

Do Your Employees Need a Shot in the Arm?

The Legal Implications of Mandatory COVID-19 Vaccinations

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Introduction

- With several FDA-approved COVID-19 vaccines and others on the horizon, employers are determining whether to implement a mandatory COVID-19 vaccination policy for their workforces.
- The EEOC has recently confirmed that employers may lawfully require their employees to receive COVID-19 vaccinations provided they consider exemptions for religious and medical accommodations.
- In addition to these legal issues, employers will need to consider the societal and administrative implications of implementing such a policy.

The EEOC and COVID-19

- Since the beginning of the pandemic, the EEOC has recognized that COVID-19 meets the ADA’s “direct threat standard.”
- The direct threat standard permits employers to implement more extensive medical inquiries (*e.g.*, temperature screening and COVID-19 testing) than would typically be permissible under the ADA.

EEOC's Latest Guidance

- On December 16, 2020, the EEOC issued an updated guidance regarding the COVID-19 pandemic.
- In its guidance, the EEOC states that the “administration of a COVID-19 vaccine” approved by the FDA is “not a medical examination.” (EEOC Guidance, K.1.)
- Accordingly, the EEOC recognizes that an employer may mandate that its employees receive a COVID-19 vaccination provided that the employer accommodate an employee’s medical condition that rises to the level of a disability and any religious beliefs an employee may sincerely hold.

Pre-Screening Questions

- If an employer administers the vaccine, any pre-screening questions that may elicit information regarding a disability must be “job-related and consistent with business necessity.” (EEOC Guidance, K.1.)
- To meet this standard, an employer would need to have a “reasonable belief” 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. (EEOC Guidance, K.2.)
- If the vaccine is being administered on a voluntary basis or by third party, then this test need not be met.

Proof of Vaccinations

- An employer is permitted to require an employee to show proof of receipt of a COVID-19 vaccination without violating the ADA. (EEOC Guidance, K.3)
- Subsequent employer questions, however, “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.’” (EEOC Guidance, K.3.)

ADA Accommodations

- If an employee indicates that he/she is unable to receive a vaccination due to a disability, the EEOC provides that employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: duration of the risk; nature and severity of potential harm; likelihood that potential harm will occur; and imminence of potential harm. (EEOC Guidance, K.5)
- A direct threat “would include a determination that an unvaccinated individual will expose others to the virus at the worksite.” (EEOC Guidance, K.5)

ADA Accommodations

- If an employer determines that an employee who cannot receive a vaccination due to a disability poses 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.” (EEOC Guidance, K.5)

ADA Accommodations

- If “there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.” (EEOC Guidance, K.5)
- Rather, employers will need to determine if any other accommodations apply (*e.g.*, remote work or teleworking, PPE, transfer, leave of absence, etc.).
- Employers may rely on CDC recommendations when deciding whether an accommodation would pose an undue hardship.

Religious Beliefs and COVID-19 Vaccinations

- If an employee claims that a sincerely held religious belief, practice, or observance prevents him/her from receiving a COVID-19 vaccination, the employer must provide a reasonable accommodation unless doing so would pose an undue hardship.
- “Undue hardship” has been defined as having more than a *de minimis* cost or burden on the employer. (EEOC Guidance, K.6)

Religious Beliefs and COVID-19 Vaccinations

- The EEOC’s guidance explains that because the definition of religion is broad, “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” (EEOC Guidance, K.6)
- If, however, an employer has an “objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.” (EEOC Guidance, K.6)

Religious Beliefs and COVID-19 Vaccinations

- If there is no reasonable accommodation for an employee's religious belief, then an employer could lawfully exclude the employee from the workplace.
- Again, this “does not mean the employer may automatically terminate the worker.” (EEOC Guidance, K.7)
- Rather, an employer would need to determine whether alternatives exist to on-site work (*e.g.*, remote work or teleworking, PPE, transfer, leave of absence, etc.).

Union Employees

- Mandatory COVID-19 vaccinations will most likely be a mandatory subject of bargaining.
- However, some management rights clauses in a CBA are broad enough to waive a union's right to bargain.
- Regardless, employers should keep their unions involved even if there is a management right to proceed with a vaccination program in order to encourage employee buy-in and avoid grievances.

Concerted Activity

- Unionized *and* nonunionized employees are permitted to engage in protected concerted activity under Section 7 of the NLRA.
- This includes discussing dissatisfaction with a mandatory vaccination program or protesting or opposing such a program.
- Action taken against employees for engaging in such activity can result in unfair labor practice charges.

Societal Considerations

- Aside from the legality of mandatory vaccinations, employers should also examine the societal, political, and ethical considerations of requiring employees to get a COVID-19 vaccination.
- With the highly politicized and polarized dialogue surrounding any potential COVID-19 vaccine, employers are certain to receive numerous objections from employees.
- Accordingly, employers need to be prepared to address these objections.

Administrative Issues

- Finally, a mandatory COVID-19 vaccination policy will involve considerable time and money to administer.
- Accordingly, employers should consider the following factors:
 - Whether it will require *all* employees to get the vaccination.
 - How employees will prove that they have received the vaccine.
 - Whether the employer will pay for the vaccinations.

Administrative Issues

- If the vaccination eventually wears off, how frequently employees will be required to get another vaccination.
- Putting into place a process to handle the accommodation requests.
- What to do if an employee refuses to get a vaccination because of a personal preference or out of fear.

QUESTIONS?



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