

EEOC Updates Technical Assistance on COVID-19 Vaccinations

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On Friday, May 28, 2021, the EEOC updated its technical assistance on vaccinations (the "Guidance"). Among other items summarized below, the Guidance states that employers may mandate vaccines under federal EEO laws, explains how to resolve requests for accommodations from employees who cannot be vaccinated for a protected reason under Title VII of the Civil Rights Act of 1964 ("Title VII") or the Americans with Disabilities Act ("ADA"), and clarifies that employers may request documentation of vaccination.

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Employer-Mandated Vaccination

Although the EEOC's previous guidance from December 16, 2020, strongly implied that employers could mandate vaccines, this updated Guidance clearly states that nothing in the EEO laws prevents an "employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations." This is true whether the employee receives the vaccine from the employer or a third party, although if the employer or its agent provides vaccines pursuant to a mandatory-vaccination policy, the employer may only ask pre-vaccination screening questions if it has "a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace."

Employers may also require confirmation, including documentation, of vaccination, but under the ADA, "documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential" and maintained in a separate location from the employees' personnel files. The Guidance does not address state data privacy laws and requirements, which may impose additional obligations.

The Guidance explains that when deciding on and implementing a vaccination policy, employers should be mindful that, "because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement." An employer may not adopt a vaccination policy that discriminates on the basis of any protected characteristic.

When introducing a vaccination policy, employers should, "as a best practice," notify employees that they may request an accommodation if they are unable to be vaccinated due to a disability or religious belief, practice, or observance. Managers and/or supervisors tasked with implementing the vaccination policy should know how to recognize an accommodation request (which does not require employees to use any particular verbiage) and should know to whom any requests should be referred for resolution.

Accommodations Process under the ADA and Title VII

Under the ADA, if an employee cannot be vaccinated due to a disability, the employer may not "require compliance" from the employee unless "the individual would pose a 'direct

threat' to the health or safety of the employee or others in the workplace." To determine whether the individual is a direct threat, the employer must "make an individualized assessment of the employee's present ability to safely perform the essential functions of the job," based on "(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."

The direct threat assessment "should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19." The Guidance identifies the following as relevant to whether an unvaccinated employee would present a direct threat:

- "the level of community spread at the time of the assessment";
- "the type of work environment," including:
 - "whether the employee works alone or with others";
 - whether the employee works inside or outside;
 - available ventilation;
 - "the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees";
 - "the number of partially or fully vaccinated individuals already in the workplace";
 - "whether other employees are wearing masks or undergoing routine screening testing"; and
 - "the space available for social distancing."

If the employer determines that the unvaccinated employee would present a direct threat to others or themselves, the employer must determine whether there is a reasonable accommodation for the employee. Possible reasonable accommodations include the following:

- Requiring the employee to
 - wear a mask;
 - work a staggered shift;
 - work at a distance from coworkers or non-employees; and/or
 - get periodic tests for COVID-19
- "making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees)";
- "permitting telework if feasible"; or
- "reassigning the employee to a vacant position in a different workspace."

An accommodation request may only be denied if there is no accommodation option that "does not pose an undue hardship, meaning [under the ADA] a significant difficulty or expense." As with the direct threat assessment, "[e]mployers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship." The undue-hardship assessment should consider the "proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19" and the "extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown."

The Guidance suggests that the employer's first option should be an accommodation that would "allow the unvaccinated employee to be physically present to perform his or her

current job without posing a direct threat.” If no such option is possible, the employer “must consider if telework is an option for that particular job as an accommodation” and, as a “last resort,” determine “whether reassignment to another position is possible.”

Employers must also provide reasonable accommodations for employees who cannot be vaccinated due to “an employee’s sincerely held religious belief, practice, or observance” and must do so “according to the same standards that apply to other accommodation requests.” The Guidance notes that “the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar” and that “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance,” unless the employer has an objective basis to question the sincerity or religious nature of an employee’s accommodation request. Under Title VII, employers are not required to accommodate employees who are unable to be vaccinated due to religious beliefs, practices, or observances if doing so would impose “more than minimal cost or burden on the employer,” which “is an easier standard for employers to meet than the ADA’s undue hardship standard.”

Finally, the Guidance explains that employees who “seek job adjustments” or request exemptions from a vaccination requirement due to pregnancy “may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work.”

Incentives

Employers may “offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community.” The employer may also offer an incentive for employees to receive a vaccination from the employer or its agent, but only if vaccination is voluntary. This is because of the “pre-vaccination disability-related screening questions” that accompany the vaccine, which employers generally cannot compel their employees to answer. Therefore, if the employer (or its agent) provides the vaccine, the employer may not offer such a large incentive that employees would feel “pressured to disclose protected medical information” to the employer in connection with those screening questions.

Employers also may not offer incentives for employees’ family members to receive the vaccine from the employer or its agent, again because of the pre-screening questions, which would lead to the employer’s receipt of genetic information in the form of family medical history of the employee. But employers may (1) provide vaccines to employees’ family members without offering any incentive or (2) offer incentives “to employees to provide documentation or other confirmation from a third party not acting on the employer’s behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated.”

Emergency Use Authorization

The Guidance no longer references the obligations of the Food and Drug Administration (“FDA”) with regard to the Emergency Use Authorization (“EUA”) status of the COVID-19 vaccines. Previously, the EEOC had indicated that the FDA had an obligation to ensure recipients of the vaccine received informed consent, but it now states that it “is beyond the EEOC’s jurisdiction to discuss the legal implications of EUA or the FDA approach.”

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Labor and Employment practice group, or the following authors:

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