

Employer Mandated COVID Vaccines: What are the risks?

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As the roll-out of Covid-19 vaccines continue, and vaccines become more readily available, many employers are considering implementing policies requiring employees to be vaccinated as a condition of returning to work, or to continue working, in the workplace. Employers who are considering implementing a mandatory vaccine policy must be aware of potential issues that may arise under anti-discrimination laws, including the Americans with Disabilities Act (ADA), which requires employers to provide reasonable accommodations to employees with disabilities, and Title VII of the Civil Rights Act of 1964 (Title VII), which requires accommodation for an employee's sincerely held religious beliefs.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) addressed these issues for the first time in its revised guidance. The EEOC has indicated that employers are, in fact, lawfully permitted to require employees to be vaccinated before returning to the office, subject to certain important limitations and exceptions discussed below.

Implications under the ADA

The ADA prohibits an employer from discriminating against employees who have disabilities and requires employers to provide reasonable accommodations to assist disabled employees in performing the essential functions of their jobs. The ADA also generally prohibits employers from: requiring a medical examination; inquiring as to whether the employee is an individual with a disability; or inquiring as to the nature or severity of a disability, unless such examination or inquiries are both "job-related and consistent with business necessity." Notably, although pregnancy itself is not a disability, many pregnancy related conditions may qualify as disabilities that trigger protection under the ADA.

Regarding the COVID vaccine, The EEOC's revised guidance makes it clear that neither the administration of a vaccination, nor the requirement that an employee show proof of vaccination, is a "medical examination" or "disability-related inquiry." Therefore, simply requiring a vaccine does not implicate the ADA. Information obtained during the vaccination process, however, may put the employer on notice that an employee has a disability. Notice of a disability may trigger the ADA and potentially require the employer to engage in the interactive process to determine if any reasonable accommodations are necessary.

The risk of obtaining such information is more prevalent in situations in which employers provide the vaccines, either directly or indirectly through third parties. This is because it is necessary, as part of the vaccine process, to obtain some information regarding the employee's medical history prior to administering the vaccine. Under current U.S. Centers for Disease Control and Prevention (CDC) guidance, health care providers who administer vaccinations are advised to ask certain questions before administering a vaccination. The information is gathered to ensure that there are no medical reasons for which the individual must be denied a vaccine.

While the administration of the vaccine on its own would not rise to the level of a medical examination or disability-related inquiry, it is likely that many prescreening questions to determine if someone should receive the vaccination would. Such questioning may also require the disclosure of certain information, such as family medical history, that would violate GINA.

Under the ADA, therefore, and given the uncertainty of what the prescreening questions might expose, any employer directly or indirectly administering the vaccine must assume that the prescreening questions will uncover disability related information, and justify each inquiry, prior to administration, as job-related and consistent with

business necessity.¹ This requirement, and the hazards associated with not only the physical aspects of administering the vaccine but also the potential exposure of disability related information in the process, exposes employers to increased risk.

The exposure related to employer mandated vaccines is minimized, although not completely eliminated, when the employer does not administer the vaccine, but simply requires proof of vaccination. In this scenario the employer will not have direct access to the medical information elicited as part of the pre-vaccine screening, eliminating the risks associated with asking those potentially disability disclosing questions. However, the risk to even non-administering employers may resurface if an employee refuses or is denied the vaccination. Questions by an employer, for example, as to why the vaccine was not administered may also elicit information about a disability. Even this disability elicited information would be subject to the pertinent ADA's 'job-related and consistent with business necessity' standard.

What this means for employers is that while requiring vaccination, or proof of vaccination, does not automatically implicate the ADA, screening and/or follow-up questions may pose risk and trigger employer obligations under the law.

Additionally, should an employee refuse or be denied the vaccine due to medical reasons, the EEOC has made it clear that the employer may not automatically exclude the employee from the workplace. Instead, the EEOC guidance states that "the employer must show that an unvaccinated employee 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.'" Employers are further advised that they should conduct an "individualized assessment" of four factors, in the context of current medical knowledge and objective evidence, when determining whether a direct threat exists: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. When determining each of these factors, the EEOC also requires proper consideration of the number of employees in the workplace who have already been vaccinated. "A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite."

Even if an employer conducts the individualized assessment and determines that an unvaccinated worker poses a direct threat, the EEOC cautions that it cannot then exclude that employee from the workplace "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat."

As with assessing the direct threat, when evaluating whether accommodations pose an "undue hardship," the revised EEOC guidance requires the employer to factor in the number of employees who already have received a COVID-19 vaccination, and the amount of contact the unvaccinated individual would have with others whose vaccination status is unknown.

If there is no reasonable accommodation, absent undue hardship, that would eliminate or reduce the risk posed by an unvaccinated employee, the employer can exclude the employee from entering the workplace. However, the EEOC guidance also states that this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other accommodation can be made and/or if other rights apply under federal, state and local law. For example, employees may be entitled to work remotely or take leave under other laws and/or the employer's existing policies.

¹Generally speaking, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat⁽²²⁾ due to a medical condition.

Implications under the religious accommodation requirements contained in Title VII

Title VII of the federal Civil Rights Act requires employers to provide reasonable accommodations to employees who indicate they cannot receive the vaccine because of their sincerely held religious beliefs, practice or observance, unless accommodation would pose an “undue hardship.” With respect to requests for religious accommodations under Title VII, the “undue hardship” standard differs from, and is less stringent than, the standard under the ADA. Title VII requires only that the employer show that providing a religious accommodation imposes “more than a *de minimis* cost or burden on the employer.”

The EEOC provides that an employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. However, employers may be justified in requesting additional supporting information if they have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice or observance. If there is no reasonable accommodation absent undue hardship, the employer can exclude the employee from entering the workplace. However, as with the ADA, employers must engage in an individualized, fact based and interactive process to determine if any reasonable accommodation can be made and must also assess whether the employee has additional rights under federal, state or local law.

Employer Take-Aways

The revised EEOC guidance affirms that employers may mandate that employees be vaccinated for COVID-19, so long as they comply with the requirements of federal civil rights laws and are prepared to address accommodation requests that are based upon disability or religion. To minimize exposure under the ADA, employers who elect to require employees to be vaccinated prior to returning to the workplace may want to consider simply requiring proof of vaccination (as opposed to providing the vaccination directly or through a third party under contract with the employer). In the event that an employee refuses to take the vaccine (or is not allowed to do so) because of medical or religious reasons, the employer needs to assess whether “an unvaccinated employee 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.’” Establishing that “direct threat of significant harm” exists may pose significant challenges, and will be a fact specific determination based on: the employer’s workplace, the need of the employee to have contact with co-workers and/or clients; the work being performed; and, the make-up of the workforce. Employers must engage in an individualized, fact based and interactive process to determine if any reasonable accommodation can be made and must also assess whether the employee has additional rights under federal, state or local law.

Notably, as more information becomes known about available vaccines and their efficacy, longevity, and plan for distribution, it is likely that the EEOC and other agencies will issue updated guidance to address new information as it becomes available. Employers who are considering implementing mandatory or voluntary vaccination policies should keep apprised of developments as they occur and are encouraged to consult with counsel.