

Mandating COVID Vaccines in the Workplace: A Summary of EEOC's New Guidance



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The U.S. Equal Employment Opportunity Commission (EEOC) recently released its guidance concerning employers requiring COVID-19 vaccinations of their workforces. The EEOC does not expressly state that mandating vaccines is permissible, but it does address many of the questions and issues that may arise should an employer mandate the COVID-19 vaccine. In short, it appears that an employer may require its employees to be vaccinated unless an employee has a qualifying exemption under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), Title II of the Genetic Information Nondiscrimination Act (GINA), or other similar workplace laws.

Potential Pitfalls with Pre-vaccination Screenings

Under the ADA, employees are protected from inquiries and requirements of medical examinations by their employers. The EEOC clarifies that the vaccination itself is not a medical examination for purposes of the ADA. A medical examination “seeks information about an individual’s physical or mental impairments or health.” In administering the vaccine, an employer is not seeking information about the employees’ impairments or health.

However, should an employer administer the vaccine directly or contract with a third party to administer the vaccine to its employees, there may be other aspects of the vaccination process that would subject the employer to restrictions.

For example, the required pre-vaccination medical screening includes questions that would likely prompt an employee to disclose a medical issue or disability. This means that if the employer or third-party contractor is screening employees, the employer must demonstrate that the screenings are “job-related and consistent with business necessity.” This standard requires an employer to have a “reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.” However an employer may avoid this requirement if it elects to either (1) simply recommend or strongly encourage its employees to be vaccinated or (2) require the vaccine but not coordinate the employees’ receipt of that vaccine – i.e., the employees may receive the vaccine at an independent pharmacy that has no relationship with the employer.

An employer can simply require proof of a vaccination without implicating any concerns or obligations under the ADA. Questions regarding the proof should be limited to whether or not the employee received the vaccine and not why the employee did or did not receive it. This will avoid the questioning becoming a disability-related inquiry under the ADA.

The required pre-vaccination medical screening may also implicate protections for employees under GINA, although this may be less likely than the ADA. GINA protects employees’ genetic information. Though the COVID-19 vaccine does not alter or interact with DNA at all, if the pre-vaccination screening asks questions surrounding protected genetic information, then GINA protections will be implicated.

If an employer mandating employee vaccination requires proof of vaccination, they should request that the proof not contain any medical information or genetic information.

Accommodation Issues in Mandating the Vaccine

While the ADA imposes many restrictions on employers, it does allow employers to institute qualifications standards requiring that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” While a vaccination requirement would constitute such a qualification standard, the EEOC has advised that the burden on employers is higher if they wish to exclude an employee from the workplace because they have objected to receiving the COVID-19 vaccine.

In such a circumstance, employers must show that allowing an unvaccinated employee into the workplace would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” To determine whether such a significant risk or substantial harm exists, employers must consider four 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.

If an employer finds that a direct threat does exist, an employer cannot exclude an employee from the workplace unless there is “no way” to provide a reasonable accommodation that would eliminate the threat such as wearing a mask. EEOC guidance further states that an employer must still consider alternative accommodations such as working remotely even if an employee can be excluded from the workplace because a direct threat cannot be reduced to an acceptable level without an undue hardship.

Accommodation issues can also arise due to an employee’s religious objections pursuant to Title VII of the Civil Rights Act of 1964. If an employee refuses the COVID-19 vaccination on the basis of a sincerely held religious belief, practice, or observation, then the employer must provide a reasonable accommodation that does not impose an

undue hardship. Though the employer must assume that the request for religious accommodation is valid, if an employer has an objective basis for questioning the religious nature or sincerity of the belief, then the employer may request additional supporting information.

Again, if an employer is unable to provide a reasonable accommodation and must exclude the employee from the workplace, the employer may not automatically terminate the employee and should consider other accommodations such as working remotely.

The threshold for establishing an undue hardship under Title VII is lower than the threshold for establishing an undue hardship under the ADA.

Employers should make sure to document their interactive processes with employees who object to receiving the vaccine for these grounds discussed above.

OSHA

One of President Joe Biden's first Executive Orders directed the Occupational Safety and Health Administration (OSHA) to issue new guidance which will likely require employers to take additional measures in the workplace to protect employees from COVID-19. While OSHA has not yet commented on mandating vaccines in the workplace, this guidance may address that issue as well. In the absence of specific guidance on COVID-19, OSHA has consistently supported employers' rights to mandate vaccinations, like flu shots. Similar to EEOC recommendations, OSHA provides for protections for employees who refuse vaccinations. Under the whistleblower provisions, employees who refuse the vaccine based on a reasonable belief that he or she has a medical condition which would create a risk or danger of serious illness or death should they be vaccinated may not be required to be vaccinated. These employees are also protected from retaliation.

However, while OSHA provides protections for employees, under OSH Act of 1970, OSHA requires employers to provide a place of employment "free from the recognized hazards that are causing or likely to cause death or serious physical harm to his employees." Employees, additionally, are required to comply with occupational health rules and standards. It is possible that COVID-19 could be considered "likely to cause death or serious physical harm" and the necessary protections employers must take could include mandating COVID-19 vaccines.

Without direct guidance from OSHA, employers will need to balance their obligations to maintain a workplace free from recognized hazards while also being mindful of OSHA whistleblower protections.

Conclusion

As you can see, a labyrinth of laws and considerations exists that employers must navigate before deciding to mandate COVID-19 vaccination. Those who choose to mandate and facilitate vaccinations are more likely to face challenges in abiding by ADA, Title VII, and other protections than those who simply strongly encourage vaccinations. Managers and supervisors responsible for coordinating an employer's vaccination requirement with employees should be well versed in identifying accommodation issues and coordinating the appropriate response (i.e., further documentation requirements or possible accommodations).

Employers who decide to mandate or encourage vaccination should consider educating their workforce in advance on the vaccination. Like all employment policies and processes, employers should also be mindful of treating like employees similarly to mitigate any legal claims.

This article is a summary of the EEOC's most recent guidance. We expect this area will continue to evolve with guidance potentially issuing from other federal agencies as well as states and localities. Employers should make sure to consult with their counsel to have a better understanding of the nuanced legal implications that arise when it

comes time to implement a vaccination policy.

Please call either of the employment attorneys below for any questions regarding this client alert.

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