SHAWE ROSENTHAL LLP

E-UPDATE

October 29, 2021

RECENT DEVELOPMENTS

Beyond Religious Accommodations – What Else Is New In The EEOC's COVID-19 Vaccine Guidance!

The Equal Employment Opportunity Commission updated its guidance document, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, on October 13, 2021, to address vaccination developments and clarify certain issues. (On October 25, 2021, it also added a new section on Religious Accommodations, as separately discussed in our E-lert). While some of the October 13 changes are non-substantial, the following may be of interest to employers:

- With regard to encouraging employees and their family members to become vaccinated, the EEOC has added that employers may work with local public health authorities, medical providers, or pharmacies to make vaccinations available in the workplace.
- Because employees with disabilities or disabled family members may require extra support to obtain a vaccination, the EEOC has added information about the HHS/Administration for Community Living's Disability Information and Assistance Line, 888-677-1199, available from 9 a.m. to 8 p.m. Eastern Standard Time, M-F.
- The EEOC now also suggests that employers should provide contact information for a management representative who employees may contact to request a religious or medical accommodation or ensure non-discrimination for pregnant employees.
- The Guidance now reflects the CDC recommendation of vaccinations for those who are pregnant, breastfeeding, trying to get pregnant now, or planning to get pregnant in the future. The EEOC continues nonetheless to reiterate that individuals seeking an exemption from a vaccine requirement due to these conditions should be treated the same as others who are similar in their ability or inability to work, in order to avoid disparate treatment claims under Title VII.
- One Q&A has been rephrased to make clear that employers may, in fact, inquire about and/or request documentation or other confirmation that an employee has obtained a COVID-19 vaccination.
- The EEOC clarifies that no genetic information is being requested, and therefore the Genetic Information Nondiscrimination Act is not implicated, when an employer asks an employee for confirmation of vaccination by a health care provider unaffiliated with the employer (e.g. employee's personal physician or other health care provider, pharmacy, or public health department).
- The EEOC had previously stated that employers may provide incentives to employees to voluntarily provide confirmation of vaccination by a third-party provider, and now asserts that the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act

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do not limit the value of such incentives, as long as the vaccine provider is not affiliated with the employer.

- On the flip side, if the vaccine is being administered by the employer or its agent, the EEOC clarifies that there are limits on the value of any incentive – which includes both rewards and penalties – offered to employees. The EEOC reiterates that, under the ADA, the value of the incentive must not be so substantial as to be coercive. Such employer-run programs involve the employer or their agent asking screening questions. Under the ADA, the incentives cannot be so large as to pressure employees to reveal their medical information in response. (The screening questions do not require genetic information, so GINA does not apply.)

More Guidance for Federal Contractors on That Vaccination Mandate…

As federal contractors know, President Biden issued an Executive Order requiring the insertion of a clause into certain new, renewed and extended contracts that mandates compliance with Guidance issued by Safer Federal Workforce Task Force. The Guidance, which was issued on September 24, 2021, requires the vaccination of most of a contractor's employees, as we discussed in detail in our September 2021 E-Update. The Task Force has now added to its FAQs on the Guidance, addressing specific issues as follows:

- If an employee's accommodations request for an exemption to the vaccine requirement is denied, the contractor must set a timeline for the employee to promptly become fully-vaccinated.
- Even where the employee does not legally qualify for a medical exemption, there may be some limited circumstances in which the contractor may grant an extension to the vaccination deadline based on a documented medical necessity (e.g. the CDC recommends delaying COVID-19 vaccination for at least 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment).
- The CDC recognizes only two medical contraindications to the COVID-19 vaccine: (1) severe allergic reaction to a previous dose or a component of a COVID-19 vaccine; or (2) immediate allergic reaction of any severity to a previous dose or a known allergy to a vaccine component. The Task Force notes that even if an individual is allergic to one component, they may not be allergic to all components in other COVID-19 vaccines.
- The CDC recommends delaying (but not excusing) vaccination in the following circumstances, recognizing that there may be other clinical considerations supporting a delay: current COVID-19 infection; multisystem inflammatory syndrome in adults (MIS-A); monoclonal antibody or convalescent plasma treatment for COVID-19 infection; immunosuppressive therapies; and myocarditis or pericarditis.
    - The contractor should require full vaccination promptly after clinical considerations no longer recommend delay.
    - During the delay, the individual must follow all masking and distancing requirements for unvaccinated individuals.
    - The individual may be prohibited from performing work at government locations if the agency finds no safety protocol other than vaccination is adequate for the job responsibilities. Contractors must still meet their contractual requirements, however.

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- Vaccination is recommended for pregnant individuals and those trying to get pregnant. The Task Force, however, states that a contractor may allow a delay based on the employee's particular medical circumstances, consistent with its process for reviewing delay requests.
- COVID-19 vaccination should not be delayed based on the receipt of other vaccines.
- Participants in a clinical trial may be considered fully vaccinated if they receive all doses of an actual vaccine, not a placebo, for which efficacy has been independently confirmed; at this point the U.S.-based AstraZeneca and Novavax COVID-19 vaccines meet these criteria. (We discussed clinical trials further in a blog post).
- An individual is considered fully-vaccinated if they receive any combination of two doses of a heterologous (i.e. mix and match) FDA-approved/authorized or WHO emergency use listed vaccine series.
- As long as a contractor has included the required clause, mandating compliance with the Safer Federal Workforce Task Force Guidance, in its first tier subcontracts, it may assume compliance by its subcontractor(s) unless it has credible evidence otherwise.

Federal Appeals Court Upholds State Vaccine Mandate Without Religious Exemptions

In general, federal district courts have been rejecting challenges to employer vaccine mandates. The U.S. Court of Appeals for the First Circuit issued one of the strongest decisions yet, upholding Maine's requirement for all state healthcare workers to be vaccinated against COVID-19. The requirement permits only medical exemptions and was challenged by workers seeking religious exemptions.

In *Does 1-6 v. Mills*, the plaintiffs argued that the lack of religious exemptions to the vaccine mandate violated their religious rights under various laws, including the Free Exercise Clause, the Supremacy Clause and Title VII. The federal district court denied their request to enjoin the vaccine requirement, and they appealed the denial to the First Circuit.

No Violation of the Free Exercise Clause. The First Circuit affirmed the denial of injunction. With regard to the Free Exercise Clause, which protects religious liberty against government interference, the First Circuit noted that, "When a religiously neutral and generally applicable law incidentally burdens free exercise rights, we will sustain the law against constitutional challenge if it is rationally related to a legitimate governmental interest." Because the law does not recognize either religious or philosophical objections to the vaccine, it does not single out religion and is thus facially neutral. It is also generally applicable, in that the State need not evaluate individual requests and also does not permit other secular exemptions. The existence of the single exemption for medical reasons (required for the health of the employee) does not undermine the State's asserted goals of (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of those in the state most vulnerable to the virus -- including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3) protecting the health and safety of all Mainers, patients and healthcare workers alike.

No Violation of Title VII. The First Circuit also rejected the argument that private employers violated the Supremacy Clause, which provides that federal law takes precedence over State law, by allegedly making Title VII (and its religious accommodations requirement) inapplicable in Maine. The employers, however, dispute that Title VII required them to offer the exemptions sought by the

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plaintiffs. The First Circuit noted that injunctive relief is an extraordinary step applicable only when inadequate damages are available; however, "When litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy." The need for injunctive relief is not established by "insufficiency of savings or difficulties in immediately obtaining other employment." In addition, the plaintiffs had not met the administrative prerequisite for a Title VII claim of filing a charge of discrimination with the Equal Employment Opportunity Commission. Moreover, the First Circuit found that the private employer hospitals had established an undue hardship in providing the religious exemptions requested, for generally the same reasons as the State's goals.

Although a win for employer mandates, this ruling will undoubtedly be appealed to the U.S. Supreme Court, so stay tuned for further developments on this issue.

DOL Issues Final Rule Reinstating and Modifying 80/20 Rule for Tipped Workers

The U.S. Department of Labor has issued its final rule reinstating the 80/20 rules and further limiting the amount of an employee's non-tipped work time for which the employer may take a tip credit. This final rule takes effect on December 28, 2021.

Tipped Employees and the Tip Credit. Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees, or have eliminated the tipped rate altogether). This partial credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips (including servers, bartenders, and nail technicians). The DOL has recognized that many tipped workers serve in a "dual jobs" situation, in which they are employed in both a tipped and non-tipped occupation. The tip credit may be applied only against the time spent in the tipped occupation.

The 80/20 Rule's Tangled History. Prior to the Trump administration, the DOL took the position that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on those duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, was rejected by the Trump DOL, which initially issued guidance, followed by formal regulations, providing that an employer may take a tip credit for any amount of time (without limitation) that an employee in a tipped occupation performs related non-tipped duties contemporaneously with their tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

A number of courts, however, rejected the Trump DOL's position and continued to enforce the 80/20 rule. And, immediately following the transition, the Biden DOL delayed the effective date of the Trump-era regulations. As discussed in our March 24, 2021 E-lert, it subsequently permitted parts of the new regulations to go into effect while further delaying other parts – including the provisions relevant to the 80/20 rule – for further consideration and possible revision. It then issued a proposed rule that sought to reinstate and modify the 80/20 rule, as discussed in our June 2021 E-Update.

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The 80/20 Rule - 2021 version. In the new final rule, the Biden DOL clarifies that work that is part of the tipped occupation is the work that produces tips as well as a non-substantial amount of work that assists the tip-producing work. With regard to the assisting work, DOL reinstates the 80/20 rule with some modification. The final rule provides that if an employee performs work that directly supports tip-producing work either exceeding 20 percent of all of the hours worked during the employee's workweek or (this is new) exceeding 30 continuous minutes, the employee is not performing labor that is part of the tipped occupation, and the employer may not take a tip credit for that time.

The final rule sets forth a definition for "tip-producing work" as "work that provides service to customers for which tipped employees receive tips." The final rule also sets defines "directly supporting work" as a task that "is either performed in preparation of, or otherwise assists, the tip-producing customer service work." And it further defines "work that is not part of the tipped occupation" as "any work that does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work." The final rule provides examples of each of these types of work for a non-exhaustive list of occupations: servers, bartenders and service bartenders, nail technicians, bussers, parking attendants, hotel housekeeper and bellhops, and food service/preparation counterpersons.

Conforming the Rule for Federal Contractors. Certain federal contractors and subcontractors are subject to Executive Order 13658, which establishes a higher minimum wage rate and tipped wage rate. The final rule also amends the regulations implementing the EO in order to conform the definitions of tipped-producing work, and "directly supporting work," as well as to incorporate the modified 80/20 rule.

TAKE NOTE

It's a Turnover – NLRB GC Now Says ~~Student-Athletes~~ "Players" Are School Employees. The issue of whether "Players" are employees of an academic institution has taken another turn, with the GC of the National Labor Relations Board asserting in a memo that they are. (General Counsel Jennifer Abruzzo characterizes the term "student-athlete" as being intended to deprive those individuals of workplace protections).

Over the years, the Board has gone back and forth on whether Players, as well as student teaching assistants, medical interns, and certain other student workers are, in fact, employees of their academic institution and thereby entitled to the protections of the National Labor Relations Act. In 2015, the union-friendly Obama Board issued a (somewhat surprising) decision declining to exercise jurisdiction over Northwestern football players who sought to unionize, and specifically declining to rule on whether those players were, in fact, employees. In 2017, the then-GC issued a memo asserting that scholarship football players, as well as graduate teaching assistants, do, in fact, meet the test for employee status under the NLRA, given that they perform services for compensation (whether scholarships or, for the assistants, pay), and their services are controlled by the institution. Unsurprisingly, the Trump Board rescinded the 2017 memo, finding that the individuals in question were not employees.

But now, GC Abruzzo has reversed course yet again, reinstating the 2017 memo and expressly asserting employee status for Players. In so doing, GC Abruzzo noted recent developments,

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including the U.S. Supreme Court's ruling in *NCAA v. Alston*, recognizing college sports as a profit-making enterprise and finding that NCAA rules limiting certain compensation that schools may offer athletes violate antitrust law. And as compensation becomes "untethered" from academics, Players are brought more fully within the scope of employee status. She also noted the NCAA's suspension of name, image and likeness (NIL) rules, thereby enabling Players to profit from NIL activities. Further, she noted the increase in collective action by Players with regard to racial justice issues and health and safety concerns associated with the COVID-19 pandemic, which she characterized as impacting the terms and conditions of employment and subject to protection from retaliation.

The GC also asserted that the misclassification of Players as non-employee "student-athletes" is a separate violation of the NLRA, which she intends to pursue. We can expect the GC to carry out this stated intention, as well as to expand her efforts to other student workers, like the above-referenced graduate teaching assistants and medical interns. This is wholly consistent with the aggressively pro-union stance taken by the Biden administration generally.

OSHA Is Soliciting Public Comments for a Proposed Heat Injury and Illness Prevention Standard. The Occupational Safety and Health Administration has issued an advance notice of proposed rulemaking on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. In its notice, OSHA poses over 100 questions to obtain "additional information about the extent and nature of hazardous heat in the workplace and the nature and effectiveness of interventions and controls used to prevent heat-related injury and illness." This information will be used in developing a proposed standard, including with regard to the scope and types of controls.

The topics for the questions include the following:

- The nature and magnitude of heat-related occupational illness, injuries, and fatalities
- The underreporting of heat-related occupational illness, injury and fatalities
- The variance of heat exposure and risk across industries, occupations and job tasks
- How unique and non-traditional work arrangements contribute to heat-related risk
- How business size impacts prevention practices and interventions
- Occupational heat exposure and outcomes based on geographic region
- Inequalities in exposure and disproportionate outcomes experienced by vulnerable occupational populations
- The impact of climate change
- Existing prevention efforts by OSHA, States, and other entities
- Heat metrics
- Contributions to heat stress in indoor/outdoor work settings and individual risk factors
- The need for and elements of a heat injury and illness prevention program
- Engineering and administrative controls, as well as personal protective equipment
- Design and implementation of acclimatization plans for workers
- Heat monitoring activities and programs
- Heat-illness emergency planning and response
- Existing worker training and engagement programs and their effectiveness

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Members of the public may submit responses to any of the questions and other comments through December 27, 2021 through the Federal Register website. OSHA will then consider the responses before issuing an actual proposed standard that would be subject to another comment process.

Employees May Be Held Accountable for the Manner of Their Complaint. Although the fact of an employee's complaint of discrimination may be protected under Title VII, the manner of the complaint may not be, as the U.S. Court of Appeals for the First Circuit recently held.

In *Jenkins v. Housing Court Dept.*, the employee complained of discrimination and other issues by sending multiple long emails to his superiors, court administrators and others. He was placed on administrative leave after sending at least 10 emails to his co-workers in the course of a month. When he returned to work, he was told his complaints would be investigated, but also reminded that he should communicate in a professional manner and follow proper channels for making complaints – through his supervisor, his supervisor's supervisor or human resources. Nonetheless, he continued to send repeated letters and emails, airing the same concerns, to judges, court administrators and the entire staff. He was issued a written warning for his conduct, even as the department continued to investigate the substance of his complaints. He persisted in sending multiple redundant emails, despite repeated requests for him to stop while the investigation was pending. And he was finally terminated for his insubordination due to his repeated refusal to comply with reasonable directives from his employer. He then sued, alleging, among other things, retaliation for his complaints of discrimination, in violation of Title VII.

The First Circuit, however, rejected his claim of retaliation. While it noted that an employer cannot disguise retaliation as "merely discipline" for the manner in which protected conduct is undertaken, the First Circuit further asserted that "at the same time, an individual is not immune from being disciplined on the basis of the manner in which he makes a complaint of workplace discrimination." In this case, the record "indisputably" showed that he was terminated on the basis of the insubordinate manner in which he repeatedly made his complaints.

It is worth noting the First Circuit cautioned that "an employer's inaction in the face of serious allegations of race discrimination in the workplace may invite the employee to persist in trying to have them addressed." In this case, however, the First Circuit noted that the employer repeatedly emphasized that the employee was free to make complaints – following the appropriate procedures – and also actively investigated them.

So there are several lessons for employers here. Employers should set up effective procedures by which employees may raise concerns, including about harassment and discrimination. These procedures should be clearly communicated to employees. Employees can then be directed to follow those procedures, and can be issued progressive discipline if they do not do so and their conduct causes a disruption. But at all times, employers should reiterate the employee's right to make complaints (appropriately utilizing the procedure) and should promptly and thoroughly investigate the substance of the complaints.

Disability Does Not Excuse Failure to Meet Conduct Standards. Even where the disability is the reason the employee cannot meet that standard, as the U.S. Court of Appeals for the Sixth Circuit explained.

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In *Lockhart v. Marietta City Schools*, a public school teacher engaged in inappropriate conversations about a religious experience that she had with students, both during and after classroom time. She was directed to stop such communications, which were in violation of the school district's policy forbidding teachers from sharing their religious beliefs with public-school students. She was placed on leave, but continued to engage in such communications with students and others, even as they became more irrational. She was subsequently diagnosed with a severely-limiting mental health condition. She was eventually terminated for her continuing inappropriate communications with students about her religious experience and her employment, despite repeated instructions not to do so. She then sued, alleging among other things, that the school failed to accommodate her disability under the Americans with Disabilities Act. The federal district court rejected her claims and she appealed that decision to the Sixth Circuit.

The Sixth Circuit, however, agreed with the district court's ruling, asserting that, "an employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, if that conduct disqualifies the employee from his or her job." The Sixth Circuit acknowledged that an employer, once it becomes aware of an employee's disability, must provide reasonable accommodations to allow the employee to meet performance and conduct standards. In this case, however, the Sixth Circuit found that would have been no accommodations available that would have allowed her to meet the conduct standard. Moreover, the employee did not request an accommodation – of additional leave – until the disciplinary hearing process that resulted in her termination had already started. As the Sixth Circuit noted, employers are not required to excuse past misconduct, and may take appropriate disciplinary action, including termination, based on such misconduct.

Pre-Shift Time Spent Booting Up the Computer May Be Compensable. Even though the amount of time it takes to turn on the computer and launch software before officially starting work may be minimal, the U.S. Court of Appeals for the Tenth Circuit warned that it may still be compensable time under the Fair Labor Standards Act.

In *Peterson v. Nelnet Diversified Solutions, LLC*, call center employees sued because they were not paid for the time required to boot up their computers and launch software before clocking in. Under the Portal-to-Portal Act, activities that are preliminary or postliminary to an employee's principal activities are not compensable. Principal activities include all those that are an "integral and indispensable" to the performance of the productive work that the employee is retained to perform. In this case, even though the activities to turn on and prepare the computers took little effort or concentration, they were integral and indispensable for the employees' work, and could not be eliminated without impeding such work.

But such activities still are not necessarily compensable under the *de minimis* doctrine, which provides that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." Courts apply three factors to determine whether work time is non-compensable under the *de minimis* doctrine: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the employee performed the work on a regular basis. The factors are not individually determinative – they are considered as a whole.

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In the current case, the amount of time at issue was between 1.6 minutes to 2.27 minutes, depending on the facility at which the employees worked. In applying the three factors, the Tenth Circuit first found that the employer could not identify any particular practical administrative barrier to estimating the time required for these activities (and in fact, its expert had calculated such time). Moreover the pre-shift time was generally the same for every employee doing the same job at the same location. Next, the Tenth Circuit found the second factor to be neutral in that the aggregate claim per employee, even though only pennies per day, could amount to $125 a year (and approximately $30,000 for the entire group), which is not insignificant for low wage workers, but also is not a particularly large amount in comparison with other *de minimis* cases. Finally, the Tenth Circuit noted that these pre-shift activities occurred regularly. Thus, on balance, the doctrine supported the compensability of the activity.

This case poses a warning for employers whose non-exempt employees are engaged in computer-based work that the simple activity of turning on the computer and launching software may, in fact, be compensable time. (And we note that the cost of litigation, in this matter, far outstripped the money at issue).

NEWS AND EVENTS

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q3 2021. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the tenth consecutive quarter and eleventh time overall that Fiona has received this honor.

Publications – Chambers' 2021 Regional Employment Practice Guide, for which Shawe Rosenthal authored the Maryland Chapter, has been released. A pdf of the chapter is available here. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients. It also publishes global practice guides providing clients with expert legal commentary on the main practice areas in key jurisdictions around the world.

Publication – On behalf of Lexology (a global resource of legal updates, analysis and insights), our firm authored the Maryland chapter of the "Employment: North America" Guide (Lexology PRO subscription required). A pdf of the chapter is available here.

Presentation – Parker E. Thoeni and Courtney B. Amelung presented a webinar on "Maryland Case Law Trends" to the Baltimore chapter of the Association of Corporate Counsel on October 28, 2021. The presentation focused on areas often overlooked by practitioners, including wage-hour, restrictive covenants, arbitration agreements, and more.

Presentation – Fiona W. Ong was a panelist for the Asian Pacific American Bar Association of Maryland's "Diversity in the Law" Program, on October 21, 2021. As moderated by Indira Sharma, Fiona and her fellow panelists, Judge Jeannie Hong, Magistrate Dilip Paliath, and Assistant State's Attorney Jaymi Sterling, discussed diversity in the legal profession.

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TOP TIP: Employers – HIPAA Does NOT Apply to Proof of Vaccination (or Other Employee Medical Records in Your Possession)!

Many employers and employees alike believe that the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA) protects the employee's vaccination information. It does not. In fact, the Privacy Rule does not apply to employee medical information in the employment context, as the U.S. Department of Health and Human Services recently explained in its Guidance, HIPAA, COVID-19 Vaccination, and the Workplace. Other laws, however, protect the confidentiality of employee medical information.

HHS confirms that HIPAA's Privacy Rule only controls the disclosure of an individual's Protected Health Information (PHI) by health plans, health care providers and certain business associates. The Privacy Rule does NOT apply to an individual's own disclosure of their health information – including vaccination status. And it does NOT apply to employment records. As HHS states, "[T]he Privacy Rule does not regulate what information can be requested from employees as part of the terms and conditions of employment that an employer may impose on its workforce."

As HHS notes, other federal and state laws apply to the employment relationship. HHS provides the pointed example that federal antidiscrimination laws do not prevent employers from requiring all employees to be vaccinated and to require proof of vaccination, subject to reasonable accommodation and equal opportunity considerations (as asserted by the EEOC in its COVID Guidance). It also reiterates that the confirmation of vaccination must be kept confidential and stored separately from the employee's personnel file, in accordance with the Americans with Disabilities Act (which governs the use and handling of employee medical information).

HIPAA's Privacy Rule does permit health plans, providers, and business associates to disclose PHI (like vaccination status) directly to an employer with the employee's authorization. And it specifically permits health care providers with a relationship with the employer to disclose PHI relating to an individual's vaccination status to the employer without the employee's authorization for two specific reasons: (1) so the employer may conduct an evaluation relating to medical surveillance of the workplace (e.g., surveillance of the spread of COVID-19 within the workforce) or (2) to evaluate whether the individual has a work-related illness. In order to do so, however, HHS states that the following conditions must be met:

- The health care provider is providing the health care service to the individual at the request of the individual's employer or as a member of the employer's workforce.
- The PHI that is disclosed consists of findings concerning work-related illness or workplace-related medical surveillance.
- The employer needs the findings in order to comply with its obligations under the legal authorities of the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), or state laws having a similar purpose (e.g., under OSHA's recordkeeping requirements, worker side effects from vaccination constitute a "recordable illness," and thus, employers are responsible for recording such side effects in certain circumstances).

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- The health care provider provides written notice to the individual that the PHI related to the medical surveillance of the workplace and work-related illnesses will be disclosed to the employer. (This can be accomplished by providing the individual with a copy of the notice at the time the health care is provided, or by posting the notice in a prominent place at the location where the health care is provided if the health care is being provided on the work site of the employer.)

Bottom line – HIPAA does not apply to an employer's requirement that an employee provide their vaccination status and proof of vaccination. The employer can require employees to be vaccinated and to submit proof of vaccination, absent a legally required reasonable accommodation for medical or religious reasons. The employer, however, must treat the vaccination information and proof as confidential medical information, and any documentation must be retained in a separate confidential medical file (not the employee's personnel file).

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- EEOC Issues Guidance on Religious Exemptions to COVID-19 Vaccine Mandates by Fiona W. Ong, October 25, 2021

- Employers – Do Not Ignore Confederate Flag Sightings in the Workplace! by Veronica Yu Welsh, October 20, 2021

- New Federal Agency Guidance on Vaccine Incentives and Surcharges: What Employers Should Know by Courtney B. Amelung, October 13, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Extraordinary Employee Misconduct: Making Snowboarding Movies While on FMLA? by Evan Conder, October 8, 2021

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