

WIT AND WISDOM OF WINTHROP

IN THE NEWS

With a constantly-shifting landscape surrounding COVID-19 vaccinations, it's important to understand your rights and obligations as an employer as they relate to employee vaccines. Below are the top three questions and answers for employers to be aware of during this ever-evolving time.

Q: CAN I REQUIRE MY EMPLOYEES TO GET A COVID-19 VACCINATION?

A: After full FDA approval is issued, yes. The EEOC has issued guidance confirming an employer's ability to require the COVID vaccine, so long as the requirement doesn't violate other Americans with Disabilities Act ("ADA") and EEOC considerations related to medical conditions and sincerely-held religious beliefs. The question that still remains, however, is whether employers must wait until the vaccines receive **full** FDA approval to implement a mandatory vaccine policy. As of the date of this article, no COVID vaccine has received **full** FDA approval. Rather, all three vaccines have been approved for use under the FDA's "Emergency Use Authorization" designation. The FDA is expected to issue full approval of the vaccines in the coming months, so current best practice for employers is to wait until full approval is issued to implement any mandatory vaccine requirement.

Q: CAN I REQUIRE THAT EMPLOYEES SHOW PROOF OF RECEIVING THE COVID-19 VACCINATION?

A: Yes, requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability, and, therefore, is not a disability-related inquiry. That being said, employers should be careful not to ask too many follow-up questions, such as why an employee did not receive a vaccine. Additionally, if you do request proof of a vaccine, best practice is to warn employees not to provide any medical information as part of the proof, in order to avoid implicating the ADA.

Q: CAN I ENCOURAGE MY EMPLOYEES TO GET A COVID-19 VACCINATION WITH INCENTIVES?

A: Yes. The EEOC had previously issued a proposal in which employers would be limited to offering employees only "de minimis" incentives for engaging in a wellness program. In January 2021, however, the Biden administration called upon the EEOC to temporarily stay its proposal on de minimis incentives. Accordingly, although the EEOC has not issued specific guidance **approving** more substantial incentives, employers can likely offer more robust incentives for the time being, such as paid time off that roughly mirrors the amount of time that an employee must take in getting a COVID-19 vaccine shot. Additional information related to COVID vaccinations can be found in Minnesota's new "COVID-19 Vaccine Employer Toolkit," available [here](#).

EMPLOYMENT LITIGATION UPDATE: MISUSE OF ACCESS TO INFORMATION

The Supreme Court is currently deciding a case that will determine, for the first time, whether an employer may be entitled to federal civil remedies when employees misuse their access to an employer's confidential information on work computers. In *Van Buren v. United States*, the Court is tasked with considering the Computer Fraud and Abuse Act ("CFAA") as it relates to an employee who was authorized to access the employer's information for select purposes, but ultimately used the information for an improper purpose. The Court's decision in *Van Buren* is expected to resolve the longstanding CFAA conflict related to whether an employee who did not "hack" into improper information, but rather was permitted limited access and use of it, has violated the CFAA by using the information for unpermitted uses.

SPOTLIGHT ON CHELSEA AHMANN



DID YOU ALWAYS KNOW YOU WERE GOING TO BE AN ATTORNEY? Absolutely not.

I switched my major in college countless times, to everything from marine biology, to pre-k education, to prison psychology. Ultimately, it was my Introduction to Criminal Law professor who sparked my passion for the law, and I haven't looked back since.

WHAT IS YOUR FAVORITE PART ABOUT PRACTICING EMPLOYMENT LAW? One of the things that drew me to employment law was the significant counseling relationship that goes with it. I will always be a litigator at heart, but I genuinely enjoy the counseling side of the law, which allows me to tailor creative solutions to client needs so that clients can avoid litigation before it starts.



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