

Virginia Bankers Association September 1st Conference Call Q & A COVID-19 and DOLI Update

This communication has been prepared by the VBA for informational purposes only, is not legal advice, and does not represent the opinions of any VBA guest speakers. The information herein does not create an attorney-client or similar relationship. You should consult with your legal counsel if you have a legal matter requiring attention.

Questions & Answers:

Q: Are there any concerns about incentives or a discount in insurance premiums for vaccinated employees?

A: Insurance premium surcharges and other incentives tied to a medical plan trigger the Health Insurance Portability and Accountability Act of 1996 (HIPAA) wellness program rules. Employers considering surcharges should confirm the plan will conform with the Affordable Care Act (ACA) affordability if employees choose not to obtain the COVID-19 vaccine and are resultingly charged higher insurance premiums. Federal Equal Employment Opportunity laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (e.g., a pharmacy). If, however, an employer sponsors or provides a COVID-19 vaccination program for its employees, EEO Commission guidance recommends that incentives (which includes both rewards and penalties) to participate, not be so large as to be coercive. The EEOC does not define how large of an incentive would constitute coercion. Regarding any incentive or surcharge policy, employers must accommodate employees who are unable to receive the vaccine because of a disability or sincerely-held religious belief.

Q: Can you explain further the religious exemption and what HR professionals should be legally inquiring?

A: Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). Title VII requires an employer, once on notice that a religious accommodation is needed, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship on the employer. An accommodation would pose an undue hardship if it would cause more than a minimal cost.

Once the employer is aware of an employee's need for a religious accommodation, it is responsible for making a good faith effort to communicate with the employee about the accommodation. An accommodation request from an employee does not have to be presented to the employer in writing. Generally, an employer should accept that an employee's request for religious accommodation is sincerely held. An employer can, however, request supporting documentation if there is a basis for questioning the employee's sincerity.

Q: Do occupancy limits still exist for meeting spaces, lunch rooms, offices, etc.?

A: There are not explicit occupancy limits in the Virginia Department of Labor and Industry's ("DOLI") VOSH Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19 regulation (16 VAC 25-220-10, et seq.) effective September 8, 2021 (since our call the proposed amendments have been adopted and are now effective). There are, however, social distancing requirements which will effectively limit the number of people allowed in any given space. See [Sections 40 D and E](#) of the regulation for occupancy requirements.

Virginia Bankers Association September 1st Conference Call Q & A COVID-19 and DOLI Update

Q: Are you seeing any legislation regarding not paying employees who have to quarantine if they chose not to be vaccinated?

A: We are not aware of any such legislation. Under the Fair Labor Standards Act (“FLSA”), employers generally have to pay workers only for the hours they actually work, whether at home or at the employer’s office. In general, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried executive, administrative, or professional employees must receive their full salary in any week in which they perform any work, subject to limited exceptions.

An employer can require an employee to use paid sick leave if that employee is quarantined for COVID-19. COVID-19 likely qualifies as a ‘serious health condition’ that would entitle a worker to unpaid leave under the federal Family and Medical Leave Act (“FMLA”); however, an individual’s efforts to avoid contracting COVID-19 or to avoid spreading the virus by quarantining likely does not invoke the FMLA.

The mandatory leave under the Families First Coronavirus Response Act (“FFCRA”) expired on December 31, 2020. The American Rescue Plan Act of 2021 (“ARPA”) allows employers who choose to grant paid leave for qualifying reasons to receive tax credits for providing paid leave through September 30, 2021. Under ARPA, an employee may qualify for either FFCRA sick leave or FFCRA family leave related to any of the following: (1) an employee is subject to a federal, state, or local quarantine or isolation related to COVID-19; (2) an employee has been advised by a healthcare provider to self-quarantine; (3) the employee is experiencing COVID-19 symptoms; (4) an employee is caring for an individual subject to a quarantine or who is self-quarantining; (5) an employee is caring for a child whose school or place of care is closed or child care provider is unavailable due to COVID-19; (6) an employee is experiencing any substantially similar condition specified by the Secretary of Health and Human Services; (7) an employee is seeking or awaiting the results of a diagnostic test for, or medical diagnosis of COVID-19 and after an exposure to COVID-19 or a test or diagnosis at the employer’s request; (8) an employee is obtaining immunization related to COVID-19; or (9) an employee is recovering from any injury, disability, illness, or condition related to a COVID-19 immunization.

Q: With the recent CDC mask guidelines, has the draft standard changed with regard to vaccinated/unvaccinated?

A: Yes, the revised DOLI COVID-19 safety regulation does have different employer requirements in regard to vaccinated and unvaccinated employees, consistent with current CDC guidance. See [Section 40](#) of the regulation for Mandatory Requirements for all Employers.

Resources:

- Revised Virginia Department of Labor and Industry’s (“DOLI”) VOSH Standard for Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19 regulation (16 VAC 25-220-10, et seq.): <https://www.doli.virginia.gov/proposed-changes-to-fps/>
- U.S. Equal Employment Opportunity Commission, COVID-19 Resources: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- U.S. Department of Labor COVID-19 and FMLA: <https://www.dol.gov/agencies/whd/fmla/pandemic>
- U.S. Department of Labor COVID-19 and FLSA: <https://www.dol.gov/agencies/whd/flsa/pandemic>
- Internal Revenue Service and ARPA: <https://www.irs.gov/newsroom/employer-tax-credits-for-employee-paid-leave-due-to-covid-19>