

COVID-19: Mandatory Vaccinations: New EEOC Publication Provides Timely Guidance for Employers

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As additional COVID-19 vaccines receive emergency use authorization from the Food and Drug Administration¹, more employers are weighing the risks of implementing mandatory vaccination programs for employees. Up until very recently, and as discussed in K&L Gates LLP's 24 November 2020 COVID-19 vaccination-related Legal Alert² on this topic, there was limited federal agency guidance on this issue as it relates to COVID-19. However, in a timely development, on 16 December 2020, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance (Guidance)³ to include a new section about how a COVID-19 vaccination interacts with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Genetic Information Nondiscrimination Act (GINA). In addition to discussing these interactions, this new Guidance addresses issues pertaining to medical pre-screening questions and employer accommodations for those unable to receive a vaccination. In its Guidance, the EEOC makes it clear that, subject to any other state or federal laws, in certain circumstances, employees who refuse to get a COVID-19 vaccination may be excluded from the workplace. Moreover, the EEOC's Guidance underscores that anti-discrimination laws do not prevent employers from adhering to public health directives from the Centers for Disease Control and Prevention (CDC) or other federal, state, and local public health agencies.

The primary takeaway from the Guidance is that mandatory COVID-19 vaccination programs are not prohibited under federal employment laws so long as employees are permitted to seek valid disability-based or religious exemptions under the ADA and Title VII, respectively. Further, if an employee is unable to get vaccinated for COVID-19 because of a disability⁴ or sincerely held religious belief, practice, or observance, and there is no feasible reasonable accommodation available, then an employer may lawfully exclude the employee from the physical workplace. That said, while the employer may exclude that employee from the workplace, it should avoid terminating the employee or taking additional adverse actions before carefully evaluating whether the employee can work remotely or has protected rights under other employment laws or regulations at the federal, state, and local level. This alert provides an update to K&L Gates' previous COVID-19 vaccination-related Legal Alert⁵ and provides additional recommendations for employers' consideration in light of the Guidance.

VACCINATIONS AND THE ADA

First, the Guidance addresses whether an unvaccinated employee may pose a direct threat that can be accommodated or result in exclusion from the physical workplace. The ADA permits employers to implement a qualification standard, such as a vaccination requirement, that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”⁶ However, if a vaccination requirement excludes or tends to exclude an individual with a disability, the employer must demonstrate that an unvaccinated employee would pose a direct threat to the workplace 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.”⁷

Under the Guidance, unvaccinated employees are not automatically categorized as a “direct threat”; rather, such a determination is fact-intensive, and employers must make an individualized evaluation before reaching that conclusion. To determine whether a direct threat exists, employers should conduct an individualized assessment of the following 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. An employer’s conclusion that there is a direct threat likely would include a determination that an unvaccinated individual will expose others to COVID-19 in the workplace. Once an employer makes the determination that an individual who cannot be vaccinated due to a disability poses a direct threat at the worksite, the employer must evaluate whether it can provide a reasonable accommodation, absent undue hardship, that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. Until that determination is made, an employer may not exclude the employee from the workplace or take any other adverse action against the employee. As the direct-threat analysis requires an individualized assessment, employers should be aware that as more information about COVID-19 and vaccines becomes available and public health guidelines are modified, determinations may change over time.

When an employer determines that there is a direct threat that cannot be reduced to an acceptable level, it may exclude the employee from physically entering the workplace. However, this determination does not mean the employer may automatically terminate the worker. Prior to any termination or other adverse action, employers will need to ascertain if any other rights apply under the equal employment opportunity laws or other federal, state, and local guidance. For instance, if an employer excludes an employee based on an inability to accommodate a request for an exemption from a vaccination requirement, the employee may be entitled to accommodations such as teleworking or other protective measures or, if not, may be eligible to take leave under certain federal, state, or local leave laws, including the Family and Medical Leave Act, or under the employer’s leave-of-absence policies.

As with any accommodation request under the ADA, employers should train managers and supervisors on how to recognize an accommodation request from an employee with a disability and how to address such a request based on the employer’s policies and procedures. Further, employers and employees should continue to engage in the interactive process to identify potential reasonable accommodations that do not pose an undue hardship on the employer. As part of the undue hardship analysis, employers may consider whether they must obtain supporting documentation about the employee’s disability, the nature of the workforce and the employee’s position, the number of vaccinated and unvaccinated employees in the workplace, and CDC and Occupational Safety and Health Administration recommendations and other health and safety guidance. Finally, employers should remind managers and supervisors to keep the existence of a reasonable accommodation confidential and to refrain from any retaliation against the requesting employee regardless of whether the request was granted.

VACCINATIONS ARE NOT MEDICAL EXAMINATIONS UNDER THE ADA

In the Guidance, the EEOC clarified that the vaccination itself is not considered a medical examination under the ADA but that employers should be aware that certain pre-screening questions may still implicate ADA provisions. Generally, so long as an employer does not seek information about an employee's disability or current health conditions in the administration of a vaccine, it is not a medical examination. However, employers should be aware that although the administration of a vaccination is not itself a medical examination, certain pre-screening vaccination questions may elicit information about a disability and, therefore, run afoul of the ADA's provision on disability-related inquiries. As a result, if the employer or a contractor on the employer's behalf is administering the vaccine, it must show that such pre-screening questions it asks employees are "job-related and consistent with business necessity."

To satisfy the "job-related and consistent with business necessity" standard, employers must have a reasonable belief, based on objective evidence, that an employee who refuses to answer the pre-screening questions and subsequently does not receive a COVID-19 vaccination will pose a direct threat to the health or safety of himself or herself or others.⁸ If an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as the employee's own health care provider or pharmacy, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

Finally, the Guidance clarifies that simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry under the ADA. However, subsequent employer questions, such as asking why an employee did not receive a vaccination, may prompt the employee to share information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." Accordingly, as a best practice, if an employer requires employees to provide proof that they have received a COVID-19 vaccination from a third party, such as a pharmacy or the employee's own health care provider, the employer should warn the employee not to provide any medical information when submitting proof of vaccination in order to avoid violating the ADA.

MANDATORY VACCINATIONS AND TITLE VII

The Guidance also addresses mandatory vaccination programs and religious exemptions under Title VII, with the EEOC generally reiterating its previous position that mandatory vaccination programs are not prohibited if the employer allows for exemptions and accommodations based upon sincerely held religious beliefs. Under Title VII, once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship. As is consistent with the religious exemption process under Title VII, the Guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances that may be unfamiliar, an employer should generally assume that a request for religious accommodation is based on a sincerely held religious belief. In certain situations, an employer may request supplemental information if the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. However, employers should consult counsel prior to making such a request.

As under the ADA, if an employee is unable to get vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance, and there is no feasible reasonable accommodation

available, then an employer may lawfully exclude the employee from the physical workplace. Again, employers should not take any other adverse actions before evaluating whether the requesting employee has rights under other federal, state, or local employment laws.

VACCINATIONS AND GINA

Finally, the Guidance addresses potential considerations under GINA regarding the COVID-19 vaccination and pre-screening questions. As a starting point, the Guidance states that actually administering the vaccination or requiring proof of the vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions or the acquisition or disclosure of genetic information. That said, pre-vaccination medical screening questions may elicit information about genetic information and implicate GINA. If pre-vaccination questions do not include any questions about genetic information, including family medical history, then asking them does not implicate GINA. Accordingly, since the pre-vaccination questions may include questions about genetic information, then employers who mandate a COVID-19 vaccination should opt for proof of vaccination rather than administering the vaccine themselves. As under the ADA, if an employer requires employees to provide proof of a COVID-19 vaccination from their own health care provider, the employer should warn the employee not to provide any genetic information as part of the proof. If employers provide this warning, then any genetic information an employee submits with the proof of vaccination will be considered inadvertent and therefore not a violation of GINA.

EMPLOYER BEST PRACTICES

Although the EEOC has signaled that mandatory vaccination programs are permissible under the federal anti-discrimination laws, such programs will still need to comply with state and local regulations, as well as all pertinent public health guidelines. Further, despite a better understanding of the EEOC's position on mandatory COVID-19 vaccines, there are still many potential unknown variables related to COVID-19 that could impact administration of a vaccine program. Thus, employers should continue to stay up to date on all applicable federal, state, and local guidance and monitor developments regarding vaccine distribution across various industries and within each state. Employers should consult or revisit the best practices discussed in K&L Gates' COVID-19 vaccination-related Legal Alert⁹, published on 24 November 2020. Additionally, employers should consider addressing how they may engage in direct-threat determinations given their specific industry, workforce composition, and environment. They should also consider whether they might want to use a contractor or other third-party provider (e.g., pharmacy) to administer the vaccine, as well as their specific vaccination verification process. Finally, employers should evaluate their own industry, workplace environment, and culture in determining whether to implement a mandatory COVID-19 vaccination program and what additional procedures and considerations may be required to be compliant with federal and state laws in addition to the EEOC Guidance.

Footnotes

¹ As of 21 December 2020, the Food and Drug Administration has extended emergency use authorization to two vaccines: Pfizer/BioNTech and Moderna.

² [COVID-19 Vaccines for Everyone! Wait, Not So Fast. Considerations for Health Care and Other Employers When Evaluating Mandatory COVID-19 Vaccination Programs](#), 24 November 2020.

³ U.S. Equal Emp. Opportunity Comm'n, [What You Should Know About COVID-19 and the ADA, The Rehabilitation Act, and Other EEO Laws](#) (Dec. 16, 2020), [hereinafter Guidance].

⁴ The Guidance highlights that certain medical conditions related to pregnancy may qualify as disabilities under the ADA. Therefore, employers should engage in the interactive process for exemptions based on a pregnancy-related medical condition.

⁵ [COVID-19 Vaccines for Everyone! Wait, Not So Fast. Considerations for Health Care and Other Employers When Evaluating Mandatory COVID-19 Vaccination Programs](#), 24 November 2020.

⁶ See, Guidance.

⁷ *Id.* (citing 29 C.F.R. § 1630.2(r)).

⁸ For purposes of a voluntary vaccination program, employers must ensure that an employee's choice to respond to pre-screening, disability-related questions also be voluntary. For a voluntary vaccination program, if an employee chooses not to answer these questions, the employer may refuse to administer the vaccine but may not retaliate against the employee for refusing to answer any pre-vaccination questions. See Guidance (citing 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d)).

⁹ [COVID-19 Vaccines for Everyone! Wait, Not So Fast. Considerations for Health Care and Other Employers When Evaluating Mandatory COVID-19 Vaccination Programs](#), 24 November 2020.

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