

The EEOC Issues Clarifying Guidance about COVID-19 Vaccines in the Workplace

Last week, the Equal Employment Opportunity Commission (“EEOC”) updated its [COVID-19 guidance](#) to address workplace issues related to COVID-19 vaccines, including mandatory vaccination policies. According to the EEOC, employers may mandate vaccines, but must attempt to accommodate employees who refuse vaccination because of disability or a sincerely held religious belief, practice, or observance. Under both exemptions, an employer is required to provide an employee with a reasonable accommodation excusing the vaccination requirement unless the accommodation would pose an undue hardship to the employer.

Exemption for Disability

According to the newly issued EEOC guidance, an employer may exclude an employee who is unvaccinated due to disability from physically entering the workplace only if the employer proves (1) that the employee poses a “direct threat” to the workplace, and (2) the direct threat cannot “be eliminated or reduced by reasonable accommodation.”

To determine whether an employee poses a “direct threat,” an employer must conduct an individualized assessment, considering four factors: (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.

If an employer determines that an unvaccinated employee poses a “direct threat,” the employer must then engage in a cooperative dialogue with the employee to evaluate whether there is a reasonable accommodation that is available that would eliminate the threat. The cooperative dialogue should focus on whether an accommodation exists that would allow the unvaccinated employee to perform their essential job functions, while also protecting others in the workplace from the risk of harm. If a reasonable accommodation is available, it must be provided as long as it does not pose an undue hardship to the employer. Examples of accommodations could include physically separate workspaces, the provision of protective equipment, or an extended remote work arrangement.

The EEOC advises employers navigating requests for accommodation to consult the Job Accommodation Network, and specifically its [COVID-19-specific guidance](#), for additional guidance. Employers should also be mindful, during both the “direct threat” analysis and the cooperative dialogue process, that as more and more employees receive a COVID-19 vaccine, the potential risks posed by an unvaccinated employee may be reduced.

Exemption for Sincerely Held Religious Beliefs

As a practical matter, an employer who receives a request for a vaccination exemption based on a sincerely held religious belief, practice, or observance must conduct a similar analysis as when they receive a disability-related request. But as a technical matter, instead of conducting a “direct threat” analysis, employers can move directly to determining whether granting an employee’s request for a religion-based exemption would pose an undue hardship. Since “jeopardizing security or health” is an example of an undue hardship, the analysis will be similar. Employers, for example, should consider whether accommodations such as separate workspace or remote work could allow the employee to perform the essential functions of their job without endangering the health of co-workers.

Sincerely held religious beliefs typically include any belief rooted in a traditional religion, as well as any moral or ethical beliefs as to what is right and wrong. The EEOC has further cautioned that employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employer "has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance," such as refusing to be vaccinated, the employer may be "justified in requesting additional supporting information."

As with disability-related requests, once an employee has made a request for an accommodation (or the employer is otherwise on notice to the need for an accommodation), the employer must engage in a cooperative dialogue with the employee concerning their request.

Employer-Sponsored Vaccine Programs

The guidance also addresses employer-sponsored vaccine programs, where an employer contracts a third-party to vaccinate its employees. Unfortunately, such programs are fraught with legal risk and procedural hurdles when they are mandatory rather than voluntary. For example, standard screening questions prior to vaccine administration touch on topics such as the employee's own health conditions and the health conditions of family members, including (in some cases) genetic conditions. According to the EEOC, such inquiries, when posed by an employer's contractor, are disability-related inquiries, and, when implicating genetic information, are likely prohibited by the Genetic Nondiscrimination Act ("GINA"), unless the disclosure is completely voluntary. However, requiring proof of vaccination from the employee's *own* healthcare provider does *not* constitute a disability-related inquiry, and, provided that the proof does not contain genetic information, does not implicate GINA. For these reasons, employers who wish to require vaccinations would generally be better served by permitting employees to provide proof of vaccination from an independent provider, even if they also engage a contractor to provide vaccines directly to employees on a voluntary basis. Employers who choose to mandate vaccination could also consider giving employees the option of receiving a vaccine through an employer-sponsored program or from their own provider, potentially eliminating challenges associated with mandatory employer-sponsored programs.

Other Considerations

Neither the New York City Commission on Human Rights nor the New York State Division of Human Rights have yet issued COVID-19-related guidance, but they may do so as vaccines become more readily available. While the process for addressing disability-related and religious-based objections to a COVID-19 vaccination would likely be similar under State and City law, employers should be mindful of expanded obligations under City law to provide accommodations on the basis of pregnancy, childbirth, or related medical condition, lactation needs, and status as victim of domestic violence, sexual violence, or stalking. Employers based in New York City must further comply with the technical requirements of the City's cooperative dialogue law, including its requirement that employers provide a written accommodation determination at the end of the process.

Finally, there are a host of practical reasons why an employer might want to strongly encourage—rather than mandate—that all employees get vaccinated. For example, employees may have concerns and anxieties regarding the safety and efficacy of a vaccine, particularly in the early weeks and first few months following its distribution, though the early positive efficacy results should certainly quell much of the anxiety that may have been felt previously by some employees. Additionally, the COVID-19 vaccine also may not be universally available to all employees in a convenient and accessible manner. Finally, there could be potential liability (*e.g.*, workers compensation liability) in the event an employee experiences an adverse reaction to a vaccine. Given all of these issues, any mandatory vaccination policy should only be implemented after careful consideration.

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