**Answers at 8, October 15, 2021**

This week’s Answers at 8 focused on legal updates and ADA accommodations, a frequent question from our members who call in to the Advice Team.

**Legal Updates:**

* Pfizer and Moderna’s vaccine boosters are now recommended for certain populations. Boosters have been proven to significantly increase immunity to the virus. Johnson and Johnson’s booster is still under consideration. We do not advice mandating boosters at this time.
* If you are a federal contractor or subcontractor, make sure you carefully review any changes to your contracts, even if you believe you are not covered by the vaccine mandate requirements, as the guidance strongly recommends the language/clause be included in other contracts as well.
* It is NOT best practice to decline ALL religious accommodations upfront and several employer policies are under scrutiny in the courts. These situations must be dealt with on a case-by-case basis.
* The idea of changing health premiums based on vaccination status (like Delta airlines) was supported by the DOL in this [FAQ](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-50.pdf). The DOL gives little clarity on the question of whether religious objections should be accommodated by offering an alternative to achieving the wellness premium, but specifically states it is required for ADA reasons. There is a limit on the premium, and the employer should always consider employee morale and get advice from their benefits broker.
* OSHA has submitted its ETS to the White House for employers with 100+ employees. More information and details should be coming up in the next week. NC has a state OSHA program and will need to accept the OSHA ETS or put in place its own program which meets or exceeds the federal one. Employers should be preparing to either test weekly or mandate testing by surveying staff, educations staff, and considering the impact of various options. Catapult’s [COVID toolkit](https://letscatapult.org/toolkits/covid-and-pandemic-toolkit/) may help.
* Mental health continues to be a concern at this time. Employers should remember that mental health can be a taboo topic that employees do not share with others. It is beneficial for employees to feel comfortable discussing concerns and asking for accommodations. Make sure your company is providing mental health awareness and “advertising” mental health supports.

**ADA Accommodations:**

The ADA covers most employers with 15+ employees and requires an interactive process to occur (between employee, employer and sometimes physician) when an employee cannot perform the essential functions of their job DUE TO a medical condition (mental or physical). As attendance is an essential function of the job, this would include attendance issues that are not already covered under FMLA or another employer leave program.

Employers should bear in mind:

* Never make assumptions about the reason an employee is having productivity or attendance issues. Address the concern and ask if they know why they are having issues and how you can help.
* If the employee self-discloses or the link between productivity and a medical issue is clear – for example, an individual in a wheelchair cannot access a top floor meeting – then the interactive process should begin.
* The employee and the employer should discuss possible accommodations that will allow the person to perform the essential functions of their job (removing essential functions or allowing for sub-par performance is not required).
* Many employers choose to require ADA documentation from an employee’s physician if the disability is not open and obvious. The doctor can be helpful in determining accommodations as well. The employee generally uses their own physician to obtain this documentation. If an employer requires a doctor’s exam for other reasons, the employer may need to pay for the exam, so contact Catapult’s advice team if you have concerns.
* If no accommodation can be found, leave is an option. Always consider FMLA and other company leave first, but if those have been exhausted or do not exist, leave can be an accommodation under the ADA as it may help the individual resume the essential duties with or without other ongoing accommodation. Generally ongoing intermittent time off is not an acceptable accommodation as it is not intended to help the employee return to the essential functions of their job (including attendance).
* Safety issues can trigger the interactive process as employees must be able to perform their job without endangering themselves or others. Do not assume that someone’s condition makes them unsafe, but if you have true evidence that they are unsafe (driving erratically, falling down repeatedly, etc.) or if they state that they do not feel they can work safely, then contact Catapult’s advice team to discuss.
* Undue hardship can be difficult to prove. If the position is easy to replace, fill it with a temporary staff member. If the position is hard to replace and takes an extensive time to train, then unless the employee’s leave is extensive, allowing them to be out is unlikely to be an undue hardship. Always contact the advice team or your attorney if you are considering declining to accommodate someone.
* The [JAN Network](Call%20the%20JAN%20network%3A%20https%3A/askjan.org/info-by-role.cfm#for-employers if you need support.) is a helpful resource to determine good accommodations.

Written by a Catapult Advisor.