, *de minimis* incentives are fine – e.g., bottle of water or gift card of modest value.
- If a wellness plan/incentive program requires employees to respond to disability-related inquiries, this may trigger the ADA or GINA.

Mandatory Vaccination

Which of the following best describes your organization's plans to require employees to receive a COVID-19 vaccination?

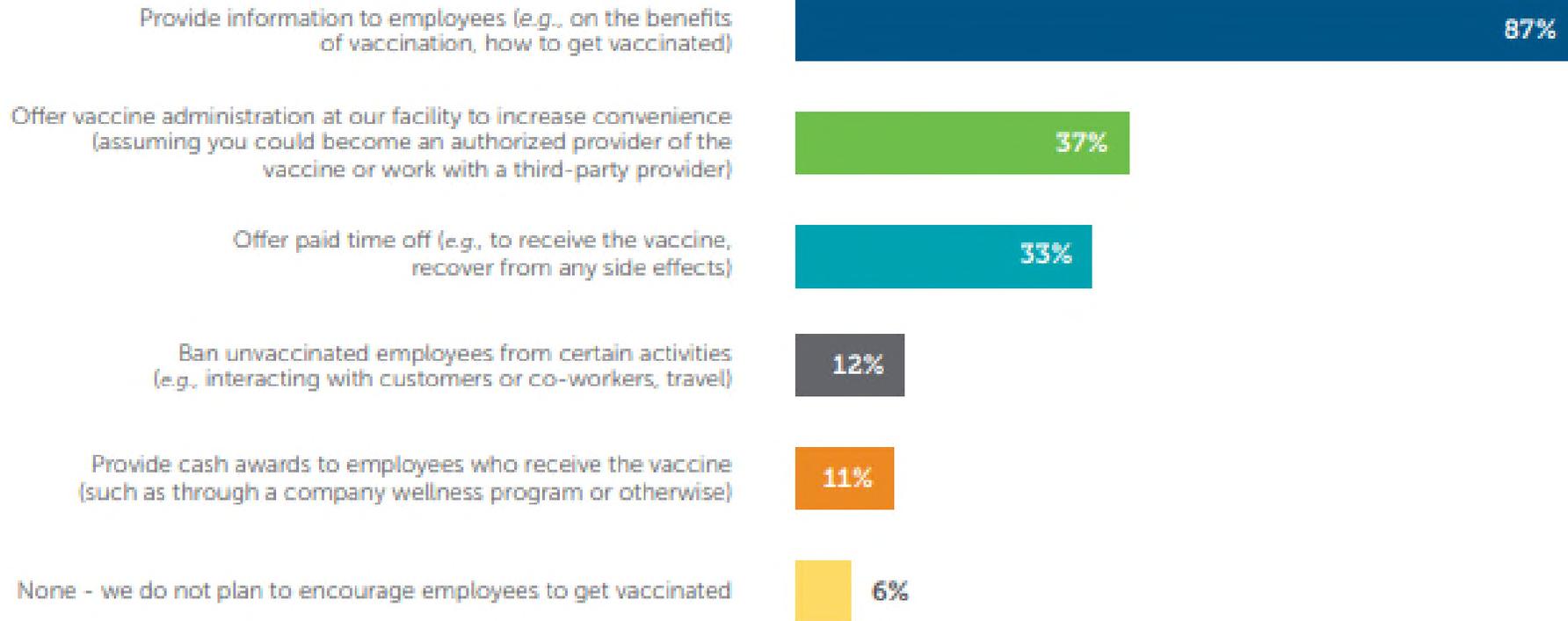


WHAT ARE OTHER EMPLOYERS DOING?

- Source: Littler COVID-19 Vaccine Employer Survey Report (Feb. 2021)(available online at: https://www.littler.com/files/littler_vaccine_employer_survey_report.pdf).

WHAT ARE OTHER EMPLOYERS DOING?

Which of the following actions, if any, is your organization planning to take to encourage employees to get a COVID-19 vaccine once they are readily available? (check all that apply)



- Source: Littler COVID-19 Vaccine Employer Survey Report (Feb. 2021)(available online at: https://www.littler.com/files/littler_vaccine_employer_survey_report.pdf).

QUESTIONS AND CONTACT INFO

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