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EEOC Issues Guidance for Employers on COVID-19 Vaccines, But Should Employers Mandate Vaccination?

The Food and Drug Administration (FDA) issued an emergency use authorization (EUA) for the Pfizer-BioNTech COVID-19 vaccine on December 11 and for the Moderna COVID-19 vaccine on December 18. On December 16, the Equal Employment Opportunity Commission (EEOC) supplemented its existing COVID-19 guidance to address issues relating to employers' potential requirement that employees be vaccinated, including those under the Americans with Disabilities Act (ADA), the Rehabilitation Act, Title VII of the Civil Rights Act and Title II of the Genetic Information Nondiscrimination Act (GINA). Employers' decision to require vaccination, however, may be affected by a number of other issues.

The EEOC's Guidance

In a question-and-answer format, the EEOC provided the following guidance.

Vaccinations are not a "medical examination" under the ADA, but prescreening questions may be.

The EEOC confirmed that for purposes of the ADA, the COVID-19 vaccination is not a medical examination that would be permissible only under certain circumstances, because it is not "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." However, employers mandating COVID-19 vaccination may trigger the ADA's provision on disability-related questions when eliciting information during necessary prescreening. In those limited cases where such employers administer the vaccines themselves, they must show that the prescreening questions are "job-related and consistent with business necessity." Employers that offer voluntary vaccination programs or use third parties (such as pharmacies or other healthcare providers) do not trigger those ADA disability-related inquiry provisions. Employers offering vaccines to employees on a voluntary basis must ensure their requisite prescreening requests are voluntary as well or that they are not involved in a third party's prescreening process. In all cases, employers must keep medical information obtained from employees during the course of the vaccination process confidential.

Mere proof of COVID-19 vaccination is not a disability-related inquiry and does not implicate Title II of GINA.

The EEOC has communicated that requiring employees to show proof of a COVID-19 vaccination is not a disability-related inquiry under the ADA. However, employers should still proceed with caution, since follow-up inquiries about why employees were not vaccinated may elicit information about a disability and trigger the "job-related and consistent with business necessity" standard.

Similarly, the EEOC clarified that employers that require proof of vaccination from employees will not implicate Title II of GINA because such requests (or requiring the vaccination) do not involve "the use of genetic information to make employment decisions, or the acquisition of disclosure of 'genetic information.'" However, prescreening questionnaires that seek genetic information (such as genetic testing and family medical history) may violate GINA.

Given the above, the EEOC recommends that employers requiring vaccination proof from a third party direct employees not to provide any medical information as part of their proof of vaccination.

Employers must assess their response to employees who are unable to receive a COVID-19 vaccination because of a disability or a sincerely held religious practice or belief.

Employers that mandate COVID-19 vaccinations should be cautious of how they respond to employees who indicate that they are unable to receive that vaccination because of a disability. The EEOC makes clear that employers are able to screen employees to ensure there is no "direct threat to the health or safety of individuals in the workplace." Arguably, COVID-19 vaccination alleviates the direct threat of transmitting the virus in the workplace.

When such a requirement or screen impacts individuals with disabilities, the EEOC explains that employers must show that an unvaccinated employee poses 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." To make such assessment, employers must examine four factors to determine whether a direct threat to the health or safety of others exists: "1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm." After an individualized assessment, employers need to conclude that an "unvaccinated individual who cannot be vaccinated due to disability poses a direct threat at the work site." Employers must then engage in the interactive process to identify a potential reasonable accommodation (e.g., the potential for remote work, reassigned duties or protective equipment) that does not result in undue hardship before excluding an unvaccinated employee from the workplace. Even then, a leave of absence rather than discharge may be warranted.

Similarly, employers must provide a reasonable accommodation to employees who have a sincerely held religious belief, practice or observance. The EEOC reiterates that employers should assume that an employee's belief underlying a request for religious accommodation is sincere. Employers, however, may request additional documentation if they have an "objective basis" for questioning the employee's "religious nature or the sincerity of a particular belief, practice or observance." Under Title VII, an accommodation need not be provided if there is more than a de minimis cost or burden to the employer. Employers should be aware, however, that their obligations under applicable state or local laws may be more onerous.

To avoid legal pitfalls, employers should consult with legal counsel before taking any adverse action against employees unwilling to agree to COVID-19 vaccination due to a disability or a sincerely held religious belief.

Other Issues to Consider

The EEOC's guidance is not the only guidance for employers to consider.

It is important to note that the FDA's EUA is not the standard approval for vaccinations. While the FDA expects manufacturers that receive EUA for their vaccines to continue clinical studies and seek full licensing approval, such approval may take months. The EEOC's guidance, referenced above, is in the context of vaccines that the FDA has "approved or authorized." Some have questioned whether the EEOC intended this guidance to apply in the context of vaccines that only have EUA. Despite the FDA's EUA, the recommendation of the Centers for Disease Control and Prevention (CDC) that healthcare workers be vaccinated, and many employees' eagerness to seek a vaccination, some employees may be fearful or skeptical. Mandating vaccinations may affect employee morale or cause some employees to resign.

Employers should also be aware of state and local guidance regarding whether mandatory vaccination is permitted and in what context. For instance, on December 4, New York Assemblywoman Linda Rosenthal introduced Bill A11179, which would mandate vaccination in "certain situations." The bill would require COVID-19 vaccination for all individuals who are "clinically determined to be safe to receive such vaccine." While the bill identifies a medical exemption, it fails to address any other exemptions, including sincerely held religious beliefs. In New Jersey, while healthcare workers are required to be vaccinated for the flu (with certain accommodation-related exceptions), the state has not mandated COVID-19 vaccination. We can expect that with the greater public availability of the COVID-19 vaccines and/or full FDA approval, state leaders may introduce more legislation.

Conclusion

Ultimately, there can be no "one size fits all" approach, and employers' location, industry and workforce may dictate decision-making. In any event, employers may consider educating their employees about the potential benefits and risks of the COVID-19 vaccines, with information from the FDA and the CDC, whether or not they eventually choose to mandate vaccination. Further, employers with unionized workforces should review applicable collective bargaining agreements because, absent express authorization or waiver, mandatory vaccination is a mandatory subject of bargaining. Given all the variables, employers should work closely with legal counsel to ensure that they are creating an appropriate, tailored approach for their business.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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