

EEOC Updates Guidance: Should Employers Mandate COVID-19 Vaccination?

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The U.S. Equal Employment Opportunity Commission (EEOC) recently updated its COVID-19 guidance to address legal questions that might arise under various federal laws from workplace vaccination for COVID-19. Although the updated guidance does not expressly authorize mandatory workplace vaccination, it undoubtedly implies that employers may adopt such a policy, subject to a number of caveats.

Whether to mandate vaccination in the workplace is a difficult decision and one that should be made by employers with full consideration of the protections afforded to employees by state and federal laws. Employers should be particularly mindful of the protections under the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act 1964 (Title VII), and the Genetic Information Nondiscrimination Act (GINA). These and other legal considerations were featured in the recent EEOC guidance as well as in prior EEOC and Occupational Safety and Health Administration (OSHA) guidance relating to the swine flu pandemic.

The ADA and Title VII respectively protect individuals who seek exemption from mandatory vaccination on account of a disability or a sincerely held religious belief. Under these provisions, and pursuant to EEOC's latest guidance, employers must, to the extent possible, try to provide reasonable accommodation for such individuals. If, however, providing reasonable accommodation poses an undue hardship for the employer, it may exclude the employee from the workplace. The standard for "undue hardship" is different under the ADA and Title VII, requiring, for the latter, only that the cost of the reasonable accommodation for the employer be more than de minimis (minimal). By contrast, the reasonable accommodation must pose significant difficulty or expense for the employer to be considered an undue hardship under the ADA. Both the ADA and Title VII, however, require the employer to engage in an interactive process with the employee to determine accommodation options that would not result in undue hardship for the employer. That said, an employer may not automatically terminate the employee even if the interactive process does not yield a reasonable accommodation. Instead, the employer must consider if any other rights apply under EEOC rules or federal, state, or local laws.

Additionally, ADA and GINA concerns could arise where employers, such as health care providers, try to administer the vaccine themselves. Although vaccination itself would not violate these provisions, information sought by employers in pre-screening questions might. Accordingly, an employer that elicits disability-related information in the course of administering the vaccine would violate the ADA. Similarly, the employer would violate GINA if, for instance, it inquired about the employee's family members' medical history. Requiring proof that an employee has received vaccination would likely not run afoul of either provision, according to the EEOC guidance.

The protections under the ADA, Title VII, and GINA offer a glimpse into the many legal pitfalls for employers considering whether to implement a mandatory vaccination policy. An additional

consideration is that both the Pfizer and Moderna vaccines have been released pursuant to an emergency use authorization (EUA). Federal law requires the Secretary of Health and Human Services to establish, as part of the EUA, appropriate conditions to ensure that the recipients of the vaccine are informed of the option to accept or refuse administration, of any consequences of refusing, and of any available alternatives and associated benefits and risks. This requirement is also reiterated in the recent EEOC guidance. The rationale behind this is that an EUA granted by the FDA is different from approval under FDA vaccine licensure in that it may permit the use of unapproved medical products or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases. Because federal law requires recipients to be made aware of their option to refuse a vaccine issued under an EUA, it is unclear whether an employer can mandate the currently available vaccines until the FDA grants full approval. This is further underscored by recent guidance issued by the CDC noting that the vaccine is not mandated by the FDA and that whether an employer can mandate COVID-19 vaccination is a matter of state or other applicable law, much of which is still evolving or not definitive.

Based on these considerations, employers may wish to keep vaccination optional, at least until the available vaccines receive full FDA licensure. This is, no doubt, a difficult decision since an employer that fails to mandate vaccination might inadvertently expose its employees to COVID-19 in violation of OSHA requirements to keep them safe from known workplace hazards. On the other hand, mandating COVID-19 vaccination for all employees might result in issues (and lawsuits) much bigger than any potential OSHA violation if the currently available vaccines are later determined to be unsafe. If employers do choose to mandate vaccination, they should not administer the vaccine but should instead have employees obtain it through their own health care providers.

Based on the CDC's priority recommendations, employers still have time to decide whether to make vaccination mandatory. They should make this decision with the assistance of legal counsel after careful consideration of federal, state, and local laws.



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