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EEOC Weighs in on Workplace COVID-19 Vaccination Programs

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We recently published a [client alert](#) about employer-mandated vaccination policies. On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidance on COVID-19 vaccinations, including employer obligations under the Americans with Disabilities Act (“ADA”) and Title VII.

Below we summarize the key takeaways from the EEOC’s vaccination guidance:

Medical Examinations and Pre-Screening Questions

Under the ADA, an employer may not mandate a medical examination unless it is “job-related and consistent with business necessity.” The EEOC clarified that a COVID-19 vaccination is not a “medical examination.” Rather, a medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.”

However, the EEOC advised that if an employer (or a contractor on the employer’s behalf) asks pre-screening questions before administering a vaccine, those questions could constitute disability-related medical examinations under the ADA.¹ In these situations, the employer must show that any disability-related screening inquiries are “job-related and consistent with business necessity.”

Pre-screening questions about the immune systems of family members may also violate the Genetic Information Nondiscrimination Act (“GINA”), which prohibits using, acquiring, or disclosing genetic information. In light of the potential risks associated with pre-screening questions, the EEOC notes that employers may choose “to request proof of vaccination instead of administering the vaccine themselves.”

Requiring Proof of Vaccination

The EEOC clarified that requiring employees to show proof of vaccination before returning to work would not constitute a disability-related inquiry because it is unlikely to elicit information about a disability. The EEOC advises employers requesting proof of vaccination to “warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.”

Further, employers should exercise caution when inquiring why an employee did not receive a vaccination, as such questions may elicit information about a disability and, therefore, must be “job-related and consistent with business necessity.”

Responding to Employees Who Are Unable to Receive a Vaccination Due to a Disability

The ADA permits employers to adopt workplace qualification standards, which, according to the EEOC, can include a “vaccination requirement.” However, if a vaccination requirement tends to exclude employees with disabilities, it is only permissible if the 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.” 29 C.F.R. 1630.2(r). The EEOC set forth four factors to consider 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.

The EEOC guidance provides that an employee cannot be excluded from the workplace (even if a direct threat), unless there is no way to provide a reasonable accommodation (absent undue hardship) that eliminates or reduces the risk.

Responding to Employees Who Refuse Vaccination Due to a Sincerely Held Religious Belief

In addition to accommodating employees with disabilities, employers must also accommodate employees who cannot become vaccinated because of sincerely held religious beliefs. However, an employer does not need to accommodate an employee if doing so would present an undue hardship. The EEOC notes that courts have defined “undue hardship” under Title VII as having more than a *de minimis* cost or burden on the employer (which is an easier standard to meet than the “undue hardship” test under the ADA).

Terminating Employees who Refuse to Receive the Vaccine

The EEOC stated that an employer can exclude employees from the workplace who cannot get vaccinated because of a disability or sincerely held religious belief when no reasonable accommodation is possible. The EEOC cautioned that this does not mean that such employees can automatically be terminated. Prior to termination, employers must determine if any other rights apply under federal, state, and local authorities.

A copy of the EEOC’s guidance on COVID-19 vaccinations is available [here](#). Employers should closely monitor further developments.



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¹ The Centers for Disease Control and Prevention recommends that health care providers ask certain screening questions before administering a vaccine.

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