

Publications

EEOC Releases Guidance on Mandatory Vaccinations

Related Professionals

[Robert A. Harris](#)

[Daniel J. Clark](#)

[Charles F. Billington III](#)

[Michael C. Griffaton](#)

Related Services

[Employee Benefits and Executive Compensation](#)

[Employment Counseling](#)

[Labor and Employment](#)

CLIENT ALERT | 12.28.2020

Earlier this month, the U.S. Equal Employment Opportunity Commission (EEOC) updated its COVID-19 technical assistance with new information on vaccinations. With the rollout of the Pfizer and Moderna vaccines, the EEOC's new guidance is welcome information regarding how federal anti-discrimination laws may affect employers' use of mandatory vaccination policies. As noted in our [prior alert](#), mandatory vaccinations in the workplace are not a new concept. The EEOC's guidance, which is summarized below, reinforces two key points: mandatory vaccinations are generally lawful, but employers must consider accommodations for those with disabilities or religious beliefs that conflict with the vaccine requirement.

The Americans with Disabilities Act and Accommodations for Individuals with Disabilities

The EEOC guidance confirms that a vaccination itself is not a medical examination. However, pre-screening questions related to the vaccination may implicate the ADA's provision on disability-related inquiries, as they are likely to elicit information about a disability. Thus, if the employer or its agent administers the vaccine (as opposed to an independent third party), the employer must show that such pre-screening questions are "job-related and consistent with business necessity." To meet that standard, "an employer would need 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." Any employee medical information the employer obtained must be kept confidential.

There are two exceptions to this "job-related and consistent with business necessity" standard. First, if vaccination is voluntary, the employee's decision to answer pre-screening, disability-related questions is also voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against the employee. Second, if an employee receives an employer-required vaccination from a third party that does not have a

contract with the employer (for example, a pharmacy or health care provider), the restriction on disability-related inquiries does not apply to the pre-screening questions.

As to accommodations under the ADA, the EEOC explains that an employer may have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” If a safety-based qualification standard like a vaccination requirement screens out an individual with a disability, then 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.” In such cases, employers must conduct an individualized assessment of the duration of the risk and the nature, severity, likelihood, and imminence of the potential harm.

However, even if an employer determines an individual poses a direct threat, the employer cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (one that does not cause undue hardship) that would eliminate or reduce this risk. Further, if the risk cannot be reduced, the employer still cannot automatically terminate the employee without considering whether the job can be performed remotely, whether statutorily mandated leave is available, or whether state or local law provides additional remedies.

The EEOC reminds employers of the importance of engaging in the interactive process. The EEOC further notes that determining whether undue hardship exists may be impacted by “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.” “Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available.” The EEOC recognizes “there may be situations where an accommodation is not possible.”

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

Title VII and religious accommodations

As to accommodations under Title VII, an employer who is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination must provide a reasonable accommodation unless it would pose an undue hardship. An “undue hardship” in the religious accommodation context is one having more than a *de minimis* cost or burden on the employer. The EEOC notes that “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief” and proceed to the question of available accommodations. As under the ADA, an employer may not automatically terminate an employee for whom a reasonable accommodation is not possible without considering if any other rights apply under the EEO laws or other federal, state, and local authorities.

Genetic Information Nondiscrimination Act (GINA) and Vaccinations

The EEOC makes clear that administering a COVID-19 vaccination to employees or requiring them to provide proof of vaccination does not implicate GINA as this does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information.”

However, if administering the vaccine requires pre-screening questions that ask about genetic information, those inquiries (like family medical history) may violate GINA. If an employer requires employees to provide proof of vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. The EEOC explains that “as long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.”

Conclusion

Workplace vaccination policies raise myriad issues about potential accommodations as well as practical issues about workforce implementation. Contact your Vorys lawyer for assistance in determining the appropriate vaccination policy for your workplace and workforce.

—

Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).