

Wage and Hour Questions on the Vaccine Mandate: Pitfalls for Illinois Employers Covered by the Executive Order

Amundsen Davis COVID-19 Alert
September 16, 2021

On August 23rd Governor Pritzker issued Executive Order 2021-20 requiring health care workers, school personnel, higher education personnel and students, and state-employees and contractors who work at state-owned or operated congregate facilities to get their first dose of a two-dose COVID-19 vaccine series, or a single-dose COVID-19 vaccine, within 10 days and be fully vaccinated within 30 days, subject to applicable medical and religious exemptions under federal and state law.

Two weeks later on September 3rd Governor Pritzker issued Executive Orders 2021-22 extending the time to get the first dose of a two-dose vaccine to *September 19, 2021*, and the second dose of a two-dose COVID-19 vaccine series within 30 days following administration of their first dose in a two-dose vaccination series (*October 19, 2021*).

Following the issuance of Executive Order 2021-22, the Illinois Department of Public Health (IDPH) issued guidance on the Executive Order. This guidance clarified that even if an employee did not have a medical or religious exemption, that they could alternatively choose to be tested for COVID-19 on a weekly basis rather than be vaccinated, unless their employer implements a stricter requirement that they be vaccinated, subject only to the applicable medical and religious exemptions.

REMEMBER: Executive Order 2021-20 only covers health care workers, school personnel, higher education personnel and students, and state-employees, and contractors who work at state-owned or operated congregate facilities.

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If you have workers subject to Executive Order 2021-20, there are a lot of questions and potential pitfalls ahead, especially in the wage and hour realm. The following are common questions that should be asked not only about the Illinois Governor's vaccine mandate, but the President's proposed OSHA rule on vaccines and other state vaccine mandates.

Do employers need to pay for the time employees spend getting vaccinated? The answer depends on whether the employer is simply complying with the Executive Order or taking it a step farther by requiring employees get the COVID-19 vaccine.

The Illinois Dept. of Labor (IDOL) guidance provides that if an employer **requires** employees to get vaccinated, the time spent obtaining the vaccination is likely compensable – even if it is non-working time. However, for optional vaccination programs, the IDOL states employees that choose to obtain the vaccine voluntarily should be allowed to utilize sick leave, vacation time or other paid time off. Based on the IDPH Guidance, there is an indication that compliance with the Executive Order is not considered a “mandatory vaccination program” for an employer, unless the employer imposes more stringent requirements. As such, unless an employer makes vaccinations mandatory, the current IDOL guidance indicates employers are not required to pay an employee for the time spent getting vaccinated.

The importance of local laws are highlighted here though due to Cook County Ordinance Sec. 42-122. Employers with a principle place of business in Cook County (which includes Chicago) must comply with Cook County Ordinance Sec. 42-122, which went into effect on July 1, 2021. The Ordinance provides that employers that have a primary business location in Cook County and who require their employees get the vaccine must compensate their employees for up to 4 hours of paid time per dose at the employee's regular rate of pay if the employee chooses to get the vaccine during their work shift. Further, regardless of whether a vaccination is voluntarily sought by an employee or required by an employer, employers cannot require that an employee get vaccinated only during non-shift hours and shall not take any adverse action against any employee for taking time during a shift to get vaccinated.

What about travel time and expenses to get the COVID-19 vaccine? If an employer imposes a mandatory vaccine requirement, under federal and Illinois state law, employers would likely need to reimburse the travel time and expenses for the employee to get vaccinated. Under the FLSA, the time spent traveling to undergo “special tests” required by the job (e.g. physical examinations, fingerprinting and drug testing) is compensable time. As such, if you put into place a mandatory vaccination policy, we would recommend employees report the time it took them to get to/from the vaccination site and such time would be compensable work time. In terms of travel expenses (e.g. mileage and tolls), Illinois law requires employers reimburse expenses that are required of the employee in the discharge of employment duties and inure to the

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primary benefit of the employer. Thus, it is recommended that employers also reimburse for the employee's mileage to/from the vaccination site.

Is there a difference between Vaccinations vs. Testing? – YES! While the Executive Order indicates that vaccinations are optional, weekly testing if an employee is unvaccinated is not optional. As a result, under the FLSA and IDOL guidance, COVID-19 testing for covered employees under the Executive Order would likely be considered compensable time. Additionally, even though the IDPH guidance states that the Executive Order does not require employers to pay for testing, this does not take into consideration the FLSA and state laws that require employers to pay for the cost of business expenses, including medical tests that are required.

The vaccine mandate landscape is starting to heat up and will be continuously changing in the near future. Employers are waiting on more information and guidance from the President's proposed OSHA's rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. Illinois' Executive Order vaccine mandate is a good primer on issues that employers throughout the United States will need to consider once the proposed OSHA rule is issued and in dealing with any state or local vaccine mandate. As these are new and complicated issues, employers should speak with experienced labor counsel in addressing vaccine mandates prior to implementing any policy requiring vaccinations.

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