



Can and Should Employers Require Employees to Take a COVID-19 Vaccine?

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As pandemic restrictions begin to lift and the prospect of employees returning to the workplace becomes a reality, many employers are wondering whether they can or should make the COVID-19 vaccine a mandatory requirement as a condition of employment or continued employment. The short answer is, per recent EEOC guidance, employers can require employees to be vaccinated, subject to certain exceptions, requirements and caveats discussed below. However, a critical issue is whether employers should mandate COVID-19 vaccinations. First, many states like California have not addressed the issue while other states are considering legislation to prevent state and local governments and private businesses from mandating COVID-19 vaccinations. Second, there are multiple issues to take into consideration before deciding whether an employer *should* mandate a COVID-19 vaccine as a condition of employment or continued employment.

The EEOC Guidance

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidance on whether employers can require their employees to take a COVID-19 vaccine under federal law. Instead of directly answering the question on whether employers can require all employees to be vaccinated as a condition of employment or continued employment, the EEOC guidance (in the form of Q&A) addresses issues surrounding exceptions employers must consider if they adopt a mandatory vaccination policy. The EEOC approach at least implies that a mandatory vaccination policy is legally permissible **under federal law**. The EEOC makes it clear that employers are required to make accommodations for religious objections under Title VII of the Civil Rights Act (“Title VII”) and disability-related objections under the Americans with Disabilities Act (“ADA”).

Disability-Related Prescreening Questions

The EEOC guidance clarified that being vaccinated is not considered a “medical examination” and thus does not *per se* elicit information regarding employees’ health status.

However, employers who administer the vaccinations themselves (which is most likely to occur in the healthcare industry) or who contract with a vendor to do so need to be mindful of the ADA’s prohibition of disability-related questions when asking pre-screening questions. To avoid potential violations of the ADA, employers must show that the questions 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 the employee or others. It is also important that employers avoid asking questions that may elicit an employee’s genetic information in violation of Title II of the Genetic Information Nondiscrimination Act (“GINA”).

To avoid the foregoing issues, an employer should consider having its employees obtain the vaccination from a third party (like a pharmacy or governmental health agency) that is not under contract with the employer.

Reasonable Accommodation for Disability or Religious Beliefs

An employer must follow the reasonable accommodation process when an employee objects to the vaccine because of a disability or a sincerely held religious practice or belief.

Disability. Some examples of disabilities that may preclude employees from receiving the COVID-19 vaccine include life-threatening allergies, diseases that compromise the employee’s immune system or – in the case of a recent Third Circuit Court of Appeals case [*Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App’x 35 (3d Cir. 2018)] – a severe and well-documented anxiety associated with the side effects of receiving vaccines. In this case, the former employee, who was a registered nurse with severe anxiety and eosinophilic esophagitis, brought action against her former employer alleging that her employment was terminated because she refused to get a required tetanus, diphtheria and pertussis (TDAP) vaccine in violation of the ADA.

If an employee objects to taking the COVID-19 vaccine because of a disability, the employer must show that the 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.” 29 C.F.R. 1630.2(r). There are 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 the employer concludes that there is a direct threat, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. The employer must determine if any other rights apply under the EEOC laws or those issued by other federal, state and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations, such as performing the current position remotely, transferring the employee to an alternative vacant position that does not pose a direct threat if the employee is unvaccinated or unpaid leave. Employers have an obligation to engage in a flexible, interactive process to determine if there are any accommodations available that do not constitute an undue hardship

(significant difficulty or expense). This is an individualized assessment and should be addressed on a case-by-case basis.

Religious Beliefs. The employer must follow the same reasonable accommodation and interactive process procedures if an employee objects to taking the vaccine due to a sincerely held religious practice or belief. Courts cast a fairly wide net as to what religious-based beliefs will provide protection under Title VII. The religious belief may be newly adopted, inconsistently observed, not part of a formal church or sect's religious practice or different from the commonly followed tenets of the individual's religion. As an example of the broad interpretation of sincerely held religious beliefs, courts have determined that veganism may constitute a religion where an employee protests to receiving a vaccine containing animal products, such as eggs. See *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *1 (S.D. Ohio Dec. 27, 2012). A religious accommodation is required unless it presents "undue hardship," which under Title VII is characterized as more than a "*de minimis* cost or burden to the employer." Unless there is an objective basis for the employer to question the sincerity of the employee's religious belief, it is prudent not to challenge the employee.

If an employee cannot be vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. However, this does not mean the employer may automatically terminate the employee. Employers will need to determine if any other rights apply under the EEOC or other federal, state and local authorities.

Additional Issues to Consider Before Mandating the Vaccine

Mandating the vaccine could potentially lead to employer liability under the workers' compensation system in the event of an adverse reaction if it is determined that it was at the direction and for the benefit of the employee. On the other hand, a unionized employer may need to bargain over vaccination programs and, at a minimum, keep their unions apprised.

If employers make the vaccination a requirement, they should be prepared to pay for (1) the vaccination, (2) the time it takes an employee to be vaccinated and (3) any sick leave related to taking the vaccine.

Employees may have general objections to receiving a COVID-19 vaccination independent of medical or religious reasons. If this is widespread, this could create a difficult situation for the employer. Thus, consideration of encouraging and incentivizing employees to be vaccinated may be a better approach. Employers also should be mindful of not violating the EEOC's wellness regulations regarding "incentives."

Whether vaccinations are mandatory or voluntary, employers should develop a written policy to address COVID-19 vaccinations.

Parting Shot. There are multiple legal and practical issues to consider before implementing a mandatory vaccination policy. It is anticipated as vaccinations become more available that the EEOC, CDC, OSHA and state agencies will issue additional guidance for employers to help navigate these issues. Employers should continue to monitor federal, state and local agencies for further guidance.

Given the complexity of the issues, if an employer is contemplating whether to require its employees to take a COVID-19 vaccine, it should consult with a qualified employment attorney.