

EEOC's updated guidance on vaccinations

On Dec. 16, 2020, the Equal Employment Opportunity Commission issued updated guidance to provide clarification on employer COVID-19 vaccination policies. The EEOC reiterated that mandatory COVID tests are permissible, but must comply with the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 and the Genetic Information Non-Discrimination Act ("GINA").

The following summarizes the EEOC's updated interpretation of COVID-19 policies and practices under these laws.

ADA considerations

For purposes of the ADA, when an employer either directly or under contract through a third party administers a mandatory COVID-19 vaccination, it is not a "medical examination." However, pre-screening questions to determine if the employee is medically prevented from receiving the vaccine are likely to elicit information about a disability and are "medical inquiries" covered by the ADA.

Those pre-screening questions are only permissible under the ADA if they are "job-related and consistent with business necessity." To establish this, the employer would "need to have a reasonable belief, based on objective evidence" that if the employee does not receive the vaccination, he or she would pose a "direct threat to the health or safety of him or herself or others."

The EEOC provided two circumstances in which the prescreening questions need not be job-related and consistent with business necessity: (1) if the employer-provided vaccination is offered on a voluntary basis and, therefore, the employee's decision to answer the question is voluntary; and (2) the employee receives the employer-mandated vaccine from a third party not under contract with the employer.

Asking an employee to show proof of a vaccine from a third party is not a disability-related inquiry, but questions about why an employee has not received a vaccine may elicit disability-information and must be "job-related and consistent with business necessity." The EEOC recommends



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employees not provide medical information with proof of the vaccination from a third-party provider.

The EEOC reiterated that an employer may adopt a qualification standard that an employee not pose a "direct threat to the health or safety to the individual or others that cannot be eliminated or reduced by reasonable accommodation."

To screen out an employee under this standard, employers should conduct an "individualized assessment" based upon the following factors: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm would occur; and (4) imminence of the potential harm.

Employers are not required to provide an accommodation if it would create an undue hardship. In determining whether waiving the vaccination requirement is an "undue hardship," the employer should consider the prevalence of other workers in the workplace who have had COVID-19 vaccinations and the amount of contact with others, including the general public, whose vaccination status is unknown.

Accommodating religious beliefs

Title VII may require reasonable accommodation for employees who cannot receive a vaccination for a sincerely held religious belief unless it would constitute an "undue hardship." The EEOC reiterated that an "undue hardship" for purposes of Title VII, means that providing an accommodation would be more than a "de minimis cost or burden on the employer."

The EEOC cautioned that an employer should only question the religious nature or sincerity of the employee's religious belief if it has an objective basis for questioning

them.

When employees are unable to receive a vaccination due to disability or religion, the EEOC acknowledges that there may be situations in which a reasonable accommodation is not possible, and the employee may be excluded from the workplace. Importantly, the guidance states that the employee should not be automatically terminated. Instead, the employer should determine whether other accommodations are available, such as remote work.

The employer should also consider whether the employee is entitled to leave under other federal, state or local laws, such as the Family and Medical Leave Act ("FMLA") or the Families First Coronavirus Relief Act ("FFCRA").

Vaccinations and the GINA

At least one of the COVID-19 vaccines uses messenger RNA, which, according to the EEOC, has raised the question of whether a mandatory vaccination is an unlawful use of genetic information. Referring to information from the Centers for Disease Control, the EEOC stated that these vaccines do not interact with DNA, so it does not violate GINA's prohibitions on using, acquiring or disclosing genetic information.

Any pre-vaccination medical screening by the employer or its third-party contractor may violate GINA if it elicits genetic information. Genetic information includes, among other things, information about the employee or family member's genetic tests and family medical history.

The EEOC recommends that if a vaccination's prescreening includes questions about genetic information, the employer request proof of vaccination from an unrelated third party, rather than administering the tests themselves.

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