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COVID-19 Vaccine Policies—What Employers Should Know

U.S. Legal Considerations Regarding Implementing a COVID-19 Vaccine Policy, Including the EEOC’s Recent Guidance

SUMMARY

On December 14, 2020, the first doses of the COVID-19 vaccine were administered to individuals in the United States. Accordingly, many employers are considering whether they can—or should—implement policies mandating COVID-19 vaccinations for their employees when the vaccine becomes widely available.

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) updated its guidance, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws](#),¹ to include answers to questions that specifically address COVID-19 employee vaccine policies. In short, the guidance states that employers may implement mandatory COVID-19 vaccine policies for employees as a condition to returning to, or remaining in, the workplace subject to certain exceptions. In this memorandum, we discuss the EEOC’s new COVID-19 vaccination guidance as well as certain other legal considerations for employers as they develop their workplace policies in anticipation of widespread distributions of COVID-19 vaccines in 2021.

EEOC GUIDANCE ON VARIOUS EQUAL EMPLOYMENT OPPORTUNITY LAWS

Americans with Disabilities Act. As background, the Americans with Disabilities Act (“ADA”) protects both applicants and employees from disability discrimination. The ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, among other things. The EEOC’s December 16 guidance explains that employers may require their employees to get a COVID-19 vaccine, subject to certain limitations.

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Responding to Employee Disability Concerns

If an employee is unable to participate in an employer's mandatory vaccination program due to a disability, the employer must determine whether the unvaccinated employee would pose a direct threat due to "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Employers should conduct an individualized analysis to determine whether such a direct threat exists. The four factors employers should consider are: (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. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to COVID-19 in the workplace.

If an employer determines that an employee who cannot be vaccinated due to a disability poses a direct threat to the workplace that cannot be eliminated or mitigated by a reasonable accommodation, the employer may exclude the employee from the workplace, but this does not mean that the employee may be terminated for this reason. In that case, employers should carefully consider EEO laws or other federal, state and local authorities to determine whether other rights apply. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may still be entitled to an accommodation to perform the current position remotely.

Applicable guidance states that managers and supervisors who communicate with employees about compliance with the employer's vaccination requirement should "know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration." Both employers and employees should engage in a flexible, interactive process to identify accommodations that do not constitute an undue hardship, which is defined as a significant difficulty or expense. This process should include determining whether obtaining supporting documentation of the employee's disability is necessary and consideration of accommodation options given the workforce and the employee's position. Also relevant to the undue hardship consideration is the "prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown." In determining whether an accommodation exists that would not pose an undue hardship, the facts about the particular job duties and workplace are relevant, and employers may wish to consider CDC and OSHA recommendations. Employers should be mindful that it is unlawful to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

The Vaccination Itself Is Not a Medical Examination

The EEOC guidance confirms that the "vaccination itself is not a medical examination" within the meaning of the ADA, stating, that if an employer administers a vaccine to an employee "for protection against contracting COVID-19, the employer is not seeking medical information about an individual's impairments or current health status, and, therefore, it is not a medical examination."

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Pre-Screening Inquiries May Constitute a Medical Examination

While the administration of the vaccine itself is not a medical examination under the ADA, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. As such, employers that require employees to receive a COVID-19 vaccine must ensure that any pre-screening questions asked of employees are "job-related and consistent with business necessity." To meet this standard, employers must "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."

Significantly, the guidance notes that there are two situations in which disability-related screening questions can be asked without meeting the "job-related and consistent with business necessity" standard. First, voluntary vaccination policies need not meet this standard because vaccine screening questions must also be voluntary. If employees choose not to answer vaccine screening questions, employers may choose not to administer the vaccine to those employees, but may not retaliate against, intimidate, or threaten the employee for refusing to answer the questions. Second, the standard does not apply to pre-vaccination medical screening questions of employees who receive an employer-mandated COVID-19 vaccine from a "third party that does not have a contract with the employer, such as a pharmacy or other healthcare provider." As a result, this exception would apply where the employer requires employees to obtain vaccines from healthcare providers in the community, but does not directly contract with the providers to administer the vaccine to employees.

Proof of Vaccination Is Not a Disability-Related Inquiry

Notably, requesting proof of receipt of a COVID-19 vaccine does not fall within the scope of a disability-related inquiry under the ADA; however, subsequent employer questions, such as inquiring as to why an employee did not receive a vaccine, may elicit information about a disability and would be subject to the ADA standard that they be "job-related and consistent with business necessity." The EEOC advises employers "may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA."

For a discussion of the EEOC's previously issued COVID-19 guidance on the ADA, please review our client memo, "[EEOC Releases Updated Guidance to Employers Regarding ADA-Compliant Practices During the COVID-19 Crisis.](#)"

Title VII of the Civil Rights Act and Responding to Religious Exceptions. As background, Title VII of the Civil Rights Act of 1964, among other things, requires employers to accommodate employees who object to a vaccination because getting it would conflict with their "sincerely held religious belief, practice, or observance," provided that granting an accommodation does not pose an "undue hardship" on the employer.

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The EEOC explains that “undue hardship” under Title VII has been defined as “having more than a *de minimis* cost or burden on the employer” and that employers “should ordinarily assume that an employee’s request for an accommodation is based on a sincerely held religious belief.” If an employer has an “objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance,” the employer may request that the employee provide further supporting information.

If an employee cannot get vaccinated because of a sincerely held religious belief, practice, or observance, and no reasonable accommodation exists, an employer may lawfully exclude that employee from the workplace but this does not mean that an employee may be automatically terminated. Employers should determine whether other EEO, federal, state, or local laws or regulations apply.

Genetic Information Nondiscrimination Act May Be Implicated by Pre-Screening Questions. Under Title II of the Genetic Information Nondiscrimination Act (“GINA”), employers may not (1) use genetic information to make employment decisions or (2) acquire or disclose genetic information, except in six narrow circumstances. The EEOC has stated that administering COVID-19 vaccinations to employees or requiring employees to provide proof of vaccination does not implicate GINA “because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of ‘genetic information’ as defined by statute.” However, pre-vaccination screening questions may elicit information about genetic information, such as questions regarding family members, which *may* implicate GINA. Whether GINA is applicable to pre-vaccination screening questions will depend upon the specific questions being asked. Employers who intend to require employees to provide proof of receipt of a COVID-19 vaccine may consider prohibiting employees from providing genetic information as part of their documentation.

OTHER FEDERAL LAW CONSIDERATIONS

Pregnancy Discrimination Act. The Pregnancy Discrimination Act of 1978 prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions.² As of the date of this publication, the [CDC has stated](#) that “[t]here are no data on the safety of COVID-19 vaccines in pregnant women.” Employers may wish to consider how mandatory vaccination policies could affect pregnant employees and begin planning reasonable accommodations for them.

Occupational Safety and Health Act. To date, the Occupational Safety and Health Administration (“OSHA”) has not released guidance on whether employers may mandate that employees receive COVID-19 vaccines, but OSHA released [guidance](#) in 2009 with regard to flu shots.³ There, OSHA explained that employers may require employees to take both seasonal and H1N1 vaccines. OSHA further explained that an employee who refuses to get vaccinated due to “a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970,” which provides whistleblower safeguards.

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National Labor Relations Act. Employers that are subject to the National Labor Relations Act (“NLRA”) and that are obligated to engage in collective bargaining with employees should consider NLRA implications that may arise by implementing a mandatory vaccination policy. Employers may wish to review any existing contracts to ensure that obligations to bargain collectively are not triggered by a mandatory vaccination policy.

IMPLICATIONS FOR EMPLOYERS

The recently issued EEOC guidance provides important clarifications for employers, and should be carefully considered by employers in developing and implementing workplace vaccination policies in the United States. That being said, important questions still remain, such as what specific circumstances constitute an undue hardship under the ADA.

In connection with the development and implementation of any workplace vaccination policy, employers also need to be mindful of other important considerations, such as:

- **Record-keeping.** Employers should consider an efficient record-keeping system to keep track of employees’ vaccination documents, including any opt-out requests and determinations of such requests. In order for a workplace vaccination policy to be effective, an individual or a department must be tasked with ensuring that only vaccinated employees are permitted to enter the workplace. To achieve this, employers may want to develop forms for employees to use to request certain exemptions, as well as a deadline by which employees must either request an exemption or receive a vaccine.
- **Exemptions and Accommodations.** Employers may want to begin thinking about reasonable accommodations for employees who may be exempt from a mandatory vaccination policy. Potential accommodations could include, for example, additional personal protective equipment, continued remote work or a modification of duties to avoid high-risk activities.
- **Confidentiality.** Employers must remember to keep confidential all medical records of employees, including medical information obtained in the course of a vaccination program.
- **Other Potential Sources of Liability.** This memorandum is limited to the U.S. federal regulatory regimes discussed above. Employers should also consider the requirements and implications of state regulations and laws, and the laws and regulations of any non-U.S. jurisdictions in which they operate. For example, employers may face liability pursuant to state workers’ compensation laws if an employee, who obtained the vaccine due to a workplace mandatory vaccination policy, suffered a severe adverse reaction to the vaccine. Employers should be aware that they may be susceptible to negligence lawsuits brought by non-employees, such as customers, vendors and visitors, who have been exposed to COVID-19 through contact with an unvaccinated employee.

ADDITIONAL INFORMATION

To stay informed of litigation and regulatory developments that affect the workplace, [click here](#) to subscribe to our *Legal Developments Affecting the Workplace* [blog](#).

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ENDNOTES

- 1 THE U.S. EQUAL EMPLOYMENT AND OPPORTUNITY COMMISSION, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (page last modified December 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
- 2 42 U.S.C. §§ 2000e *et seq.*
- 3 OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OSHA's position on mandatory flu shots for employees (Nov. 9, 2009), <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

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