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EEOC Issues COVID-19 Vaccine Guidance

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The US Equal Employment Opportunity Commission (EEOC) issued revised guidance on December 16 relating to COVID-19 vaccines in the workplace. As the Food and Drug Administration began to authorize emergency use of vaccines, the much-anticipated guidance from the EEOC effectively permits employers to impose a mandatory vaccination program under certain conditions.

For employers considering a vaccination mandate, the revised guidance addresses how employers should respond to employees who may decline vaccination due to their disability or religious belief, and how employers should administer a mandatory vaccination program.

ADA compliance

The Americans with Disabilities Act allows an employer to have a qualification standard, such as a vaccination requirement, that requires "an individual shall not pose a *direct threat* to the health or safety of individuals in the workplace." Before screening out an employee who did not receive vaccination due to a disability, the employer must conduct an individualized assessment to 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."

Four factors are relevant in determining whether a "direct threat" exists: (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; and (iv) the imminence of the potential harm. If the employer concludes there is a direct threat from that unvaccinated individual, then the employer shall provide a reasonable accommodation that eliminates or reduce this risk presented by the unvaccinated employee.

An employer need not provide a particular reasonable accommodation if it poses an "undue hardship" under the ADA, which means causing the employer "significant difficulty or expense." The revised EEOC guidance notes that the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may affect the undue hardship consideration.

If there is no reasonable accommodation, absent undue hardship, that would eliminate or reduce the risk posed by an unvaccinated employee, the employer can exclude the employee from entering the workplace.

Compliance with religious accommodation requirements under Title VII of the Civil Rights Act

Title VII of the federal Civil Rights Act requires employers to provide reasonable accommodation to employees who indicate they cannot receive the vaccine due to their sincerely held religious belief, practice or observance, unless accommodation would pose an "undue hardship." Under Title VII, "undue hardship" means having more than a *de minimis* cost or burden on the employer.

The EEOC provides that an employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. However, employers may be justified in requesting additional supporting information if they have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice or observance.

If there is no reasonable accommodation absent undue hardship, the employer can exclude the employee from entering the workplace.

Beyond reasonable accommodation

The EEOC's guidance makes clear that it would be lawful for an employer to exclude an employee from physically entering the workplace if the employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance and there is no reasonable accommodation possible. However, the EEOC guidance also states that this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the equal employment opportunity laws or other federal, state and local authorities. For example, employees may be entitled to work remotely and take leave under other laws or the employer's existing policies.

Administering a mandatory vaccination program

Additionally, the EEOC's guidance explains that an employer-mandated vaccination program may implicate ADA provisions pertaining to disability-related inquiries and medical examinations. The ADA permits employers to make disability-related inquiries and conduct medical examinations if they are "job-related and consistent with business necessity."

The EEOC clarifies that the vaccination itself is not a "medical examination" for the purposes of the ADA, but pre-vaccination screening questions may implicate the ADA's provision on disability-related inquiries. If an employer *requires* employees to receive a COVID-19 vaccination administered by the employer or a third-party contracted by the employer, pre-vaccination screening questions must be "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 her or himself or others.

To avoid triggering the "job-related and consistent with business necessity" requirement, employers can either (i) adopt a *voluntary* vaccination program or (ii) require proof of vaccination (or engage in the disability/religious accommodation analysis above) but allow employees to obtain the vaccination as administered outside the employer and by a third-party that does not have a contract with the employer.

Similarly, simply requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry, but subsequent employer questions – such as asking why an individual did not receive a vaccination – are subject to ADA's "job-related and consistent with business necessity" requirement.

Note that, while the EEOC guidance provides key answers as to employers' obligations with respect to federal antidiscrimination law, employers will still need to ensure that any mandatory vaccination program is permissible under applicable state laws.

Conclusion

While it will likely be months before COVID-19 vaccines are available to the general public, the revised EEOC guidance answers affirmatively that employers may mandate COVID-19 vaccines within the parameters of federal civil rights laws, so long as they are prepared to address accommodation requests on the basis of disability or religion.

For questions or more information on mandatory or voluntary vaccination programs in the workplace, please contact a member of Cooley's employment group.

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