



Legal Aspects of COVID-19 Vaccination for Employers

Presenters

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Caitlin A. Donahue, Esq.

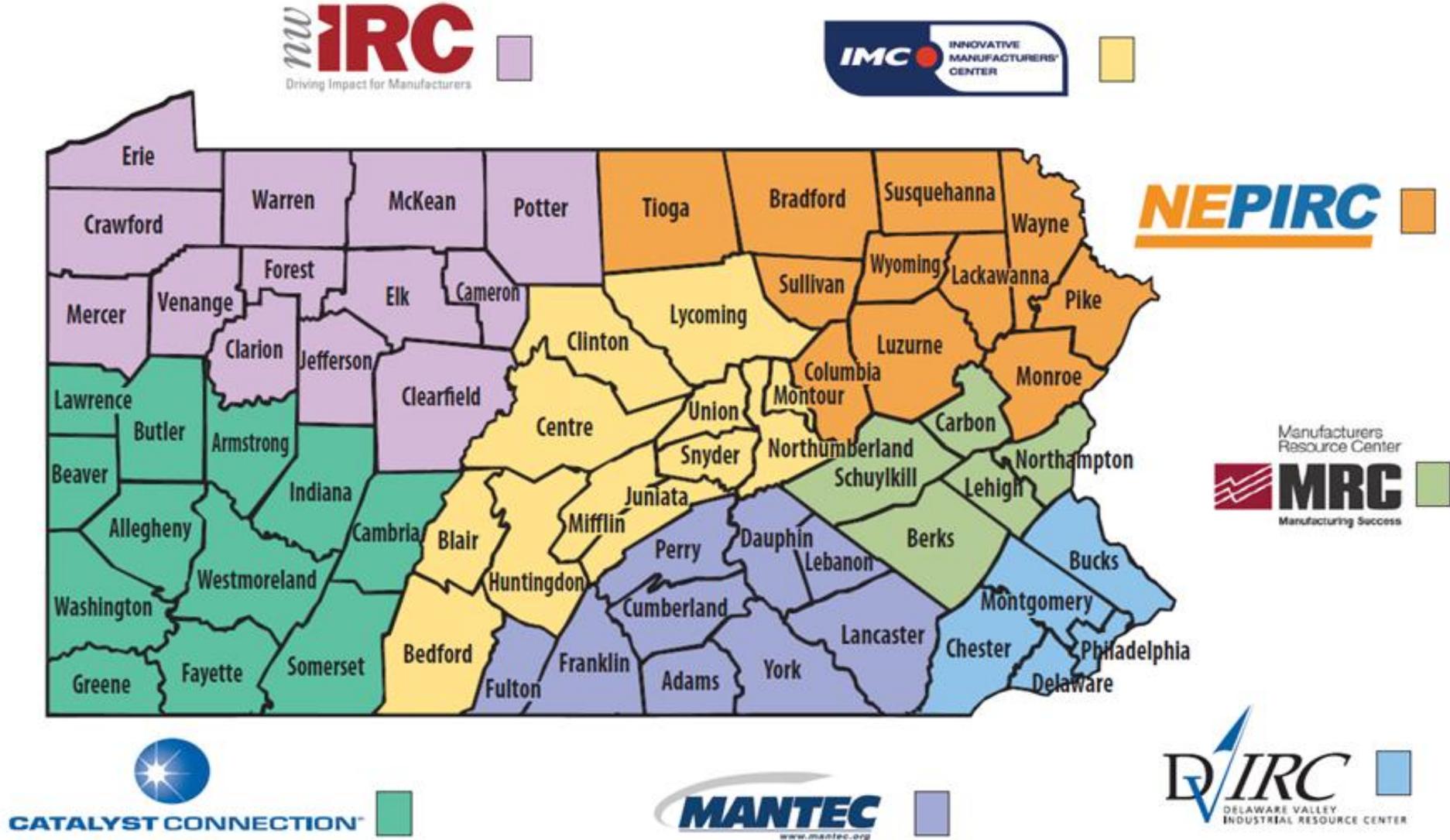
Original Presentation ~ February 10, 2021

Welcome

- **Introductions:** Eric Joseph Esoda, President & CEO, Northeastern Pennsylvania Industrial Resource Center (NEPIRC)
- **Featured Presenters:** James F. Devine, Esq., Partner, Cipriani & Werner, PC
Caitlin A. Donahue, Esq., Associate, Cipriani & Werner, PC
- **Moderator:** Chelsey Coslett, Marketing Specialist, Northeastern Pennsylvania Industrial Resource Center (NEPIRC)



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Housekeeping Tips & Suggestions

- All attendees are automatically muted with their camera turned off.
- Attendees can submit questions at any time using the **Q&A button**.
- Our presenters will field questions at designated breaks throughout the presentation.
- Questions not addressed during the presentation will be answered via email by Attys. Devine and Donahue within two weeks.
- A document summarizing each question and response will be available on NEPIRC's website within three weeks. Attendees will receive a link to that document via email.
- This webinar is being recorded and will be available on NEPIRC's website. Attendees will receive a link to that video via email.

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Can Employers Mandate Vaccination?

The EEOC Speaks

- On December 16, 2020, the EEOC updated its COVID-19 guidance.
- Employers can implement and enforce mandatory COVID-19 vaccination policies for employees.

So Many Questions...

- Will businesses have the option of providing on-site vaccinations for their employees?
- Will businesses incur any potential liability for providing or requiring vaccines?
- Should businesses become involved in public awareness programs to promote the vaccine?
- Will vaccinated individuals be exempt from future quarantine requirements?
- What about transportation, storage and accessibility?

Why the Dilemma?

“You have to have a good reason to give people about why it is ethically right for them to subject themselves to a vaccine they don’t want to get.”

- Ubaka Ogbogu, Professor of Law and Bioethics at the University of Alberta

Is it Right? Is it Ethical?

- Some employees may have social, cultural, religious, or political reasons for not wanting to get vaccinated – is that enough?
- “Do we want to distinguish between people who we think have a good reason to not want to be vaccinated and those who don’t?”
- Another factor to consider is that although the two vaccines authorized so far are at least 94% effective in reducing the risk of developing COVID-19, whether they also reduce the risk of transmitting the coronavirus to others has not yet been tested.

Effective Communication and Dialogue

- Are you able to show the vaccine is the only thing that would prevent them from transmitting the disease?
- Employers will still be responsible for providing PPE and other safety equipment.
- Educate employees with facts:
 - What the vaccine will do
 - Risks associated with foregoing vaccination
 - Options for vaccination

Mandatory: Yes – However...

- Employers can require that employees receive the COVID-19 vaccine as a condition of returning to, or remaining in, the workplace.
- However, there are two exceptions:
 - Medical disabilities
 - Sincerely-held religious beliefs
- If an employer determines that an unvaccinated employee presents a **direct threat to the health and safety of persons in the workplace** that cannot be reduced or eliminated through a reasonable accommodation, the employer can exclude the employee from the workplace.
 - **Objective evidence**
- Employer may not automatically terminate the employee.
 - **Must assess whether other accommodations, such as remote work, can be provided**

Medical Disability / Other Considerations

- People with weakened immune systems due to other illnesses or medication
- People with autoimmune conditions
- Persons who have or had Guillain-Barre Syndrome
- People who have Bell's Palsy
- Pregnant women or women who may plan on becoming pregnant within the next 10 years
- People who have a history of Anaphylaxis

Sincerely Held Religious Beliefs

- Does the employee sincerely hold a religious belief that conflicts with employment requirements?
- Has the employee informed his/her supervisor of the conflict?
- Has the employee been penalized for failing to comply with employment requirements?
- Is the employee's belief or practice of a religious nature?

Religious Belief Exemption

- **Factors to consider:**
 - **Whether the employee behaves in a manner inconsistent with the professed belief**
 - **Whether the benefit is likely being sought for secular reasons**
 - **Courts are deferential to religious claims – even claims well outside the mainstream**
 - **Finally, could the employer have accommodated the religious belief without imposing an undue hardship?**

Criteria for Accommodation

- Employers must assess four factors in making this determination:
 - The duration of the risk presented by the unvaccinated employee
 - The nature and severity of the potential harm presented by the unvaccinated employee's presence in the workplace
 - The likelihood that harm will occur
 - How imminent that harm is to others in the workplace
- Only after conducting this analysis and concluding that the disabled employee cannot be reasonably accommodated can the employer exclude the employee from the workplace.

Is that it?

- That does **not** mean that the employer may terminate the employee's employment.
- It means that the employer will need to assess if other accommodations can be provided to permit the employee to continue working, such as permitting the employee to work, or continue to work, remotely or having the employee work in another location on-site where the threat is reduced or eliminated.
- This implicates policies, past practices and job descriptions.

After Vaccination, Guidelines Must Still be Followed

- Wear a mask
- Stay at least six feet away from others
- Avoid crowds
- Wash hands with soap and water
- Follow CDC travel guidance
- Follow quarantine guidance after exposure to COVID-19
- Follow any applicable workplace guidance

Not a Medical Exam Under the ADA

- Administration of a COVID-19 vaccine by an employer, or by a third-party with which the employer has contracted to provide vaccinations to employees, such as an outside health care clinic or similar provider, is not a “medical examination” according to the Americans with Disabilities Act (ADA).
 - *Not seeking information about the employee’s current health status*

Not GINA

- Administering the vaccine or requiring employees to provide proof of vaccination does not implicate the Genetic Information Non-Discrimination Act (GINA).
 - *Genetic information is not being used to make employment decisions and no genetic information is being acquired by the employer or disclosed by the employee.*

Must be Job Related – No?

- While administration of the vaccine is not a “medical examination” under the ADA, the U.S. Centers for Disease Control and Prevention (CDC) suggests health care providers should ask certain pre-vaccination screening questions to ensure there is no medical reason for a person not to receive the vaccine.
- These questions may constitute a “medical examination” under the ADA because they could inquire into a person’s disability status.

What Can I Do?

- If an employer is going to require that employees answer pre-vaccination screening questions that are disability-related:
 - Must be able to demonstrate that the questions are job-related
 - Consistent with business necessity
 - Based on objective evidence
 - Presents a direct threat to his/her own health or safety or that of others

Now that Crosses the Line!

- Pre-vaccination screening questions could implicate GINA:
 - If they elicit disability-related information
 - Must evaluate questionnaire for potential genetic conditions in the screening checklists for vaccine contraindications

Did You or Didn't You?

- Simply asking or even requiring employees to show proof they received a COVID-19 vaccine is not prohibited.
- Be careful not to ask why they did not receive the vaccine.
 - Could be a prohibited disability-related inquiry
 - Unless inquiry was job related and a business necessity
- Employers who ask employees to provide proof of vaccination also should exercise caution.
 - Make sure to ensure the information does not disclose any medical information beyond proof of vaccination.

HIPAA? What About It?

- U.S. Department of Health and Human Services (HHS) issued the “Standards for Privacy of Individually Identifiable Health Information” – the Privacy Rule
- Established a set of national standards to address the use and disclosure of individuals’ health information called Protected Health Information (PHI)
- Organizations subject to the Privacy Rule, called Covered Entities
- It also set standards for individuals’ privacy rights and how their health information is used
- Covered entities include health plans, health providers, and clearinghouses – NOT employers
- Employment records and employer wellness programs are exempt from PHI

So, What Do We Do with this Information?

- Retention of vaccination information shall be kept separate and apart from the employee personnel file. This will ensure the employee's PHI is kept confidential.
- Consider implementing Non-Mandated and Mandated Vaccination Policies.

Religion Now More than Ever!

- Employers also must accommodate employees whose sincerely-held religious beliefs prevent them from receiving the COVID-19 vaccine, unless doing so would present an undue hardship to the employer.
- If that is the case, the employer can exclude the employee from the workplace, but, as with disabled employees, cannot automatically terminate the employee and must determine if any other accommodations can be provided to permit the employee to continue working.

It's Your Fault – Not Mine!

- What if the employee suffers from some type of side effect, is the employer liable?
- Pennsylvania Workers' Compensation Act (WCA) should provide the sole remedy for illness or injury arising from the vaccine
- Adverse medical reaction to vaccine is likely deemed “in the course and scope of employment”
- Mandated or Not

Let's Talk About Rights and Duties

- Employer protections under PA WCA when the employee refuses the vaccine for unprotected reasons:
 - Employer cannot force an employee to waive their rights under WCA nor can the employee voluntarily waive their rights.
 - However, the employer does have a valid basis for denial of a worker's compensation claim if/when the employer has proof that the employee's injury occurred as a result of "violation of a positive work order".
- Written refusal, signed acknowledgment

I'm Not Working with Them

- An employer who allows a non-vaccinated employee to come to work is at risk for liability exposure for the spread of COVID-19 to customers, visitors/vendors, contractors – anyone who has contact and can prove contact/exposure resulted in contracting virus.
- Back to the basics – evaluate Return to Work Program:
 - Job descriptions
 - Remote work
 - Essential functions

What's in a Job Description?

- Job title
- Essential functions
- Make it objective
- Legitimate business purpose
- Promote growth
- Scrutinize qualifications
- Remember intangibles
- Job summary
- Marginal functions
- Make it achievable
- Advance culture
- Develop interactively
- Define physical requirements
- Consider accommodations

So, What's Essential?

- A job duty is an essential function if any of the following is true:
 - The reason the job exists is to perform that function; for example, an essential function of a pilot is to fly planes
 - Only a few employees can perform the function
 - The function is so highly specialized that the employer hires people into the position specifically because of their expertise in performing that function

Why Employers Must Take Care

- The Equal Employment Opportunity Commission (EEOC) considers:
 - The employer's assessment of which functions are essential
 - Whether the position exists to perform that function
 - The experience of employees who actually hold that position
 - The time spent performing the function
 - The consequences of not performing the function
 - Whether other employees are available to perform the function
 - The degree of expertise or skill required to perform the function

Remote Work

- A **remote employee** is someone who is **employed** by a company but works outside of a traditional office environment.
 - **100% Remote Work**: These positions are fully remote and allow you to work from home for all working hours, with no in-office time or travel required
 - **Remote: During Pandemic**: Jobs with this classification are only remote during the pandemic until the company decides that employees can be back in the office
 - **Partial Remote Work**: Partial remote jobs either require some travel or some time in the company's office
 - **Option for Remote Work**: These jobs give workers the option to either work from home or go into the office – or both

Questions?

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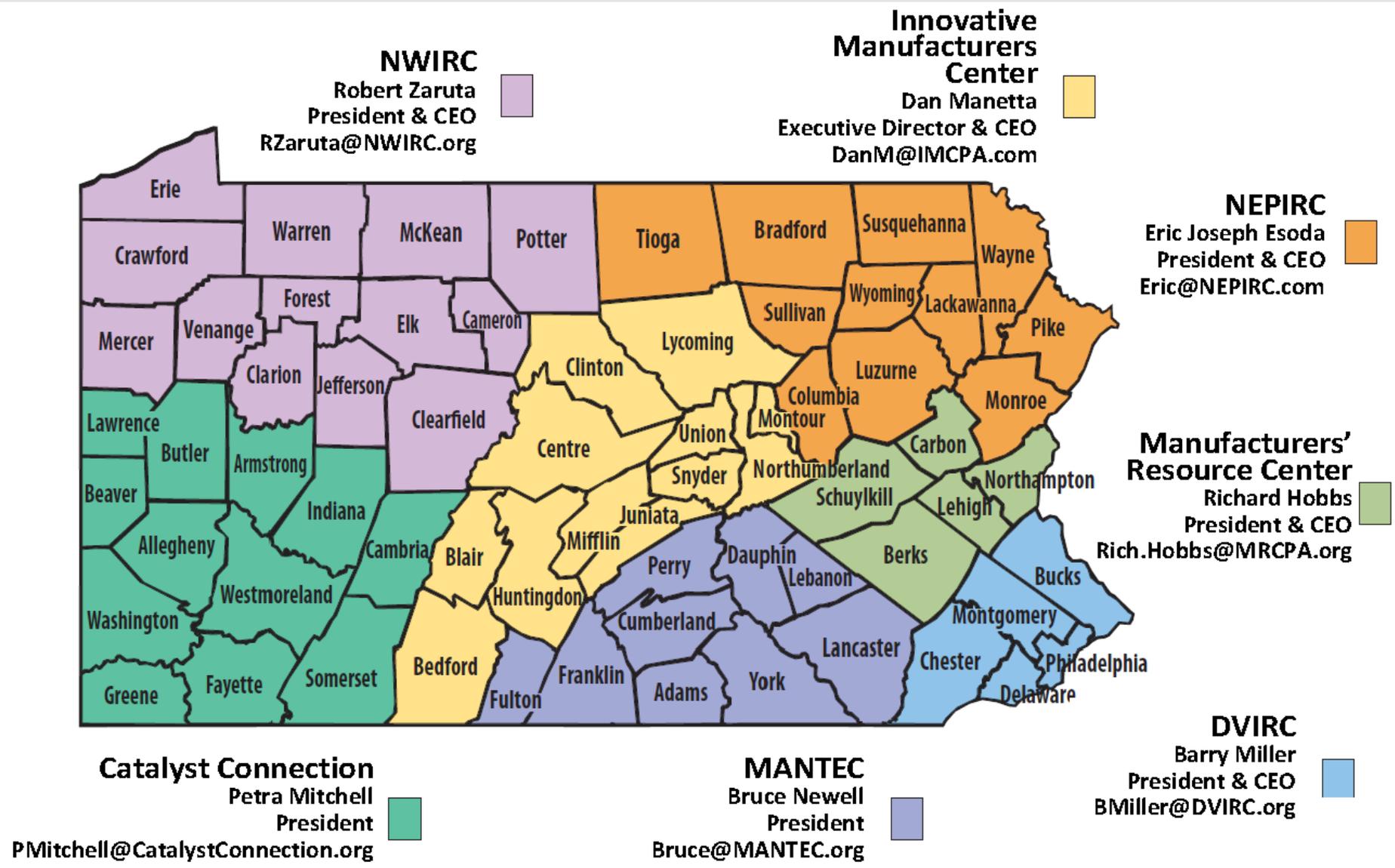
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