Employee Benefits & Workers' Comp News

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Pandemic June/July 2021 Volume 29 • Number 3

Should Employers Require Employees to Get Vaccinated?

If so, what if an employee refuses?

There are many good reasons for employees to get the COVID-19 vaccine. Not only are vaccinated employees less likely to transmit the virus to customers, patients, and the public, they protect other employees. They are in that sense a very good workers' compensation loss prevention tool.

One negative aspect of requiring employees to get vaccinated is that injuries or illnesses reported from the vaccine will likely have to be treated as workers' compensation claims and recordable incidents on Occupational Safety and Health Administration logs. At this point, however, that risk seems low.

More importantly, with vaccinations now readily available, there are substantial advantages of having all employees vaccinated.

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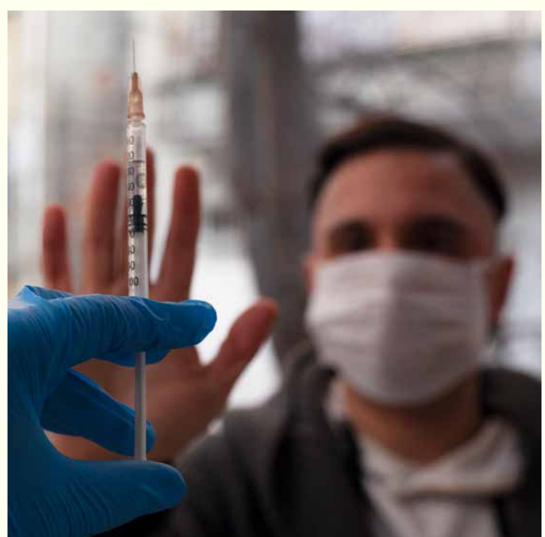

This Just In…

The Biden Administration's Department of Labor has revoked a rule enacted by the Trump Administration that would have made it clear that workers at gig firms, such as Uber, DashDoor and Instacart, are independent contractors, not employees.

"By withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect," said Secretary of Labor Marty Walsh. "Legitimate business owners play an important role in our economy but, too often, workers lose important wage and related protections

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ADA Compliance

Employers have questioned whether the Americans With Disabilities Act of 1990, which prohibits employers from seeking information about an individual's impairments or health status, makes it illegal to require employees to vaccinate. The U.S. Equal Employment Opportunity Commission (EEOC), the agency which enforces laws against workplace discrimination, has issued guidance on the matter.

The EEOC's "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" explains that employers may require the vaccination because it is not a medical examination and will not reveal private information. The EEOC cautions that employers must still comply with the Americans with Disabilities Act (ADA); Title VII of the Civil Rights Act of 1964 (Title VII); and other workplace laws.

The EEOC guidance also says that requiring an employee to show proof of vaccination is also permitted because such an inquiry is not disability related. However — and this is where it gets tricky — Section K.3 of the guidance states that questions from the employer, such as asking why the employee did not receive a vaccination or other prescreening questions, "may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity."'

Exceptions

There are two exceptions, however, where according to ADA laws some employees are allowed to opt out.

- **Disability Accommodation:** When an employee refuses to get vaccinated because of a disability, the ADA requires employers to determine whether the unvaccinated employee poses a "direct threat" due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If a reasonable accommodation cannot be made, then the EEOC names four factors to use for evaluating whether a threat exists:

  - Duration of the risk
  - Nature and severity of the potential harm
  - Likelihood that the potential harm will occur
  - Imminence of the potential harm

- **Religious Accommodation:** Under Title VII, an employer must accommodate an employee's sincerely held religious beliefs, practices or observances, unless they could cause an undue hardship on the business. If an employer questions the religious nature or the sincerity of a particular belief, they may request additional information. In these types of situations, employers need to determine if any other rights apply under the EEO laws or other federal, state and local authorities.

Legal Concerns

Not everyone is onboard with the EEOC's guidance. An employee in New Mexico and educators in California have filed lawsuits asking that "allowing mandates to be vaccinated" be overturned.

Plus, some states have introduced legislation banning private employers from requiring COVID-19 vaccinations.

Congress has taken notice and introduced two House Bills — 214 and 608. Both Bills would prohibit employers from taking adverse actions against current or prospective employees based on their COVID-19 immunization status.

At this point, however, under most circumstances, employers would seem to have the right to fire an employee who refused to be vaccinated.

when employers misclassify them as independent contractors."

The Biden Administration action restores the previous Fair Labor Standards Act (FSLA) provisions. These provisions still allow companies to classify their contractors as independent but require a broader test to determine the relationship between the parties.

Uber and other gig companies claim contractors who work with them do not want to be classified as employees. Uber has proposed a model that would grant independent contractors some benefits.

In November, California voters passed a ballot measure that overrode a state law that would have made gig workers employees. Now, gig workers in California have access to limited benefits but are still classified as independent contractors.

Alternatives to the Traditional 401(k)

One of the most popular group retirement plans is a 401(k). There are other options — such as PEPs, 403(b) and ESOPs— that might be a better fit for your company.

First introduced in 1978, 401(k) plans are now America's most popular choice for employer-sponsored retirement plans. However, just because traditional 401(k)s are popular doesn't mean they are the best option for all companies.

A traditional 401(k) allows employers to enjoy tax credits and write-offs while employees can use pretax money to fund their account. This lowers taxable income and lets funds grow tax-free until the employee retires — when, hopefully, they're in a lower tax bracket. Employer contributions help employees' retirement savings grow even faster.

Here are a few options that might be good for your company.

Pooled Employer Plans

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) became law in 2019. On Jan. 1, 2021, the SECURE Act established a new type of multiple employer plan. Pooled Employer Plans (PEPs) allow sponsors to pool their retirement resources with those of other employers.

The operation of a PEP is handled by third party administrators known as pooled plan providers (PPPs). PPPs must register with the IRS and Department of Labor and meet certain criteria as eligible providers.

The difference between 401(k) multiple employer plans (MEPs) and PEPS is MEPs are available to businesses within a similar industry (food service, construction, etc.). PEPs can included employers of every size and from various industries.

While available to employers of any size smaller employers are expected to benefit the most from PEPs. Benefits include:

- Spending less time on the day-to-day administrative tasks required under traditional plan sponsorship.
- Fewer legal obligations — the PPP serves as the administrator and has fiduciary responsibility.
- Better pricing — by pooling assets, participants increase their access to improved pricing, and diverse investment products.

The downside of a PEP is they are still new and employers may be hesitant to embrace them. Plus, MEPs with their industry-specific benefits and sometimes greater flexibility may still be more attractive to many employers.

403(b) Plans

A 403(b) plan is a retirement account for employees at public schools and tax-exempt organizations. These include teachers, school

administrators, professors, government employees, nurses, doctors and librarians.

Both 401(k) and 403(b) plans share these similarities:

- Employees may be eligible for matching contributions. However, if it is a non-ERISA 403(b) plan, there can be no employer contributions and non-ERISA plans may lack the same level of protection from creditors as plans that require ERISA compliance.
- Contributions are limited to $19,500 in 2021. The combination of employee and employer contributions are limited to the lesser of $58,000 in 2021 or 100% of the employee's most recent annual salary.
- Earnings are tax-deferred until withdrawn.

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- Roth options are available.
- Participants must reach age 59½ to withdraw funds without incurring an early withdrawal penalty.
- There is a $6,500 catch-up contribution allowed for those 50 and older in 2021.

Differences include:

- Many 403(b) plans vest funds over a shorter period than 401(k)s and some even allow immediate vesting.
- Employees who have 15 or more years of service with certain nonprofits or government agencies may be able to make additional catch-up contributions to a 403(b) plan.

On the downside, a 403(b) may offer narrower investment choices than other types of plans.

Defined Benefit Pension Plans

Defined benefit plans provide a fixed, pre-established benefit for retiring employees. For many years employers used defined pension plans to entice employees to stay their entire careers.

The advantage to employees of a pension plan is that it provides predictable benefits and it's not dependent on asset returns. The employer makes most, if not all, of the contributions.

To an employer the advantage is that they can deduct contributions, and, since they generally contribute more each year, they get to deduct more each year.

However, defined benefit plans often are more complex and more costly to establish and maintain than other plans. Plus, the employer cannot retroactively decrease benefits if funding for the year is tight.

These plans have lost favor because the burden of providing the guaranteed benefit falls to the employer. Primarily to avoid the uncertainty of funding specified benefits with unknowable and typically ever-increasing costs, employers have shifted to defined contribution plans, like a 401(k). The amount saved depends on the employee. Employers can contribute funds, but usually less than with a pension plan.

Pension plans can be offered by a business of any size — even if the business offers other retirement plans.

Employee Stock Ownership Plan

To establish an Employee Stock Ownership Plan (ESOP), an employer sets up a trust fund for employees and contributes either cash to buy company stock, contributes shares directly to the plan, or has the plan borrow money to buy shares. If the plan borrows money, the company makes tax deductible contributions to the plan so it can repay the loan.

Employees don't pay tax on contributions until they receive the stock when they leave or retire. They can either sell it on the market or back to the company.

Companies with ESOPs and other employee ownership plans account for well over half of *Fortune Magazine's* "100 Best Companies to Work for in America" list year every year.

The biggest advantage of an ESOP is it creates a strong ownership culture, while producing the potential for the company to gain significant tax advantages. ■

Additional 2021 Tax Benefits Now Available for Employees with Dependents

The $1.9-trillion stimulus package known as the American Rescue Plan Act (ARPA) includes major changes to the longstanding federal-income-tax child and dependent care credit.

Your employees who have dependent care expenses can get additional tax deductions for the 2021 tax year.

The American Rescue Plan Act (ARPA), a $1.9-trillion stimulus package, includes major changes to the longstanding federal-income-tax Child and Dependent Care Credit (CDCC). For the 2021 tax year only, employees who claim dependent care expenses may be eligible for a higher tax credit.

The legislation temporarily increases the dollar limits on eligible expenses for claiming the CDCC from $3,000 to $8,000 for one qualifying individual and from $6,000 to $16,000 for two or

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more qualifying individuals.

The amount of the credit employees get is a percentage of the amount of work-related expenses they paid to a care provider for the care of a qualifying individual and is based on their adjusted gross income.

Prior to the ARPA the CDCC was nonrefundable, meaning it could only be used to offset an employee's federal income tax liability. If the employee had no liability, they would not get credit. But for 2021, the credit is refundable for most employees whose primary place of residence has been in the United States for more than half the year.

Eligible Filers and Qualifying Individuals

To qualify for this credit, the taxpayer must have under their care a "qualifying individual or individuals." Married couples must file a joint Form 1040 for the tax year in question to claim the CDCC. Generally, married couples cannot take this credit if their filing status is "married filing separately."

Qualifying individuals are defined as anyone the employee is taking care of who meets these requirements:

- A dependent qualifying child under age 13
- A spouse who is physically or mentally incapable of self-care who lives with the employee for more than half the year
- An individual who is physically or mentally incapable of self-care and lived with the employee for more than half the year
- Children of divorced or separated parents or parents who are living apart.

To apply for the credit, the person filing must provide the Taxpayer Identification Number (usually the social security number) of each qualifying individual.

Eligible Expenses

An eligible expense is care provided in or outside the household primarily for the well-being of a qualifying individual. Typical eligible expenses are payments to a day-care center, nanny or nursery school. Before-school and after-school programs also qualify.

Costs that aren't eligible are overnight camps or private K-12 schools.

Anyone claiming the credit must report the name, address, and social security number or employer identification number of the care provider on their tax turn.

To Apply

Employees who received dependent care benefits which are excluded or deducted from their income must subtract the amount of those benefits from the dollar limit that applies to them.

Employees who qualify for the credit must complete Form 2441, Child and Dependent Care Expenses and attach it to Form 1040, U.S Individual Income Tax Return; Form 1040-SR, U.S. Tax Return for Seniors; or Form 1040-NR, U.S. Nonresident Alien Income Tax Return. If they received dependent care benefits from you — their employer (an amount shown on their Form W-2 Wage and Tax Statement) — they must complete Part III of Form 2441.

If your employees need more information about qualifying for this credit, they should visit www.irs.gov/publications/p503.

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What Safety Regulations Apply to Your Business?

When it comes to workplace safety, ignorance is no defense. OSHA safety and health regulations often apply to all businesses, regardless of size.

If you're not sure which regulations apply to your business, OSHA provides some resources. It has created a Web-based step-by-step guide to help small employers identify some of the regulations that might apply to them. You can find this OSHA Compliance Assistance Quick Start at https://www.osha.gov/dcsp/compliance_assistance/quickstarts/index.html.

OSHA also offers employers an on-site consultation service. Trained state government staff will visit your site and provide free advice. The service is separate from any enforcement programs that OSHA operates and is entirely confidential. Sessions identify and uncover potential workplace hazards and are intended to help small business owners improve their workplace safety and health systems.

If that isn't sufficient incentive, then this might be — you could qualify for a one-year exemption from routine OSHA inspections if you participate!

Find out more at https://www.osha.gov/dcsp/smallbusiness/consult.html. Your insurance broker can also help you with compliance and safety issues. For more information, please contact us.

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