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Briefly

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SORTING OUT THE RECENT COVID-19 GUIDANCE - ISSUES AND OPTIONS FOR EMPLOYERS

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"[T]he current guidance indicates employers have some discretion to modify their policies regarding masks and other workplace protocols related to COVID-19."

As of June 1, 2021, according to the U.S. Centers for Disease Control and Prevention (CDC), less than 50% of the United States has received full vaccination against COVID-19. Despite this less-than-stellar statistic, in May 2021, both the CDC and the U.S. Equal Employment Opportunity Commission (EEOC) issued updated guidance which in effect relaxes certain workplace policies regarding COVID-19. In early June 2021, OSHA also issued additional guidance and standards as explained below.

CDC Guidance. The CDC guidance states that fully vaccinated individuals "can resume activities without wearing a mask or staying 6 feet apart" except where otherwise required by state or local laws, but further recommends that unvaccinated individuals should continue to wear a mask, continue social distancing, and other prevention measures. The CDC guidance provides that masks should still be worn where required by an employer or private place of business, and in certain close proximity and high-risk circumstances such as while flying on planes, riding public transportation, and visiting health-care facilities. The CDC guidance adds that even fully vaccinated people with COVID-19 symptoms should "isolate themselves from others, be clinically evaluated for COVID-19, and tested for SARS-CoV-2 if indicated."

EEOC Guidance. On the heels of the CDC updated guidance, the EEOC on May 28 updated its "Technical Assistance Questions and Answers," issued as part of the Commission's guidance entitled "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.*" The Technical Assistance was updated particularly under Section K, which contains Questions and Answers addressing COVID-19 vaccinations. In the updated information, the EEOC specifically notes that federal EEO laws "do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation (subject to undue hardship) provisions of Title VII and the ADA and other EEO considerations." The EEOC guidance reiterates the requirements under Title VII and the ADA to provide reasonable accommodations for employees who do not get vaccinated due to a disability, pregnancy, or based on religious grounds. Under those circumstances, the employee may be entitled to a reasonable accommodation such as allowing an unvaccinated employee to wear a mask, work at a social distance, work a modified shift, telework, or even accept a reassignment.

The EEOC guidance goes on to address the extent to which employers may offer encouragement, such as incentives, to employees and family members to be vaccinated. The EEOC suggests employers may provide employees and family members with educational information concerning vaccinations, may offer an incentive to employees to provide voluntarily documentation "or other confirmation" that they have received a vaccination in the community, and may offer incentives to receive voluntarily a vaccination, but the EEOC noted that because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. Therefore, if the vaccination is administered by the employer or its agent, the incentive must not be so substantial as to be coercive, but this incentive limitation "does not apply if an employer offers an incentive to employees to voluntarily provide documentation … that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of the employer." Under the ADA, information

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about an employee's COVID-19 vaccination is considered confidential employee medical information and must be stored separately from the employee's personnel files. The EEOC notes that as a "best practice," employers introducing a vaccination policy and requiring documentation of vaccinations should notify employees that it will consider reasonable accommodation requests based on disability or religious grounds on an individualized basis.

While Title II to the Genetic Information Nondiscrimination Act (GINA) prohibits covered employers from using genetic information of employees to make employment decisions and restricts employers from requesting or disclosing genetic information concerning employees and/or an employee's family member, the EEOC notes that under the GINA, the act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information. The EEOC notes that Title II of GINA is not implicated if an employer requires an employee to provide confirmation they have received a COVID-19 vaccine from a doctor, pharmacy, or other healthcare provider in the community. Bear in mind that the guidance is based on the three COVID-19 vaccines now available, which do not inquire about genetic information. GINA's Title II provisions prohibit an employer from offering incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent because the pre-vaccination medical screening process would lead to the employer's receipt of genetic information in the form of family medical history of the employee and therefore the employer may not offer incentives in exchange for the family member getting vaccinated.

With respect to mandatory employer vaccination programs, the EEOC guidance provides that an employer may require a COVID-19 vaccination for all employees even though the employer knows some employees may not get the vaccine because of a disability, provided the vaccination program is part of a safety-related standard that is job-related and consistent with business necessity. If a particular employee is not able to meet the safety-related qualification standard because of a disability, under the ADA the employer may not require compliance unless it can demonstrate that the individual would pose a direct threat that cannot be eliminated or reduced by reasonable accommodation. Potential accommodations under these circumstances could include requiring the employee to wear a mask, permit telework, or reassign the employee to a vacant position in a different workspace. The EEOC guidance further indicates that prior to instituting a mandatory vaccination policy, employers are advised to provide managers, supervisors, and others responsible for implementing the policy with clear information concerning accommodation requests and responding to such requests.

Finally, although employers may have different safety standards based on employee vaccination status, employers should be mindful that such standards and protocols are not used in a manner that fails to comply with federal employment nondiscrimination laws.

State and Local Laws. Although the updated CDC and EEOC guidance is welcomed by many businesses, employers must be mindful of applicable state and local laws regarding mandatory vaccinations, masks, or other COVID-19 related requirements. For example, on May 25, 2021, Tennessee Gov. Bill Lee signed into law Public Ch. 513 which provides in part as follows:

> "The governor shall not issue an executive order, a state agency or department shall not promulgate a rule, and a political subdivision of (Tennessee) shall not promulgate, adopt or enforce an ordinance or resolution, that requires a person to receive an immunization, vaccination, or injection for the SARS-CoV-2 virus or any variant of the SARS-CoV-2 virus."

OSHA. As employers digest the impact of the EEOC and CDC guidance, they should also be mindful of the continuing obligation under the Occupational Safety and Health Act (OSHA) to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."

On June 20, 2021, OSHA issued "Emergency Temporary Standards" ("ETS") related to COVID-19 with respect to healthcare settings and services, such as skilled nursing homes and hospitals, assisted living facilities, etc. Perhaps reflecting the complexity in determining coverage of the ETS, OSHA has issued a flow chart for employers to determine whether the ETS apply to a particular workplace, located at: https://www.osha.gov/sites/default/files/publications/OSHA4125.pdf/. The entire materials related to the ETS can be found at: https://www.osha.gov/coronavirus/ets.

OSHA also updated its previously issued *"Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,"* which is intended "to help employers and workers not covered by the ETS to identify COVID-19 exposure risks to workers who are unvaccinated or otherwise at-risk, and to help them take appropriate steps to prevent exposure and infection." The guidance contains recommendations which are advisory and informational in nature, as well as descriptions of mandatory safety and health standards, which are clearly labeled as "mandatory OSHA standards." This updated guidance from OSHA may be found at https://www.osha.gov/coronavirus/safework.

Conclusion. In light of the relaxed masking requirements under the May guidance from the EEOC and CDC, employers are exploring options with respect to mask policy changes and as a practical matter, employers essentially

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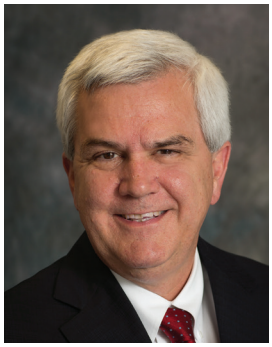
NLRB GENERAL COUNSEL MEMO SIGNALS BROADER ENFORCEMENT



Howard B. Jackson

"[T]he Memorandum pointed to issues such as workplace safety, or racial discrimination, as examples of subjects where discussion of same would be viewed as inherently concerted [and thus protected]."

In one of his first moves, President Biden fired then General Counsel of the National Labor Relations Board ("NLRB" or "Board") Peter Robb. The Office of the General Counsel is the prosecutorial arm of the Board and has traditionally operated with a degree of independence and of insulation from political changes. The General Counsel is appointed by the President and confirmed by the Senate for a four-year term. Nevertheless, President Biden removed Mr. Robb before his term ended.

On March 31st of this year the Acting General Counsel, Peter Sung Ohr, issued a Memorandum setting out the intentions of the Office of General Counsel with respect to "*Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines*" under the National Labor Relations Act ("Act"). This Memorandum signals the Office of the General Counsel's intent with respect to more broadly enforcing certain employee rights under the Act.

The primary focus of the Memorandum is on Section 7 of the Act, which provides protection for "*concerted activities*" engaged in for "*mutual aid and protection.*" Where both factors are met, an employer may not take action against an employee on the basis of their activity. Note first that this right applies to all employees in workplaces within the Board's jurisdiction – generally speaking employers who conduct over $50,000 of business annually in interstate commerce – not just unionized employers.

Activities for "Mutual Aid or Protection." What activities are considered to be for the purpose of "mutual aid or protection"? Certain activities such as discussing or protesting wages, benefits, hours or working conditions are clear examples of activity engaged in for mutual aid or protection. The Memorandum notes that a variety of other activities may be considered for mutual aid and protection such as political or social justice advocacy where there is a clear link to the employees' "interests as employees." The Memorandum provided as examples a hotel employee's interview with a journalist over the topic of how earning the minimum wage impacted her and others like her, as well as how an increase in the minimum wage would do so as well, and a "solo" strike by a pizza shop employee to attend a convention and demonstration where she and others sought an increase in the minimum wage.

In short, going forward the General Counsel will analyze employee activity related to various social issues with an eye toward determining whether such activities fall within the ambit of "mutual aid or protection" under the Act. You can bet that where the subject matter of the issue involved in the activity relates in some manner to the workplace the Board will be very likely to find the activity protected.

"Concerted Activities." The second focus of the Memorandum involved whether activity is "concerted." To receive protection the employee action must be "concerted". The Board generally finds activity "concerted" when it is "engaged in with or on the authority of other employees", or where an employee seeks to "initiate or to induce or to prepare for group action." For example, employee discussion of their concerns over wages, hours or other working conditions has long been viewed as "concerted" as such discussions are a preliminary step to organizing activity.

The Memorandum stated that although "contemplation of group action may be indicative of concerted activity, it is not a required element." Further, no "magic words" are required for a discussion or activity to be concerted. These comments and others make it clear that the General Counsel will view discussions related to workplace concerns such as wages or working conditions as inherently concerted and as such, protected from retaliation by employers.

In addition, the Memorandum pointed to issues such as workplace safety, or racial discrimination, as examples of subjects where discussion of same would be viewed as inherently concerted. Clearly, the General Counsel will take a broad view of which subjects of discussion or action are viewed as concerted and thus protected.

Conclusion. In view of this Memorandum and the Board's coming shifts in emphasis employers are well advised to review their policies that relate to employee discussion and to consider carefully contemplated disciplinary actions that involve employee comments or discussions that in any manner touch on workplace concerns.

have four options: (1) eliminate mask requirements only for fully vaccinated employees; (2) maintain mask requirements and other safety protocols for everyone regardless of vaccination status; (3) eliminate mask requirements and other protocols for all employees (clearly the riskiest, and arguably not in compliance with existing OSHA guidelines); or (4) develop some combination or graduated-scale of the three options above. In the event an employee refuses to disclose his or her vaccination status, the employer should handle the situation as though he/she is not vaccinated, and enforce COVID-19 safety guidelines accordingly as to that employee – of course, not in retaliation for not disclosing, but as a safety measure.

Each option has various considerations, risks, and drawbacks. For example, eliminating the mask requirement only for "fully vaccinated" employees involves certain legal considerations with respect to whether to require proof of vaccination versus relying on the "honor system;" how much, if any, information to obtain; and ensuring compliance with requirements for handling confidential medical information, etc. Obviously, eliminating the mask requirement altogether involves risks as well, such as handling an outbreak if one should occur. Of course, maintaining the mask requirement regardless of vaccination status may bring about resentment from fully vaccinated employees, which may also present enforcement issues for employers.

In implementing policies including mask requirements based on vaccinated/unvaccinated status, employers should also be mindful of the racial and ethnic disparities in the COVD-19 vaccination process. According to the CDC, as of May 13, 2021:

> "Black, Hispanic and Asian people are still not getting vaccinated at the same rates as White people. …Black people account for 8.5% of those fully vaccinated, but 12.4% of the total U.S. population, and Hispanic people represent 11% of those fully vaccinated, although they make up 17% of the U.S. population. The gap among Asian people is smaller, accounting for 5.3% of those fully vaccinated compared to 5.8% of the population. But non-Hispanic White people are notably overrepresented among those fully vaccinated. White people make up 61.2% of the U.S. population, but 65.8% of those fully vaccinated. American Indian and Alaska Native people are also slightly overrepresented among those fully vaccinated, CDC data shows."

The bottom line is that (subject to applicable federal, state, local or other laws) the current guidance indicates employers have some discretion to modify their policies regarding masks and other workplace protocols related to COVID-19. As mentioned above, all employers should bear in mind they have an on-going general duty under OSHA to provide a safe workplace. Employers must also consider the implications of employment laws such as Title VII, the ADA, and GINA with respect to their response to the recent CDC and EEOC guidance. Finally, employers should also continue to stay abreast of updates and developments in this area, as both the EEOC and OSHA have indicated further guidance will be forthcoming. Due to the fast-paced nature of developments in this area, and the fact that the recent guidance from the CDC, OSHA and the EEOC requires careful analysis, employers are encouraged to seek assistance and advice from legal counsel with respect to development and implementation of workplace policies in response to the guidance, ETS and recommendations, as well as any forthcoming guidance from these agencies. The CDC guidance may be found at: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html; the EEOC guidance may be found at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

EEO-1 REPORTS FOR 2019 & 2020 DUE BY JULY 19, 2021

Jerome D. Pinn….

The EEOC has opened its portal for covered employers to submit EEO-1 report information on their workforce. "Covered employers" are those having 100 or more employees, and federal contractors having 50 or more employees. The EEO-1 report, filed annually, asks for information from the previous year about the number of employees - sorted by job group, race/ethnicity and sex/gender. ***EEO-1 reports were suspended for 2020 due to the Coronavirus pandemic. Covered employers will now have until July 19, 2021, to submit both their 2019 and 2020 employment data.*** This year, there are two options for providing the data to the EEOC, an online submission form (using manual input) or a data file upload. There is no penalty for covered employers not filing an EEO-1 report. However, the EEOC or OFCCP can ask an employer for its EEO-1 reports in certain circumstances, and for these reasons, we do recommend that covered employers file EEO-1 reports.