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Can I require my employees to get the COVID-19 vaccine?

In short, a practice/employer can require an employee to be vaccinated before returning to work, but accommodations must be considered for employees who refuse to get the vaccine due to a disability or sincerely held religious belief. The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing workplace antidiscrimination laws, released updated [guidance](#) on Dec. 16, 2020, that appears to give the greenlight to employers requiring employees to get vaccinated, with certain limitations. While it does not explicitly say mandating the vaccine is permissible, the questions answered in the guidance assume that a mandate has been adopted by the employer.

As discussed in more detail below, requiring employees to get vaccinated can trigger many federal laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act, Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act. These, as well as state and local laws, may or may not apply to an employer, depending on size. Additionally, while requesting proof of vaccination from an employee (rather than an employer administering it directly) can avoid some of these laws' implications, they cannot be avoided entirely. For these reasons, it is important that an employer consult with its own attorney before deciding to implement a vaccine mandate.

Disability

The ADA puts limits on an employer's ability to make disability related inquiries or require medical examinations. If an employee says he or she is unable to get the COVID-19 vaccination due to a disability, the employer must be able to show that an unvaccinated employee poses a direct threat such that there is 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." There are four factors to consider on an individualized basis:

1. Duration of the risk.
2. Nature and severity of the potential harm.
3. Likelihood that the potential harm will occur.
4. Imminence of the potential harm.

The EEOC does provide an example that the risk of an unvaccinated person exposing others to the virus at the workplace could be deemed a direct threat. However, if this determination is made, an employer cannot take any action against the employee unless there is no way to provide a reasonable accommodation that would reduce the employee from being a direct threat (e.g., remote work). If the direct threat cannot be reduced to an "acceptable level," an employer can prevent the employee from coming into work, but automatic termination is not permissible. Employee rights under other federal, state and local laws will need to be analyzed before taking further action.

If an employer decides to institute a vaccine mandate, clear communication with staff will be vital. In its guidance, the EEOC states:

Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. 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 impact the undue hardship consideration.

Further, the EEOC reminds managers and supervisors that "it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation."

Directly administering vaccine to employees

Per the EEOC guidance, "If a vaccine is administered to an employee by an employer [or by a third party with whom the employer contracts to administer a vaccine] for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination." However, "pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are 'job-related and consistent with business necessity.'"

For the pre-screening questions to meet this requirement, the "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." There are two situations where pre-screening questions can be asked without meeting this standard, though. One is if the employer offers the vaccination to employees on a voluntary basis. In this case, the employee's decision to answer the pre-screening questions also must be voluntary (if the employee chooses not to answer, the employer may decline to give the vaccine but cannot take any retaliatory actions against the employee). The second exception to the "job-related and consistent with business necessity" requirement is if the vaccination is from a third party that is not contracted with the employer (e.g., pharmacy or other health care provider). In this case, the pre-screening questions are okay because they are not being asked by or on behalf of the employer.

Requiring proof of vaccination

Under the ADA, it is permissible to ask employees for proof of a COVID-19 vaccination because it is not likely to "elicit information about a disability and, therefore, is not a disability-related inquiry." But follow-up questions like, "Why didn't you get the vaccine?" may elicit such information and must meet the "job-related and consistent with business necessity" standard discussed above. (If an employer does require proof of vaccination, any other medical information should not be included so as not to trigger the ADA.)

Religious beliefs

If an employee states that he or she cannot get the COVID-19 vaccine due to a sincerely held religious belief, practice or observance, a reasonable accommodation is required unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have found that an “undue hardship” has more than a de minimis cost or burden on the employer.

The guidance also discusses what is a sincerely held religious belief:

[B]ecause the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

Similar to the case of an employee being unable to receive the vaccine because of a disability, if an employee cannot receive it due to a sincerely held religious belief and a reasonable accommodation cannot be made, then it is permissible to exclude the employee from the workplace. However, automatic termination is not permissible and employee rights under other federal, state and local laws will need to be analyzed before taking further action.

Conclusion

While a COVID-19 vaccine mandate may be permissible under federal law, practices should consult with their own counsel to discuss the risks and benefits of such a policy, as well as to determine what state and local laws may apply. A staff education campaign that encourages vaccination may be preferable and less administratively burdensome for practices, and further guidance from the EEOC may be given as the vaccine becomes more available to the population.