Is This The Future?

NYT Articles:
- “What do bosses really think of remote work?”
- “The worst of both worlds: Zooming from the office”: calling a hybrid workplace “a mushy middle ground” and questioning whether such flexibility is sustainable
- “The vaccine mandate conundrum”: will they bring people back to work?
- “When vaccine mandates collide” re conflicting federal, state & local orders
Today’s Discussion
• Tension Between Remote v. In-Person Work
• Vaccination Mandates
• Flexible Work Schedule
• “Zoom” Etiquette & EEO Issues
• Questions

Remote v. In-Person Work
• Equity Issues Resulting from “Essential” Public Servants
• Working Parents, Particularly Mothers
• Recruitment
• Accountability With Employees – Two-Job Phenomenon / SIAs
• Reluctance By Staff to Return to Office
Vaccine Mandate – Mandatory

- Jabobson/Love Standard
- In California, mandatory vaccination policies are constitutional
- No mandatory vaccination policy from a major California City has been struck down as unconstitutional to date
- See list of California city policies
- OK to require vaccination for new candidates
Vaccine Mandate – Vax-or-Test

- OSHA issued an Emergency Temporary Standard requiring private employers with 100 or more employees to implement vaccination or weekly testing requirement for employees; will also apply to the public sector via Cal-OSHA
- Currently “on pause” due to pending federal challenge (5th Cir.) on November 12
- Risks of exemption for “personal beliefs"
- DIR guidance is that employers must pay for time spent testing and for the test itself

Vaccine Mandate – Labor Relations

- No requirement to meet-and-confer over decision to implement a vaccination policy
- Must meet-and-confer over effects of the policy
- PERB Case
- MMBA emergency exception (requires official action by governing body)
- Paid v. unpaid leave pending termination hearing for failure to comply with policy
## Vaccine Mandate – Discipline

<table>
<thead>
<tr>
<th>City</th>
<th>Unvaccinated Employees Must…</th>
<th>Discipline for Noncompliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Los Angeles</td>
<td>Vaccinate unless exempt</td>
<td>Possible ban on promotion or transfer</td>
</tr>
<tr>
<td>San Diego</td>
<td>Vaccinate unless exempt</td>
<td>Subject to termination</td>
</tr>
<tr>
<td>San Jose</td>
<td>Test and report twice weekly until Dec. 31, 2021, then vaccinate unless exempt</td>
<td>Subject to termination</td>
</tr>
<tr>
<td>San Francisco</td>
<td>Vaccinate unless exempt</td>
<td>Disciplinary action or non-disciplinary separation</td>
</tr>
<tr>
<td>Fresno</td>
<td>Test and report once per week</td>
<td>Discipline up to and including termination</td>
</tr>
<tr>
<td>Sacramento</td>
<td>Vaccinate</td>
<td>Placed on unpaid leave status</td>
</tr>
<tr>
<td>Oakland</td>
<td>Test and report at least once per week</td>
<td>Subject to termination</td>
</tr>
</tbody>
</table>

## Vaccine Mandate – Medical Accommodations

- Similar analysis to any other employee requesting reasonable accommodation:
  - Employee has a qualifying medical condition/disability that prevents them from getting the vaccine
  - Employee requests a reasonable accommodation;
  - Employee provides required documentation to support an exemption; and
  - An exemption would not pose a direct threat to the health & safety of the employee or others that cannot be mitigated

- The Medical Board of California has informed all licensed professionals that inappropriate medical exemptions may subject physicians to discipline
Vaccine Mandate – Religious Accommodations

- Legal standard – employers must accommodate a “sincerely held” religious belief, i.e., in good faith and relates to an established religious or belief system that holds place akin to God
- Employer must assume belief is sincere unless there is a legitimate basis to question otherwise, e.g.:
  - Whether an employee previously received other vaccines;
  - Whether an employee adopted the professed belief this year or since the start of the pandemic;
  - Whether the belief is predicated on conspiracy theory, e.g., fetal stem cells in the vaccine (although stem cell lines used in development)
  - Whether belief is based upon “wellness,” veganism, health lifestyle choices (would better support a “personal beliefs” exemption)
  - Distrust in the vaccine or medical community

Most recognized organized religions do not prohibit vaccinations
- If questionable basis appears, grounds to request documentation from faith leader; watch out for letters from an online “church” or pastor or otherwise engage employee in interactive process to resolve outstanding questions
- Make final decision based on holistic review
- Be consistent in granting or denying requests
- Based decisions on established criteria that could be produced in litigation
- Consider whether to meet-and-confer regarding such criteria as part of effects bargaining regarding vaccination policy
Flexible Work Schedules

• COVID has redefined expectations about flexible work schedules and impacted reasonable accommodation analysis generally

• Flexible work schedules
  • Remote Work versus family-friendly workplace policies
  • Child-care considerations
  • Commuting

• RA Requests
  • Influx in requests seeking permanent at-home days for medical reasons
  • Commuting

• Job suitability for remote work
• Disaster Service Worker status
• Productivity, attendance, and accountability
• Expenses

• Clear policy & remote work agreements are key
Flexible Work Schedules

• Work from Home Policy Tips
  • Success in the remote work context requires managing expectations. Both the employee and employer need to be on the same page in terms of work product
    • Set expectations regarding:
      • Performance and scheduling
      • Any tasks that cannot be completed at home
      • The line between home professional and private life
      • Any expenses to be reimbursed
      • How employees are to communicate among each other
      • Clear guidelines about remote integrations/zoom protocols

“Zoom” Etiquette & EEO Issues
"Zoom" Etiquette

• Evolution of workplace behavior while physically at home

• Need for workplace investigations based on remote-only conduct

• Consider updating EEO policy and/or Code of Conduct to address

QUESTIONS?
Thank you!

Ruth M. Bond, Partner
rbond@publiclawgroup.com

Jenica Maldonado, Of Counsel
jmalanado@publiclawgroup.com