

Update: EEOC Issues Employer Guidance on COVID-19 Vaccinations

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In the article, *May Employers Mandate COVID-19 Vaccines?*, we discussed legal and practical considerations for employers contemplating mandatory COVID-19 vaccines for their employees. We noted that the Equal Employment Opportunity Commission (“EEOC”) and other federal and state authorities might be providing updated guidance on this issue.

On December 16, 2020, the EEOC issued new guidance confirming that, although employers may likely mandate COVID-19 vaccines without violating federal anti-discrimination laws (and assuming accommodations are made for employees who cannot take vaccines for qualifying medical or religious reasons), the safest approach—at least for employers outside of certain high-risk fields like the healthcare industry—may be to make vaccinations voluntary, but highly encouraged.

For instance, the EEOC noted in its new guidance that mandatory vaccinations would not be considered “medical examinations” under the Americans with Disabilities Act (“ADA”), but that pre-screening questions for vaccines would likely elicit information about disabilities, and thus have to be “job-related and consistent with business necessity” (just like “medical examinations”). And to satisfy this standard, the guidance recites that employers would need to have a reasonable belief, based on objective evidence, that an employee who does not answer such questions (and thus does not receive the vaccine) would pose a direct threat to the health or safety of himself or herself or others before he or she could potentially be “excluded” from the workplace. And even then, the non-vaccinated employee could only be “excluded” from the workplace if there were no reasonable accommodation (absent undue hardship) that would allow the employee to keep working in the workplace.

But the EEOC also noted in its new guidance that this “job-related and consistent with business necessity” standard would *not* have to be satisfied if the employer instead offered vaccinations to employees on a *voluntary* basis—since employees' decisions whether to answer any disability-related pre-screening questions would also have to be voluntary under such circumstances (and the employer could take no retaliatory actions against employees who declined to answer any such questions under such circumstances). Making vaccinations voluntary may thus be the safest approach for employers, particularly because the EEOC's new guidance further notes that, if any pre-screening questions included inquiries about genetic information, such questions could also implicate Title II of the Genetic Information Nondiscrimination Act (“GINA”). GINA prohibits

employers from using, acquiring, or disclosing genetic information except in limited circumstances.

For employers who nonetheless wish to mandate vaccines for their employees—despite the legal and practical concerns outlined in our previous article—the EEOC's new guidance reiterates that accommodations must be provided for qualifying disabilities and religious beliefs. With respect to accommodations for qualifying disabilities, the guidance notes that even where an employee poses a direct threat by virtue of having a disability that precludes a vaccination, the employee still cannot be “excluded” from the workplace unless there is no reasonable accommodation that could eliminate or sufficiently reduce the risk. Although not addressed in the guidance, such accommodations could presumably include additional personal protective equipment (“PPE”) for the non-vaccinated employee (and/or for others); moving the non-vaccinated employee's workstation; erecting plexiglass barriers in the workplace; etc. The EEOC's new guidance also notes that even where a non-vaccinated employee might legally be “excluded” from the workplace due to a direct threat that cannot be reduced to an acceptable level, this does not mean the employee may automatically be terminated. Instead, the employer might still need to permit the non-vaccinated employee to telework or take a leave of absence—including, potentially, under the Families First Coronavirus Response Act (“FFCRA”), the Family and Medical Leave Act (“FMLA”), and/or the employer's policies.

As to reasonable accommodation of religious beliefs, the new guidance states that “the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held belief.” Nonetheless, the guidance provides that if the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, it would be justified in requesting additional supporting information from the employee.

For employers who wish to mandate vaccinations for employees despite the legal risks, the EEOC's new guidance makes clear that the safest approach would be to simply mandate the vaccinations, but to play no role in their actual administration. That is, employers should likely neither administer the vaccines themselves, nor contract with a third-party to do so. The guidance opines that if an employer plays any such active role in a vaccine's administration, the employer would be subject to the same ADA standards relating to prescreening questions discussed above. Conversely, the guidance states that an employer would not be subject to these same standards if vaccines were instead provided by a third-party with whom the employer does not contract—such as a pharmacy or an individual employee's own healthcare provider.

Having employees receive any mandatory vaccinations from their own healthcare providers would also reduce the risk of violating GINA. GINA does not prohibit an individual employee's own healthcare provider from asking questions about genetic information (e.g., as part of any prescreening questions), but it *does* prohibit an employer or a doctor working for an employer from asking about genetic information.

The legality of mandatory COVID-19 vaccinations will remain the subject of evolving legal guidance (and likely lawsuits) in the months ahead, but the considerations outlined in both the EEOC's latest guidance, and in our previous article , suggests that the safest approach for most employers is likely to simply encourage vaccinations, but not to make them mandatory.