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Equal Employment Opportunity Commission Provides Employers with Guidance on Administration of the COVID-19 Vaccination

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) updated its Technical Assistance Questions and Answers section titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” to include various frequently asked questions regarding administration of the COVID-19 vaccine in the workplace. Specifically, the guidance addresses whether employers can mandate employees to be vaccinated against COVID-19 and what accommodations may be required under either a mandatory or voluntary vaccination program.

Mandating the COVID-19 Vaccine

The EEOC provides that an employer may require its employees to receive the COVID-19 vaccine once available as a condition to returning to work or remaining at work notwithstanding any obligation to accommodate employees under the Americans with Disabilities Act (“ADA”) or Title VII of the Civil Rights Act of 1964 (“Title VII”). The EEOC contends that mandating employees to receive the vaccine does not violate the ADA since it is not a medical examination or inquiry.

However, the EEOC cautioned that pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees

are “job-related and consistent with business necessity.” To meet this 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. An employer can avoid triggering this standard by having employees receive the vaccination from a third party that does not have any contract with the employer, such as a pharmacy or other health care provider. Likewise, an employer can offer the vaccine on a voluntary basis which would allow employees to answer the pre-screening questions voluntarily. If an employee chooses not to answer pre-screening questions in a voluntary program, the employer may decline to administer the vaccine but may not retaliate against the employee for refusing to answer the pre-screening questions.

Moreover, an employer’s request for 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. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.”

Employees’ Disabilities and Religious Beliefs

The EEOC also provides guidance on how employers should respond to employees who refuse to receive the COVID-19 vaccine due to a disability or a religious objection. Although the ADA provides for “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace,” when this requirement tends to screen out individuals with disabilities, 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.” An employer should conduct an individualized assessment of four factors in 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.

If an employer determines, based on objective evidence, that the presence of an unvaccinated employee presents a direct threat to the health and safety of persons in the workplace that cannot be reduced or eliminated through a reasonable accommodation, the employer can exclude the employee from the workplace. However, this does not mean the employer may automatically terminate the worker. Instead, the employer will need to engage in a flexible, interactive process to identify workplace accommodation options, such as remote work, or the availability of leave of absences.

Similar to an employee who cannot receive the vaccination due to a disability, 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 unless it would pose an undue hardship under Title VII, which has been defined as having more than a *de minimis* cost or burden on the employer. The EEOC cautions that because the definition of religion is

broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.

Complying with Title II of the Genetic Information Nondiscrimination Act ("GINA")

The EEOC also provides that an employer who administers the COVID-19 vaccine to employees or that requires proof of vaccination does not implicate Title II of GINA so long as the employer is not collecting genetic information. However, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, including immunity questions, may violate GINA if the employer or a doctor working for the employer is asking the questions. To avoid a violation, an employer may want to request proof of vaccination instead of administering the vaccine itself.

Additionally, the U.S. Centers for Disease Control and Prevention has stated that mRNA vaccines, such as the COVID-19 vaccines, do not interact with an individual's DNA in any way; therefore, requiring employees to get the vaccination does not violate GINA.

Lastly, the EEOC does not provide specific guidance for employers with unionized workforces, but a mandatory vaccination policy would most likely be subject to mandatory bargaining with the union and such policy could not be unilaterally implemented unless an impasse was reached or the union waived its bargaining rights.

Takeaway

The EEOC's guidance allows private employers to implement mandatory or voluntary COVID-19 vaccination policies. However, as discussed above, employers need to be mindful that any mandatory policy will have to comply with the restrictions and requirements under the ADA and Title VII, such as the obligation to provide reasonable accommodations for disabilities and religious beliefs. Employers administering the vaccine themselves also have to be cognizant that pre-screening questions do not exceed the permissible scope under the ADA and GINA.

Since state and local governments may issue additional guidance on administering the COVID-19 vaccination that is either aligned with or diverges from the EEOC's guidance, such as whether mandatory vaccination is permissible, employers should keep an eye out for this guidance while determining and drafting any vaccination policy.

If you have any questions regarding this alert, please do not hesitate to contact us.

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