

**Alert | Health Care & FDA Practice/
Labor & Employment**



December 2020

Mandatory or Voluntary Employee Vaccinations: EEOC Weighs In

Since well before FDA approval of the first COVID-19 vaccine, many employers have contemplated whether eventual employee vaccination should be a voluntary or mandatory condition of returning to, or remaining at, the workplace. The current legal considerations surrounding employee vaccination depend on interpretation of many existing laws and other sources of employee rights in the workplace. Such rights are not just established by laws, but also by collective bargaining relationships and, in some cases, the industry which the employer does business. In addition, there are compelling business considerations unique to each employer that should influence whether to mandate, or simply encourage, employee COVID-19 vaccination.

In addition to other previous guidance released, the Equal Employment Opportunity Commission (EEOC) has now provided its current interpretation, which certainly is subject to change, of how employers might grapple with the laws the agency enforces.¹

¹ With a widely anticipated [Dec. 16, 2020 update](#) to its publication “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” EEOC addresses vaccination under the laws it enforces that supply relevant employee rights, including the rights of employees with disabilities, as protected by the Americans With Disabilities Act (ADA), the rights of employees who may have religious objections to receiving a vaccination, as protected under Title VII of the Civil Rights Act of 1964 (Title VII) and the right not to disclose or allow employers the opportunity to use genetic information under Title II of the Genetic Information Nondiscrimination Act (GINA).

Voluntary Employee COVID-19 Vaccination

EEOC's new guidance generally clears the way for employers to encourage employees to receive vaccinations *on a voluntary basis*. Critical to this is EEOC's clear statement that it does not consider vaccinations themselves to be "medical examinations" which require special justification under the ADA. EEOC does state that the concurrent need to answer pre-vaccination medical screening questions may implicate ADA rights, requiring employers to establish that employee vaccination is "job related and consistent with business necessity." However, EEOC makes an exception to this justification requirement "if an employer has offered a vaccination to employees on a voluntary basis."

Mandatory Employee COVID-19 Vaccination

EEOC's new guidance does not prevent employers from making employee vaccination a mandatory condition of remaining in or returning to the workplace, but it does impose an obstacle course for employers if they choose to make COVID-19 vaccination mandatory.

The obstacle course starts with the medical screening questions required before employees receive the vaccination. As noted, EEOC states that answering these questions may implicate employee ADA rights, so any employer mandating vaccination which either itself administers or contracts out mandatory vaccine administration must establish that the mandatory vaccination requirement is "job related and consistent with business necessity" for each position for which the employer requires mandatory vaccination. Employers can avoid this obstacle if they are willing to accept proof of mandatory vaccination carried out by "a third party that does not have a contract with the employer, such as a pharmacy or other health care provider." But even employers who accept such proof of vaccination are cautioned "to warn the employee not to provide any medical information as part of the proof."

The obstacle course continues in how employers mandating vaccinations must handle employees who object to receiving the vaccination either due to a disability or religious beliefs. In both cases it is necessary for the employer to channel such employees through "a flexible, interactive process" of exploring, in an open-minded manner, the nature of the objection and whether reasonable accommodation may be made to allow the employee to continue working. If the only way a disabled employee can continue working is by being present in the workplace, the employer must be able to prove, under the ADA's legal standards, that the unvaccinated employee poses a "direct threat" causing a "significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Even where there is "no possible reasonable accommodation," EEOC's view is "this does not mean that employer may automatically terminate the worker" without first determining "if any other rights apply under the EEO laws or other federal, state or local authorities."

Practical Realities and Implications

In the opening to the new "Vaccinations" addition to its guidance, EEOC includes a disclaimer-type statement that "The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions." Accordingly, employers should be safe to follow such authorities. That said, neither the CDC nor any federal, state, or local public health authority has, as of today, made it mandatory for any group of employees to receive the COVID-19 vaccination as a condition of remaining in or returning to the workplace. Assuming this remains the case, and there is no further law or guidance on the subject, any employer who wishes to implement mandatory vaccinations should consider and determine, taking into account its business and unique circumstances, how to navigate each obstacle in the course EEOC has set up in its Dec. 16, 2020 guidance.

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