

Update: EEOC Issues Guidance Regarding COVID-19 Vaccines in the Workplace

Labor & Employment Law Update

By Suzannah Wilson Overholt on December 16, 2020

In follow-up to our previous blog regarding mandating the COVID-19 vaccine in the workplace, the U.S. Equal Employment Opportunity Commission (EEOC) has now issued guidance addressing that very issue. According to the guidance, employers may ask employees if they have had the COVID-19 vaccine and require the vaccine pursuant to U.S. Centers for Disease Control (CDC) or other federal or state guidelines. However, any mandates must allow exemptions for employees who are unable to receive the vaccine due to disability or a sincerely held religious belief or practice.

The key takeaways from the EEOC's guidance are as follows:

- In order for an employer to require the COVID-19 vaccine, it 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." Employers 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.
- An employer must provide reasonable accommodations to a vaccine requirement for employees who seek accommodation based on disability or a sincerely held religious belief, practice, or observance. The EEOC has consistently required such accommodations, which we described in an earlier blog.
- The administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) is NOT a "medical examination" for purposes of the Americans with Disabilities Act (ADA).

- Pre-screening questions associated with administering the vaccine may implicate the ADA's prohibition on disability-related inquiries if the employer requires the vaccine and answering the questions is mandatory. If the employer administers the vaccine, it must show that pre-screening questions are "job-related and consistent with business necessity." This is not a concern if the vaccine and answering the questions are voluntary.
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is NOT a disability-related inquiry.
- Title II of the Genetic Information Nondiscrimination Act (GINA) is NOT implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute.
- GINA may be implicated if pre-screening questions include questions about genetic information, such as family medical history. If the pre-vaccination questions include questions about genetic information, employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

Due to the evolving nature of this issue, advice of qualified counsel should be sought before implementing any COVID-19 vaccine program in the workplace.

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