

The Shot and the Pot: A Discussion on Employer Rights and Responsibilities Regarding COVID-19 Vaccinations and Cannabis In The Workplace



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Vaccines and the Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are typically quite fact-specific.
- Always take state and local law into account.
- This situation is very fluid and can change rapidly due to a variety of factors.
- COVID-19 vaccines are approved by FDA pursuant to Emergency Use Authorizations. Employers must decide whether or not to mandate vaccines.

Can Employers Mandate the Vaccine?

EEOC Guidance Issued on December 16, 2020.

- Employers *can require* workers to get COVID-19 vaccine.
 - *EUA* status does not negate this.
 - Consider the employee's duties and work setting.
- When may an employee be “*excluded from the workplace*” for not being vaccinated?
 - Direct Threat – would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation? This is a high standard.
 - Vaccination as safety Qualification Standard – requires an objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity.

Employer Responsibilities under ADA/Title VII

- EEOC (Equal Employment Opportunity Commission):
 - An employee may be entitled to an exemption from a vaccine requirement due to an ADA-covered disability or other medical circumstance
 - An employee may be exempted from a flu shot or COVID-19 vaccination requirement based on sincerely-held religious beliefs, practices, or observances
 - In either case – engage in and document communication with employee to determine whether a reasonable accommodation is needed and feasible
 - The process may be as important as the final decision
- Demonstrate consideration of possible reasonable accommodations

CDC Isolation/Quarantine Guidance

- Sick and Tests Positive
 - 24 hours without fever
 - No other symptoms
 - 10 days have passed since symptom onset.
- Positive and No Symptoms
 - 10 days have passed since the first positive COVID-19 test
- Sick and Tests Negative.
 - Stay home for 24 hours or until symptoms have improved.

COVID-19 Vaccines: Fully Vaccinated People

Not required to quarantine if they meet all of the following requirements:

- Have been fully vaccinated;
 - Are within three months following receipt of the last dose in the series; and
 - Have remained asymptomatic since the current COVID-19 exposure.
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- Employers should follow current post-exposure quarantine guidance for workers who do not meet all three of these criteria after an exposure to someone with suspected or confirmed COVID-19.

Should continue to practice other basic precautions:

- Wearing masks, social distancing, avoiding crowds, and hand-washing, etc.

Summary Regarding Vaccine Mandates

- An employee may be entitled to exemption from “required” vaccines:
 - due to an ADA-covered disability or other medical circumstances
 - based on sincerely-held religious beliefs, practices, or observances
- In either case – the “interactive process” is critical
- Employer must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries

How to handle employees with vaccine issues or hesitancy

- Anticipate issues, questions and pushback from some employees
- Develop an overall stance regarding vaccine-related issues
- Develop policies and communications aligned with this decision
- Educate employees
- Keep up to date with new developments -- work with your counsel
- **REMEMBER**: Just because an employee gets vaccinated, no automatic exemption from masking requirements

Overview of New Marijuana Legislation

- Three Bills signed by Gov. Murphy on 2/22/21.
 - Legalization and Regulation of Cannabis Use and Possession. (Bill A21)
 - Decriminalized possession for small amount. (Bill A1897)
 - Provide protections for underage users. (Bill S3454)
- What hasn't changed:
 - Home growing of marijuana is still illegal.
 - Operating a vehicle while under influence is still illegal.
 - Marijuana is still illegal at the Federal level.

New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act

- Legalizes personal use cannabis for certain adults.
- Intent is to adopt new approach in similar fashion to regulation of alcohol for adults.
- Intent is to prevent sale or distribution of cannabis to persons under 21 years of age.
- Controlling and regulating the manufacture, distribution, and sale of cannabis will strengthen our ability to keep it and illegal marijuana away from minors.

Legalization and Regulation of Marijuana: More work to do.

- Murphy has to seat a five(5) member Cannabis Regulatory Commission (CRC).
- The CRC has 180 days to develop rules for retail industry. If the five members are seated after 180 days, then they have 45 days to develop rules.
- Retail industry projected revenue may be between \$850 million and \$1 billion annually.
- In the interim, charges for possession will begin to cease.

Decriminalization of Possession

- Law permits marijuana possession of six(6) ounces or less.
- Consumption must occur on private property.
- Users must be age twenty-one(21) or older.
- Removes marijuana use/possession from being a parole/probation violation.
- Judge cannot prohibit use as terms of condition for supervised release.
- Previously, possession of fifty(50) grams or 1.76 ounces carried a maximum eighteen(18) months in jail and a \$25,000 fine.

How will new Legislation impact a Drug-Free Workplace?

- Employers are still permitted to maintain drug and alcohol free workplaces.
- Employers are not required to accommodate the use, possession, sale, or transfer of cannabis in the workplace.
- Employers may have policies that prohibit being under the influence or intoxicated during work hours.
- Will need to monitor the accommodation issue as we go forward.

Drug Testing

- Employers may still require ‘Reasonable Suspicion’, post-accident, random, or pre-employment testing.
- Test must include scientifically reliable testing of blood, urine, or saliva, **and** a physical evaluation of the employee’s state of impairment.
- Each employer will be required to have a **Workplace Impairment Recognition Expert**- a person trained to detect and identify employees use or impairment from cannabis or other substances.

Helpful Resources

EEOC.gov

CDC.gov

OSHA.gov

HHS.gov



Visit **Fisher Phillips** Vaccine Resource Center for Employers

The logo for Fisher Phillips, featuring the company name in white text on a red, ribbon-like background.

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Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit **[fisherphillips.com](https://www.fisherphillips.com)** for up-to-date information

Questions?

Thank You.

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