

OSHA Adds a New Consideration for Employers Related to Adverse Reactions to Vaccines

It is probably safe to say that as more businesses continue to reopen without restrictions and there is increased availability to vaccine supplies, many employers are considering whether they want to implement a mandatory vaccine policy. Of course, the determination is a highly fact sensitive analysis that turns on many factors including but not limited to the size of the employer, the industry, the nature of the employees' duties, and the administrative burden and similar considerations that follow a mandatory or voluntary policy. Many employers are reportedly also considering offering "incentives" to employees to persuade them to receive the vaccine.

In recent guidance published on April 20 in the form of new FAQ's, OSHA added an additional administrative and recordkeeping issue that should be considered relating to recording of adverse vaccine reactions. In the FAQ's, OSHA states that if an employer requires its employees to be vaccinated as a condition of employment, then any adverse reaction to the vaccine is work-related. Accordingly, the adverse reaction would need to be recorded under OSHA when it is a new case and meets one or more of the general recording criteria in the recordkeeping regulation, e.g., days away from work, restricted work or transfer to another job, medical treatment beyond first aid.

On the other hand, OSHA states that it will exercise its enforcement discretion and will not require adverse reactions to be recorded when the employer only "recommends" that employees receive the vaccine, even if it provides vaccines or makes arrangements for employees to receive them offsite.

OSHA specifically notes, however, that the "vaccine must be truly voluntary." In opining on this requirement, OSHA clarifies that it must be the employee's choice to accept or reject the vaccine without consequence to their performance rating or professional advancement, and an employee who elects not to take the vaccine cannot suffer any repercussions from their choice.

The FAQ's do not directly address the issue of whether employers who provide incentives could cross the line from voluntary to mandatory, particularly if the incentive is more than nominal. In prior guidance issued in 2012 discussing if certain overall safety record incentive plans could be retaliatory, OSHA took the position that if an incentive is great enough that the loss of such an incentive would dissuade reasonable workers from reporting injuries, it could be retaliatory. Although OSHA issued more recent guidance in 2018 generally stating that incentive programs that reward workers for reporting near-misses or hazards and encourage involvement in safety and health are permissible, employers should be aware this could be a potential issue with respect to vaccines and should consider making any incentive for an employee to receive a vaccine not so generous or enticing so as to raise the question of whether agreeing to the vaccination was truly "voluntary."

A copy of the newly published FAQ's can be found [here](#).



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