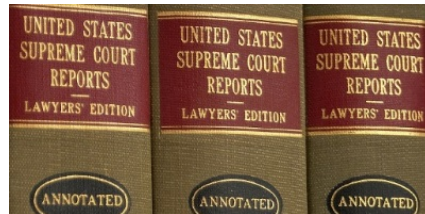




SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



POST PANDEMIC EMPLOYMENT LAW: Your Questions Answered

VACCINATING EMPLOYEES

FACULTY

Christopher M. Valentino, Esq.
Jackson Lewis P.C.

Program Coordinator: Hon. John J. Leo

June 24, 2021
Suffolk County Bar Association, New York

Like us on:



“The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members”



Christopher M. Valentino

Office Managing Principal
New York Metro
Long Island
P 631-247-4653
F 631-247-0417
Christopher.Valentino@jacksonlewis.com

Practices

Labor Relations
Workplace Training

Services

Managing Your Work Force
and WARN Act
Compliance
New York Metro

Industries

Healthcare
Manufacturing
Technology

Education

St. John's University
School of Law
J.D., 2000
Dean's List

College of the Holy Cross
B.A., 1997
Dean's List

Admitted to Practice

- New York - E.D. N.Y., 2001
- New York - S.D. N.Y., 2001
- New York, 2001

Social Media

LinkedIn

Christopher M. Valentino is office managing principal of the Long Island, New York, office of Jackson Lewis P.C. He represents companies in matters relating to traditional labor, equal employment opportunity, employment litigation and related matters.

Chris has extensive experience in all matters relating to EEO compliance and workplace laws and is a frequent speaker at management education programs. Since joining Jackson Lewis in September 2000, he has regularly counseled clients in the development and implementation of preventive labor and employee relations programs and has represented management with respect to union organizational drives and in proceedings before the National Labor Relations Board, the federal and state courts and other federal and state administrative agencies, as well as in the area of collective bargaining, contract administration and arbitration.

In addition to his traditional labor expertise, Chris also focuses on counseling employers on reductions-in-force, personnel decisions, the administration of employer policies and procedures, disability management in the workplace, restrictive covenants, substance abuse testing in the workplace, the development of employee handbooks, employment applications and related matters.

Chris also has conducted hundreds of management training seminars on topics including maintaining a union-free environment, avoiding litigation, avoiding discrimination and sexual harassment; effective management interviewing, documentation and evaluation skills; and, compliance with the Americans with Disabilities Act and FMLA.

Honors and Recognitions

- *The Best Lawyers in America*®, "Employment Law - Management", "Labor Law - Management" and "Litigation - Labor and Employment" (2018-present)
- *Super Lawyers*®, "Rising Stars" (2013-2015) and "Super Lawyer" (2017-2020)

Professional Associations and Activities

- SHRM-LI

Published Works

- "The Pivotal Role of Human Resources in Business Management: The 1980s to

JacksonLewis

Is it Legal to Mandate that Employees Get Vaccinated for Covid-19?

Christopher M. Valentino, Esq.

June 24, 2021

Jackson Lewis P.C. / Long Island Office

Christopher.Valentino@jacksonlewis.com / (631) 247-4653

Christopher M. Valentino, Esq.



Christopher M. Valentino is office managing principal of the Long Island, New York, office of Jackson Lewis P.C. He represents companies in matters relating to traditional labor, equal employment opportunity, employment litigation and related matters.

Chris has extensive experience in all matters relating to EEO compliance and workplace laws and is a frequent speaker at management education programs. Since joining Jackson Lewis in September 2000, he has regularly counseled clients in the development and implementation of preventive labor and employee relations programs and has represented management with respect to union organizational drives and in proceedings before the National Labor Relations Board, the federal and state courts and other federal and state administrative agencies, as well as in the area of collective bargaining, contract administration and arbitration.

In addition to his traditional labor expertise, Chris also focuses on counseling employers on reductions-in-force, personnel decisions, the administration of employer policies and procedures, disability management in the workplace, restrictive covenants, substance abuse testing in the workplace, the development of employee handbooks, employment applications and related matters.

Chris also has conducted hundreds of management training seminars on topics including maintaining a union-free environment, avoiding litigation, avoiding discrimination and sexual harassment; effective management interviewing, documentation and evaluation skills; and, compliance with the Americans with Disabilities Act and FMLA.

Introductory Statement

THE MATERIALS CONTAINED IN THIS HANDOUT WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS P.C. FOR THE ATTENDEES' OWN REFERENCE IN CONNECTION WITH MANAGEMENT EDUCATION SEMINARS PRESENTED BY THE FIRM. SINCE THESE MATERIALS AND RELATED DISCUSSIONS ARE INFORMATIONAL AND EDUCATIONAL IN NATURE AND REPRESENT THE SPEAKER'S OWN VIEWS, ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE. PROFESSIONAL ADVICE SHOULD BE OBTAINED BEFORE ATTEMPTING TO ADDRESS ANY LEGAL SITUATION OR PROBLEM.

Is it Legal to Mandate that Employees Get Vaccinated for Covid-19?

Yes

- In its May 28, 2021 guidance, the United States Equal Employment Opportunity Commission (“EEOC”) issued updated guidance stating that federal laws don’t prevent an employer from requiring workers to be vaccinated.
- The Guidance is entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.
- It can be found at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

But . . .

- This rule is subject to important exceptions:
 - reasonable accommodations;
 - sincerely-held religious belief; and
 - disparate impact.

Examples of Reasonable Accommodation Exception

- Examples of reasonable accommodations might include an unvaccinated employee entering the workplace:
 - wearing a face mask;
 - working at a social distance from coworkers or non-employees;
 - working a modified shift;
 - getting periodic tests for COVID-19; and
 - be given the opportunity to telework, or as a last resort, accept a reassignment.

Best Practice

“As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.”

More on Reasonable Accommodations

- If an employee asks to be exempt from the vaccination requirement due to a disability the employer MUST engage in the interactive process.
- Employers and employees may find it helpful to consult the [Job Accommodation Network \(JAN\) website](https://askjan.org/) as a resource for different types of accommodations. JAN's materials about COVID-19 are available at <https://askjan.org/topics/COVID-19.cfm>.
- An employer MUST consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

Direct Threat Defense

- A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. [29 C.F.R. 1630.2\(r\)](#).
- Two Step Analysis: is there a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.
- Factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.
- Must be a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.

Confidentiality and Non-Retaliation

Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

Can An Employer Ask for Proof of Vaccination?

- Yes.
 - Requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.
 - However, it must be kept confidential since this constitutes medical information.

Undue Hardship & Sincerely-Held Religious Belief

- Undue hardship defense applies under the ADA
- It also applies under Title VII where an employee seeks a religious accommodation for a sincerely held religious belief.
 - “Sincerely held” is a very broad standard! Employers should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.
- In applying the undue hardship standard, an employer’s size and resources come into play.
- While the standard is easier to establish under Title VII than the ADA, employers should be weary in relying on the defense either statute since courts are often unsympathetic to the defense.

Disparate Impact

- If an employer's policy of requiring vaccinations has a adverse impact on a protected group, it could be a violation of Title VII.
- If adverse impact results from such a policy, the burden falls on the employer to show that the policy was justified by business necessity and was consistently applied.

Impact of New York Law?

- New York State and local laws do not appear to impact the EEOC's guidance.
- Generally, these laws are more protective of employees than federal law (for example, broader definitions of disability).
- New York Labor Law 196-C: requires employers with one or more employees to provide a paid leave of absence, not to exceed four hours, to allow a sufficient period of time for an employee to receive a Covid-19 vaccination.
 - Pay must be at regular rate and shall not be charge against any other leave right.
 - Increases to 8 hours if two vaccinations are required.
 - Applies only to time for employee to receive vaccine (not family member, etc.)
 - Employer may require notice for leave and proof of vaccination (but keep confidential under ADA and NY State Human Rights Law.
 - Employer can give more time and must do so if a CBA requires.
 - No retaliation for exercising rights under the law.

Questions?

JacksonLewis

Thank **you.**



SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

**Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend
resources. All calls are private and confidentiality is protected under
Judiciary Law Section 499. (Lawyer Assistance Committee)**

Feel Free to Join Us at Our Weekly Recovery Meeting