

New EEOC Guidance Addresses Employer-Mandated COVID-19 Vaccinations

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Summary

With the U.S. Food and Drug Administration's (FDA's) issuances of emergency use authorizations for two COVID-19 vaccines recently, the first shipments of the vaccines have been dispatched and inoculations have begun for the highest-priority populations.

As the vaccines become more widely available in the coming weeks and months, employers may desire to make vaccination mandatory for their workforces and should be aware of various protections and accommodations required by local, state and federal laws, such as the Americans with Disabilities Act and its relevant regulations (together, the "ADA"). To help employers to navigate these issues, the U.S. Equal Employment Opportunity Commission ("EEOC") released guidance on December 16, 2020, which confirms that, under federal law, employers generally are permitted to require that their employees be vaccinated for COVID-19; however, such mandates are subject to exceptions on the basis of a worker's disability or a sincerely held religious practice or belief.

The following questions and answers summarize the key provisions of the EEOC's latest guidance, which addresses protections under federal law. State and local laws may be interpreted differently by applicable authorities, potentially in a manner that provides greater protection to workers.

Question #1: If an employee refuses to get vaccinated, can an employer automatically terminate the individual's employment?

Not automatically. If the employee's refusal is related to a protected status such as disability or religion, the employee may be entitled to an accommodation such as performing his or her position remotely or modifications to the physical workplace. In addition—or in the alternative if no other accommodations are viable—the employee may be eligible to take leave under local, state or federal law, or under the employer's leave policies.

Question #2: What if a COVID-19 vaccine mandate has the effect of screening out an employee with a disability?

The ADA allows an employer to impose standards to prevent a "direct threat" to the health or safety of other individuals in the workplace. If a safety-based standard such as a COVID-19 vaccination mandate screens out (or tends to screen out) an individual with a disability, the employer must 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."

In order to make this showing, an employer must have made an “individualized assessment” of the risk posed by the individual (i.e., not an across-the-board determination), considering factors such as the duration, nature and severity, likelihood, and imminence of the risk. If the conclusion is that an individual who cannot be vaccinated due to disability poses a direct threat to others at the workplace, the employer may exclude him or her from the workplace, but must follow the typical interactive process for identifying reasonable accommodations (such as telework or leave of absence) that do not pose an undue hardship to the employer.

Question #3: If an employer requires an employee to receive the vaccination from the employer (or a contractor on its behalf), and asks certain medical screening questions prior to administration, are these questions subject to the ADA standards for disability-related inquiries or the Genetic Information Nondiscrimination Act (GINA)?

Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability, which means that if asked by the employer or its contractor, they would be considered “disability-related” under the ADA. According to the EEOC, if an employer requires an employee to receive a vaccination administered by the employer or direct contractor, the employer must show that pre-vaccination screening inquiries are “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, as discussed above.

The EEOC guidance does, however, discuss two circumstances in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement:

1. If an employer offers a COVID-19 vaccination to employees on a voluntary basis, the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.
2. If an employee receives an employer-required vaccination from an independent third party such as a pharmacy or other health care provider, the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply to pre-vaccination medical screening questions.

Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received one would not implicate Title II of GINA, though certain pre-vaccination screening questions might (e.g., by asking about family members' medical histories). GINA prohibits an employer or a health care provider working for the employer from asking questions about genetic information. Therefore, if an employer requires that employees provide proof that they have received a COVID-19 vaccination from their own health care providers, the employer should warn its employees not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.

Further, if an employer requires an employee to receive a vaccination administered by the employer or direct contractor, the employer should ensure that any pre-vaccination screening questions will not elicit and instruct employees not to provide genetic information.

Finally, the ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

Question #4: Can an employer request proof of receipt of a COVID-19 vaccination without triggering a disability-related inquiry?

Yes. According to the EEOC, simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability, and this would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."

If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the EEOC advises employers to consider warning employees not to provide additional medical information as part of the proof, in order to avoid implicating the ADA.

Question #5: How should an employer respond to an employee who refuses to get vaccinated on the basis of a sincerely held religious practice, belief or observance?

According to the EEOC, once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose more than a *de minimis* cost or burden on the employer.

EEOC guidance explains that because 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.

Question #6: Does the EEOC's guidance reflect that the currently available COVID-19 vaccines have been approved by Emergency Use Authorization (EUA) and not the typical vaccine licensure process?

Yes, the EEOC's December 16, 2020 guidance expressly refers to the EUA status of COVID-19 vaccines and provides links to the FDA's website for more information about the EUA process. There is no indication that the EEOC's interpretation of the relevant laws or its advice to employers would be different had the COVID-19 vaccines been approved by the typical licensure process. The EEOC's guidance is, however, limited to federal (not state or local) law, and does not take a definitive stance on objections that an employee might raise that relate specifically to the vaccines' EUA status.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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