

Managing Potential Employee Non-Compliance with COVID-19 Requirements

Article

December 10, 2021

The COVID-19 pandemic had brought health-related, and religious-related, matters to the forefront of the employer-employee relationship, perhaps like never seen before. As a result, employers often have been forced to have difficult conversations with employees over topics like mandatory vaccinations, working from home, masking requirements, and exemption requests. This article addresses some of the common responses employers have received from employees over these issues and some suggestions as to response strategies.

Response #1: “You can’t ask me whether I’m vaccinated – HIPAA!”

The provisions of the Health Insurance Portability and Accountability Act, or HIPAA, are often misunderstood. While HIPAA does include a Privacy Rule, that rule is entirely inapplicable to the workplace—employers can ask employees for information when needed, and employment records are not covered under HIPAA, even those containing personal health information. If an employee objects to discussing health information on HIPAA grounds, you can tell the employee that HIPAA does not apply to your conversation and that a failure to cooperate will not be tolerated.

Response #2: “You can’t make me wear a mask – First Amendment!”

With limited exceptions that apply only to public-sector employees, the First Amendment, in and of itself, provides employees with no workplace protections. Even as to public-sector employees, the First Amendment has limited applicability to workplace conduct, particularly as to issues involving health and safety concerns. As such, if an employee refuses to wear a mask, to be tested for COVID-19, etc., on the basis that he or she feels her First Amendment rights are being trampled upon, you can tell the employee that his or her objection is groundless. (For you public-sector employers, be sure to consult with legal counsel to determine whether any situation-specific facts bring the First Amendment into play.)

Response #3: “You can’t tell anyone about my vaccination status.”

That is partially true. The Americans with Disabilities Act (ADA) generally requires that employers maintain the confidentiality of any medical information they receive from or about an employee, including vaccination status. There are exceptions to this rule, however. Human resources representatives may disclose this information, for example, to supervisors or managers if the information is needed to provide job duty restrictions, to analyze and implement reasonable accommodations, or to enforce work rules (e.g., masking requirements for non-vaccinated employees). Keep in mind that any such disclosures must be on a “need to know” basis, and the amount of information shared should be limited to only the amount necessary to accomplish the stated purpose.

Response #4: “I’ve told you I can’t get the vaccine because of medical reasons – you can’t ask for proof.”

Yes, you can. As with any accommodation request, an employee requesting an exemption from a vaccination requirement based on a disability may be required to provide medical documentation demonstrating both the underlying disability and the reasons why said disability precludes vaccination. Upon receipt of the documentation, be sure to review it carefully and ask follow-up questions, particularly if the health care provider is from outside of your area or provides only general information. For example, if the employee’s evidence is from a chiropractor in Chattanooga saying only that the employee is allergic to a vaccine ingredient, you may, and should, ask for further information or indicate to the employee that you will require a second opinion. (You may laugh at that example, but, seriously, it’s not that outrageous.)

Response #5: “I can’t get the vaccine, so you have to let me work from home.”

For those employees who cannot comply with a vaccine mandate, whether internal or government-mandated, because of an underlying disability or a sincerely held religious belief, employers must provide a reasonable accommodation, assuming one exists that does not create an undue hardship. An employer, though, is not automatically required to provide an employee with the accommodation of his or her choosing. Rather, if more than one reasonable accommodation exists, the employer gets to choose. So, while such an employee very well may prefer to work from home, if mask-wearing, social distancing, and, perhaps, weekly testing would allow for the employee to safely work in person, then the employer may insist on the same.

In handling these, and other, issues, uniform policy enforcement is critical. In the constant battle to recruit and retain employees, it can be tempting to turn a blind eye to non-compliance by a critical employee. Doing so sets precedent that, if not subsequently followed, can lead to trouble in the form of discrimination claims (e.g., a policy enforced against a female employee but not a male).

Managing Potential Employee Non-Compliance with COVID-19 Requirements