Memorandum

To: AMFA Membership
From: National Executive Council and Local Leadership
Date: September 29, 2021
Re: Vaccination Participation Pay Program and Your Privacy Rights Under Federal Law

Dear Members:

Alaska and Horizon published a letter introducing a vaccine incentive of $200 for those employees who complete their COVID-19 vaccine series, report their vaccination status, and upload an image of their vaccination record card on PeopleSoft by October 15, 2021.

Southwest has recently published a letter addressing “vaccine incentives” accompanied by an FAQ that addresses Southwest’s Vaccination Participation Pay Program (VPPP). The VPPP offers employees 16 hours of pay provided that they complete their COVID-19 vaccine series, report their vaccination status and upload an image of their vaccination record card on WorkPerks by November 15, 2021. Southwest asserts that the VPPP is unrelated to the Biden Administration’s announced intention to implement a federally-mandated vaccination program for large employers.

A core purpose of the new programs, in our view, is to induce employees to voluntarily divulge personal medical so that the carriers are in a position to comply with any future federal mandate without a disruption in operations. Such a purpose is not inherently improper, with two caveats.

First, any future mandatory vaccination programs must conform to exemptions applicable under federal law based on religious faith and/or disability. These exemptions have been previously addressed in a prior memorandum to AMFA members regarding COVID Vaccination – A Review of Your Legal Rights.

Second, with respect to the vaccination information obtained pursuant to new programs, the employers must comply with the Americans with Disabilities Act’s (ADA) confidentiality provisions. 42 U.S.C. § 12112(d)(4). The Equal Employment Opportunity Commission (EEOC) has determined that ADA’s confidentiality provisions relating to employee medical information extend to documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination.

Although the ADA does not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee’s personnel files under the ADA. Employers are required by law to make every effort to limit the number of management representatives who are informed of your vaccination status.
Even if an individual has no disability, they may have a cause of action under the ADA in the event that the Act’s limitations on medical inquiries and/or confidentiality provisions are violated. See, e.g., *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) (“a plaintiff need not be disabled to state a claim for the unauthorized gathering or disclosure of confidential medical information.”); *Pollard v. City of Northwood*, 161 F. Supp. 2d 782, 793 (N.D. Ohio Mar. 19, 2001) (“a plaintiff does not have to be a qualified individual with a disability to gain protection under 42 U.S.C. § 12112(d)(4).”); *In re NHL Players’ Concussion Injury Litig.*, 120 F. Supp. 3d 942, 950 (D. Minn. 2015) (“Persons need not be disabled in order to state a claim for the unauthorized gathering or disclosure of confidential medical information.”).

If you believe that your information regarding your vaccination status has been improperly disseminated, you would have standing to file a charge with the Equal Employment Opportunity Commission (EEOC) and, upon conclusion of the EEOC investigation, pursue your claims in federal court.

Fraternally,

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