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Employment Law Update: Do's and Don'ts for Employers on Mandating COVID-19 Vaccinations

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Amidst the FDA's recent approval of at least two COVID-19 vaccines – and given the divergent views as to who will be able or willing to receive them in the coming months – employers are now considering whether and to what extent they can mandate vaccinations of their employees. Some clarity as to these much-debated issues was provided in the form of Equal Employment Opportunity Commission (EEOC) COVID-19 guidance issued on December 16, 2020.

The guidance pertaining to vaccinations is supplemental to the EEOC's existing COVID-19 guidance for employers, which was first issued in March 2020. The latest guidance focuses primarily on the intersection between a vaccination mandate and the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA) and Title VII of the Civil Rights Act of 1964 (Title VII).

As an initial matter, the EEOC guidance clarified that being vaccinated is not considered a "medical examination." Simply by administering the vaccine to protect employees from contracting COVID-19, employers are not eliciting information regarding employees' health status or performing a medical examination. However, pre-screening questions, which per CDC guidelines may be necessary to ascertain whether there is a medical reason preventing someone from being vaccinated, can cross the line of the ADA rule prohibiting disability-related inquiries, as such questions are likely to seek information regarding an individual's possible disability.

One way for employers to avoid any possible violation of the ADA rule is to have a third-party unrelated to the employer (such as a pharmacy) ask the pre-screening questions and administer the vaccine. An employer can require that employees show proof they received the vaccine but should warn employees not to include any sensitive medical information in such

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proof.

Alternatively, if the employer is administering the vaccination directly, there are two options. One is to offer vaccination on a voluntary basis, which would in turn render any answers to disability-related questions voluntary. On the other hand, if employer-administered vaccination is desired to be mandatory—which is most likely to occur in the case of healthcare industry employers – the employer must show that any disability-related inquiry is “job-related and consistent with business necessity.” This requirement is met if the employer has a reasonable belief, based on objective evidence, that the employee’s refusal to answer questions and thus receive the vaccine poses a “direct threat” to the health of the employee or others.

There are **two viable exceptions to a vaccination mandate**, specifically based on (1) disability, and (2) sincerely held religious belief.

If an employee is refusing to be vaccinated due to disability, the employer must demonstrate that the employee poses a direct threat due to “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodations.” In such a situation, the employer must evaluate whether the employee presents a “direct threat” by factoring in: (1) duration of the risk; (2) the nature and extent of the potential harm; (3) the likelihood of harm; and (4) how imminent is the potential harm. Ultimately, if the employee presents a direct threat to the workplace, the employer must explore the options to accommodate the employee – for example, by allowing telework. Only if no reasonable accommodation is possible, can the employer exclude the employee from the workplace and, even then, before terminating the employee, the employer must consider whether other federal, state, or local laws provide additional protection.

The second exception from the vaccination mandate is based on the requirement that employers provide a reasonable accommodation for a sincerely held religious belief. Such accommodation is owed 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 question its genuineness.

Finally, it is important that employers avoid asking questions – especially during pre-screening – that may elicit an employee’s genetic information in violation of GINA.

In sum, while employers can mandate vaccination, any such decisions should be carefully considered. It is essential that employers provide appropriate staff training to deal with any request for accommodations through a fair and structured interactive process. Also, any information relative to an employee’s possible disability or request for accommodations must be kept confidential.

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