EEOC Issues Critical Guidance for Vaccination Issues in the Workplace

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With the continuing effect of COVID-19 on the workplace and the recent roll-out of the first COVID-19 vaccine across the country, employers are increasingly concerned with how the equal employment opportunity (EEO) laws will be applied to them in their efforts to encourage or mandate employee use of the vaccine. While many questions still remain, on December 16, 2020, the Equal Employment Opportunities Commission (EEOC) issued critical updates to its COVID-19 FAQ guidance. The EEOC guidance confirms that employers may maintain mandatory COVID-19 vaccination policies as a safety-based qualification standard in the workplace. However, as with any mandatory vaccination program, an employer must follow processes for disability or religious accommodation along with other considerations. This *Legal Update* will provide a summary of the updated EEOC guidance, along with practical considerations for employers including the key questions of:

- Can I mandate that all employees receive a COVID-19 vaccine?
- How must I address employee requests to be exempt from the vaccination program for medical or religious reasons?
- What ADA and GINA restrictions around medical examinations apply in COVID-19 vaccination programs?
- Can I require an employee to prove the employee has received a COVID-19 vaccination?
- Can I require others such as vendors and contractors entering my workplace to be vaccinated?

Mandatory Vaccination Programs and Disability Accommodations

- *Mandatory vaccination programs must explore reasonable accommodations for employees with disabilities that prevent them from receiving the vaccine.*
- *Employers may not exclude disability-related unvaccinated employees from the workplace unless no reasonable accommodations are available and the employee's workplace presence poses a direct threat to health and safety.*

Employers must be careful to ensure that any vaccination requirements do not screen out, or tend to screen out, individuals with a disability or other legally protected basis under the law. Therefore, the ADA requires that employers enter into an interactive process to explore reasonable accommodations with an employee who claims that he or she cannot take the vaccine due to a disability. Employers and employees are directed to engage in a flexible, interactive process to identify a possible workplace accommodation that does not create undue hardship (significant difficulty or expense) for the employer or that fails to mitigate a direct threat in the workplace.

The EEOC suggests that the employer consider the possibility of performing work remotely as a reasonable accommodation, as well as considering whether the employee may be eligible to take leave under the Families First Coronavirus Response Act (ending December 31, 2020), the Family and Medical Leave Act or under the employer's own policies. Employers may also rely on CDC recommendations when deciding whether an effective accommodation is available, as well as applicable OSHA guidance. Employers who fail to engage in the interactive process to find reasonable accommodations for employees who cannot take the vaccine for disability-related reasons risk significant exposure to liability under the ADA.

An employer may only exclude an employee who cannot take the vaccine due to a known and verified disability if the employer can show that the unvaccinated employee would pose a direct threat through 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." The EEOC has identified individuals having COVID-19 or displaying COVID-19 symptoms as constituting a direct threat in the workplace. However, for an employee not displaying symptoms, as part of the direct threat determination, an employer must conduct an individualized analysis of four factors to determine whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; (3) and the imminence of the potential harm. The employer must also consider whether an unvaccinated individual would expose others to the virus at the worksite. Ultimately, the employer must be able to prove that it is unable to provide a reasonable accommodation that would eliminate or reduce the risk of an unvaccinated employee's presence in the workplace. Prior to terminating an employee because there is no reasonable accommodation available the employer must also consider whether any other federal, state or local EEO laws apply.

Mandatory Vaccination Policies and Religious Accommodations

- *Employers must offer reasonable accommodations to employees who are unable to receive the vaccine due to a sincerely held religious belief, practice or observance.*
- *Employers should assume requests for religious accommodations are sincere; if an objective basis exists to doubt the sincerity of the request, the employer may request supporting information.*

Title VII of the Civil Rights Act requires employers to provide reasonable accommodations in the workplace for an employee's sincerely held religious belief, practice or observance if such accommodation will not result in undue hardship. This religious accommodation requirement also applies to an employer's mandatory COVID-19 vaccine policy. Therefore, if an employee informs the employer that a religious belief, practice or observance prevents the employee from receiving the vaccine, the employer must engage in the interactive process with the employee to evaluate the employee's claim for religious exemption and to evaluate whether a reasonable accommodation is possible, absent undue hardship. Although the EEOC notes that the definition of "religion" is broad under Title VII, if an employer has an "objective basis" for questioning the nature or sincerity of the belief, practice or observance, an employer is justified in requesting additional supporting information.

Longstanding EEOC guidance explains that "undue hardship" must involve more than a minimal cost or burden on the employer. Examples EEOC has historically identified as amounting to "undue hardship" for purposes of a religious accommodation analysis include: violating a seniority system; causing a lack of necessary staffing; and jeopardizing security or health. Thus, the risk associated with COVID-19, possible COVID-19 exposure or COVID-19 symptoms in the workplace might be characterized as "undue hardship." Similar to the disability accommodation analysis, if there is no reasonable accommodation available, an employer may be required to consider separation.

ADA Medical Examination and GINA Issues in Mandatory Vaccination Programs

- *Mandatory employer administered vaccines (directly by the employer or through a third party) are not an ADA prohibited medical examination, are not a violation of the Civil Rights Act of 1964 or Pregnancy Discrimination Act nor prohibited under the Genetic Information Nondiscrimination Act (GINA); however, employers must proceed with caution with regard to pre-screening vaccination questions.*
- *Pre-screening vaccine questions must refrain from seeking genetic information, such as family member medical history, which may violate the provisions of GINA.*

The ADA generally prohibits disability-related inquiries and medical examinations of employees, except under limited conditions (where job-related and consistent with business necessity). However, the EEOC guidance confirms that the administration of the vaccine by an employer, or a third-party for the employer, does not constitute a medical examination or disability-related inquiry for the purposes of the ADA. Instead, the EEOC position is that the vaccine is administered to an employee for protection against contracting COVID-19. Thus, the employer is not seeking information about an individual's impairments or current health status but rather is protecting the employee and workplace against the spread of COVID-19.

The EEOC guidance makes clear that under GINA—which restricts employer use, acquisition and disclosure of employee genetic information—mere administration of the vaccine does not run afoul of GINA.

Although administering the vaccine is not an ADA medical examination, pre-screening vaccination questions raise concerns about disability-related inquiries, because they may elicit information about a disability. Pre-screening questions are used to determine that there is no medical reason that would prevent an individual from receiving a vaccination. Thus, by their nature, pre-screening questions are subject to the ADA's restriction on medical examinations and disability-related inquiries. If an employer uses a pre-screening questionnaire in its vaccination program, the employer must be able to show that its pre-screening questions are "job-related and consistent with business necessity." To meet this standard, the employer would need to show a reasonable belief, based on objective evidence, that an employee who does not answer the pre-screening questions and does not receive the vaccine will pose a direct threat to the health and safety of the employee or others.

In addition to ADA pre-screening questionnaire issues, pre-screening questionnaires also implicate GINA concerns. Any pre-screening questionnaire should refrain from seeking genetic information, such as the employee's or family members' medical histories.

Any medical information obtained in the course of a vaccination program must be kept confidential.

Voluntary Vaccination Programs and Medical Examination Issues

- *Voluntary pre-screening questions asked in connection with voluntary employer vaccine programs are not prohibited ADA medical examinations or disability-related inquiries.*
- *Vaccinations and pre-screening questionnaires provided by third-party medical providers that do not have a contract with the employer are not subject to ADA medical examination restrictions.*

When an employer's COVID-19 vaccination program is voluntary, any pre-screening questionnaires used in connection with the voluntary program must also be voluntary. If the employee chooses not to answer the pre-screening questionnaire, the employer may decline to administer the vaccine to the employee but must not retaliate, intimidate, or threaten the employee for refusing to answer the questions. GINA-related concerns about eliciting genetic information also apply.

The ADA's medical examination restrictions apply only to employer-administered vaccines, or from vaccines administered by third-party medical providers who have a contract with the employer. Where the employee receives the vaccine from a third-party medical provider, such as a pharmacy, that does not have a contract with the employer, the ADA's restriction on medical examinations do not apply.

Similarly, any medical information obtained in the course of a vaccination program must be kept confidential by the employer.

Proof of Vaccination for Mandatory Vaccine Policies

- *Employers can require proof of vaccination, but must be careful to avoid asking for medical information as part of proof or if employee declines vaccination.*

Unlike vaccination pre-screening questionnaires, merely requesting proof of receipt of the vaccination is not considered a disability-related inquiry, as such documents are not likely to elicit information about a disability. Employers are permitted to require proof that an employee has been vaccinated, if the employer maintains a mandatory vaccination policy. There is an important caveat, however. While requesting proof itself is permissible, if the employee declines to take the vaccine, the employer follow-up questions, such as asking why the employee did not receive the vaccine, may elicit information about a disability. In order to avoid ADA implications, the EEOC advises that if the employer requires proof of vaccination, the employer should warn the employee not to provide any medical information as part of the proof of vaccination. Moreover, the employer should similarly warn the employee not to provide genetic information as part of the proof, as such warning will render any receipt of genetic information inadvertent under GINA.[1]

Other Considerations – Training, Third Party Vaccination Requirements and Collective Bargaining

The EEOC further advises that supervisors and managers are responsible for communicating with employees about the employer's vaccination requirements and should also know how to recognize an accommodation request, as well as the procedure for consideration of a reasonable accommodation. This makes supervisory training on ADA interactions with employees and the protocols of the employer in the operation of its accommodative process critical.

Yet another issue confronting employers who desire to create a mandatory vaccination policy and protected work environment is the access of vendors, contractors and visitors to the site. While mandating vaccination is a right of the employer, contractual restrictions may hamper such a mandate. Careful consideration of contractual obligations, and the reality of the need for the goods or service to the business may influence a more global approach to facilitate access without a vaccination.

A final consideration in the implementation of a vaccination policy, whether mandatory, voluntary or incentive-based, is whether the workplace is subject to a collective bargaining agreement. While the National Labor Relations Board has granted employers discretion in implementing safety plans in the face of the pandemic without first negotiating such plans with the union, due to the time before the vaccine will be available for use, there is a question as to whether the "immediacy to act" is in existence to take this mandatory subject of bargaining off the table. Careful consideration of the General Counsel's Opinion Letter from April of 2020 is encouraged before unilateral action is taken on such a policy effecting union represented employees.

Recommendations for Employers

In light of the EEOC's guidance, we recommend employers who are considering implementing COVID-19 vaccination programs consider the following in order to minimize legal exposure:

- Determine whether a mandatory as opposed to a voluntary/incentive-based vaccination policy is appropriate for your workplace and workforce.
- Consider the risks of conducting the vaccination program either directly or through a medical provider working for the employer. In light of medical confidentiality issues, employers may consider using an off-site vaccination program.
- Train supervisors and managers on how to address requests for a reasonable accommodation and the disability and religious accommodation issues that may confront them. An employer should identify when Human Resources should be involved in any accommodation request.
- As with any request for disability or religious accommodation, an employer should apply its standardized format for engaging in the interactive process.
- Before excluding any employees with disability or religious accommodation issues from the workplace, exhaust all reasonable accommodation possibilities, and conduct an individualized direct threat analysis to demonstrate that the employee's presence would expose others to the virus at the worksite.
- Ensure that when seeking proof of vaccination from employees that they are specifically notified that they should not provide any medical information, including genetic information, such as family medical history.
- Formulate and communicate written vaccination policies and expectations to employees.
- Consider restrictions or limitations for visitors or contractors in the workplace if the requirement is to be imposed on all persons accessing the facility.
- Meet with appropriate employee representatives to obtain any "decision" approvals that may be necessary and to be available to discuss "effects" items which the union may raise for discussion.

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[1] See the following link for model language to be used in this GINA warning: https://www.law.cornell.edu/cfr/text/29/1635.8

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