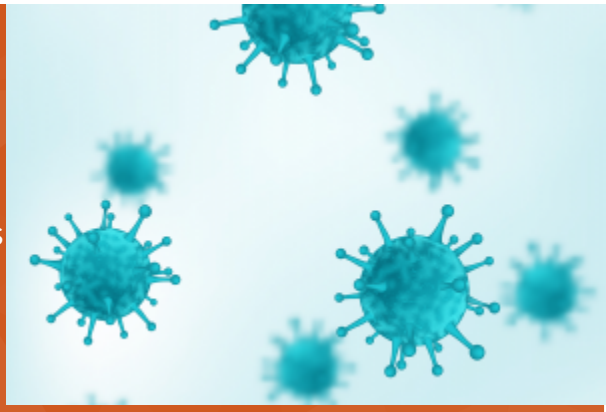
COVID-19 Alert: Mandatory Vaccination Programs

EEOC Issues New Employer Guidance on COVID-19 Vaccines — Private Employers Poised To Play Front Line Role in Government's Mass Vaccination Effort



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On December 16, 2020, the U.S. Equal Employment Opportunity Commission ("EEOC") issued new guidance to employers related to mandatory COVID-19 vaccination programs for employees (the "Guidance"). In broad terms, the Guidance instructs that, subject to certain limits:

- Federal law does not prohibit mandatory employee COVID-19 vaccination programs; and
- Under certain circumstances, employers may bar employees who refuse COVID-19 vaccinations from the workplace.

As noted by several commentators, mandatory employee COVID-19 vaccination programs are "positioned to require large numbers of Americans who otherwise would not receive a vaccination to do so because their employment depends on it." As such, by outlining a legal path for mandatory employee COVID-19 vaccination programs, the Guidance appears to place employers on the front line of the Government's mass vaccination efforts.

What employers need to know about the Guidance is summarized below.

ARE MANDATORY EMPLOYEE COVID-19 VACCINATION POLICIES LAWFUL UNDER FEDERAL LAW?

As described in detail in the Guidance, the availability of COVID-19 vaccinations implicate questions under various federal civil rights laws, including the Americans with Disabilities Act ("ADA"), religious protections of Title VII of the Civil Rights Act of 1964 ("Title VII"); and the Genetic Information Nondiscrimination Act ("GINA"). While the Guidance does not expressly sanction mandatory employee COVID-19 vaccination programs, the Guidance does indicate that such programs may be permissible under these federal laws, provided that:

- Employers may be obligated to provide exemptions or accommodations to employees, with respect to a mandatory COVID-19 employee vaccination program, based on religious objections or disability status; and
- Federal civil rights laws may limit the types of questions employers may ask employees with respect to their vaccination status.

Specifically:

ADA Considerations

The ADA generally prohibits an employer from requiring a "medical examination" of, or making "disability-related inquiries" to, an employee, unless such examination or inquiries are both "job-related and consistent with business necessity." The Guidance instructs, however:

- "The [COVID-19] Vaccination itself is not a medical examination;" and
- "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."

As such, the Guidance concludes that the ADA does not expressly apply to, or operate to prohibit, a mandatory employee COVID-19 vaccination program.

That said, the Guidance does provide the following parameters to such programs:

- If the employer intends to mandate its employees receive a vaccine, employers must follow ADA restrictions as they relate to potential pre-screening questions. For example, health care practitioners often ask certain pre-screen questions prior to administering a vaccine to ensure the patient may have the vaccine. In the scenario where an employer *requires* its employees to receive the vaccine (either administered by the employer or a third party contracted by the employer), such pre-screen questions will be "disability-related" inquiries under the ADA. As such, employers should be cognizant that pre-screening questions are in fact "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, cannot receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.

- If the employer intends to mandate its employees receive vaccines, employers must provide reasonable accommodation to any employee whose disability prevents them from being vaccinated, unless doing so is an "undue hardship (significant difficulty or expense)." As instructed in the Guidance: "Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration."

- A mandatory employee COVID-19 vaccination program may not unilaterally bar unvaccinated employees from the workplace. Rather, "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.'" To make that determination, the employer must conduct an "individualized assessment" of four factors in determining whether a direct threat exists: "the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm." A conclusion that there is a direct threat would include a determination "that an unvaccinated individual will expose others to the virus at the worksite." If an employer determines that an unvaccinated worker poses a direct threat, the employer may not then exclude that employee from the workplace "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat."

Title VII Considerations

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 an undue hardship under Title VII. The Guidance defines "undue hardship" under Title VII as having more than a de minimis cost or burden on the employer. Further, 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.

GINA Considerations

Under Title II of GINA, employers are prohibited from using, or acquiring or disclosing (except in limited circumstances) genetic information in the course of employment and in making decisions related to employment. The EEOC advises that Title II of GINA is likely not implicated if an employer administers the vaccine or requires proof of a vaccine.

However, the EEOC cautions that pre-screening questions *may* elicit information that would fall under Title II. Because the pre-screening questions are not yet known, employers should proceed with caution. If the pre-screening questions end up eliciting information covered under Title II (such as information regarding one's immune system or history), the EEOC recommends that employers do not administer the vaccine themselves – and instead require proof of the vaccine. Even so, if requiring proof of the vaccine, the EEOC recommends warning employees to communicate to the health care provider administering the vaccine to not list any genetic information as part of the proof. If the employer issues such as warning, and the proof contains genetic information, however, the disclosure of that genetic information is considered inadvertent and will not be considered unlawful under GINA.

WHAT HAPPENS IF AN EMPLOYER CANNOT EXEMPT OR PROVIDE A REASONABLE ACCOMMODATION TO AN EMPLOYEE WHO CANNOT COMPLY WITH A MANDATORY VACCINE POLICY BECAUSE OF A DISABILITY OR SINCERELY HELD RELIGIOUS PRACTICE OR BELIEF?

If an employee refuses vaccination, or may not be vaccinated, for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, the Guidance clarifies that it "would be lawful for the employer to exclude the employee from the workplace." This instruction does not mean that the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under other federal, state, and local authorities are applicable. For example, if an unvaccinated employee cannot be brought back into the workplace, the employer may be obligated to offer the option to work remotely as an accommodation (as many have done during the pandemic), or to offer leave under other laws or the employer's existing leave policy.

WHAT'S NEXT?

Vaccinations have become an inflection point in the news cycle, and it appears certain that the controversies surrounding vaccines will be played out in the workplace. While the Guidelines generally permit mandatory employee COVID-19 vaccination programs (subject to the exceptions outlined above), employers may face significant and varied pressures around such programs.

As employers navigate these issues, they are cautioned to be deliberative, and to adopt workplace safety strategies that are consistent with government recommendations and the particulars of the employer's specific work environment.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please contact Matthew Mitchell should you have questions concerning this subject, or any other COVID-19 response matters.

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