

Mandating COVID-19 Vaccines in the Workplace: EEOC Issues Updated Guidance

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Perhaps the most-asked question by employers these days is: Can a COVID-19 vaccine be required of employees? The answer is generally yes, with some important qualifications.

Following the approval of COVID-19 vaccines for emergency use and subsequent distribution to the states, the EEOC issued supplemental COVID-19 guidance on December 16 to address circumstances to consider when mandating COVID-19 vaccination, once the vaccine becomes widely available. The guidance addresses practical, compliance-related questions, including whether the administration of the COVID-19 vaccine constitutes a “medical examination” and whether asking medical screening questions prior to administering the vaccine, or requiring proof of vaccination, constitutes a “disability-related inquiry” — both of which are subject to restrictions under the Americans with Disabilities Act (ADA).

The EEOC’s revised “What You Should Know” now includes a section devoted to the COVID-19 vaccine at work, and outlines the steps an employer should take to ensure compliance with its legal obligations under federal workplace discrimination laws, including the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA).

Previously, questions related to employer mandates for a COVID-19 vaccination as a condition of employment was merely theoretical, and the EEOC’s commentary had been limited to a March 2020 update to its 2009 pandemic guidance document issued in response to the H1N1 influenza outbreak. In the March update, the EEOC stated that employers subject to the ADA and Title VII generally may not “compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic,” noting with respect to COVID-19 that “as of the date this document is being issued, there is no vaccine available for COVID-19.” As various COVID-19

vaccines become more widely available, the EEOC's recent publication is intended to provide guidance to employers subject to federal EEO laws.

COVID-19 Vaccinations and Related Inquiries

The ADA imposes restrictions against certain pre- and post-employment medical questions and examinations. The EEOC now helpfully clarifies that the administration of a COVID-19 vaccine is not a "medical examination" for purposes of the ADA because the employer "is not seeking information about the individual's impairments or current health status."

However, pre-screening vaccination questions may constitute "disability-related inquiries" under the ADA, and therefore must be job-related and consistent with business necessity. According to the EEOC, if an employer offers the vaccine to employees on a voluntary basis, then it may not require vaccine recipients to answer medical screening questions as a condition of receiving the vaccine. The employer may, however, refuse to administer the vaccine to a non-responsive employee for nondiscriminatory and nonretaliatory reasons.

Finally, the EEOC provides that it is not a disability-related inquiry for an employer to ask or require an employee to show proof of receipt of a COVID-19 vaccine, because an employee may choose not to take the vaccine for reasons other than disability, and the requested proof is unlikely to elicit information about a disability.

ADA and Title VII Issues Regarding Mandatory Vaccinations

The EEOC's updated guidance discusses the EEO compliance implications of mandating employee COVID-19 vaccinations. First, the EEOC acknowledges the COVID-19 vaccines currently are available to the public only under the U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA), and are not approved yet for general use. However, guidance does not suggest the emergency authorization prohibits an employer's prerogative to mandate vaccination as a condition of employment, subject to the limitations of the ADA and Title VII.

Under the ADA, any job qualification standard (such as a vaccine requirement) that screens out or tends to screen out individuals with disabilities must be job-related and consistent with business necessity. The EEOC guidance implicitly acknowledges, however, that a workforce's exposure to the

virus from an unvaccinated individual could constitute a “direct threat,” allowing the employer to prohibit the unvaccinated employee from the worksite.

The EEOC provides a caveat, reminding employers that before excluding an employee from the worksite they must first conduct an individualized assessment of the employee and the potential harm to others at the worksite that cannot be significantly reduced or eliminated through workplace accommodations. In this respect, an employer’s treatment of an unvaccinated employee mirrors the steps currently in place for those who have tested positive for COVID-19 or who present symptoms. The EEOC guidance specifically mentions remote work as one possible accommodation that may be available to an employee who refuses an employer-mandated vaccination on the basis of disability.

The EEOC guidance next confirms that Title VII permits an employee to refuse an employer-required vaccine based on a sincerely held religious belief or practice. In that case, the employer must provide a reasonable accommodation absent an “undue hardship.” Courts have defined “undue burden” under Title VII as meaning more than “*de minimis* cost or burden on the employer,” and the EEOC publication seems to adopt this interpretation as well. However, the employer typically must treat such an asserted religious objection with a presumption of sincerity. Nonetheless, an employer with an objective basis for challenging the objection may ask the employee to provide documentation in support of their stated objection.

Genetic Information Nondiscrimination Act (GINA)

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment or (2) acquire or disclose genetic information except in six narrow circumstances. The definition of “genetic information” under GINA is expansive.

Therefore, while requiring employees to be vaccinated is unlikely to implicate GINA, certain information obtained during the vaccination could. For example, a pre-screening questionnaire that collects an employee’s family health history could constitute the acquisition of “genetic information” that may violate GINA.

Finally, it should be noted that the EEOC’s updated guidance does not carry the force and effect of a formal regulation or law, which means courts are not compelled to follow it as this body of law continues to develop.

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