

Updated EEOC Guidance on Mandatory Vaccinations

In an article published last month entitled ["Can Employers Require Employees to Get Vaccinated for COVID-19"](#), we addressed whether employers may require their employees to be vaccinated with the COVID-19 vaccine. Now that COVID-19 vaccines are being administered, the Equal Employment Opportunity Commission ("EEOC") has updated its COVID-19 Guidance addressing mandatory vaccinations. The EEOC's Guidance ["What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"](#), can be found by [CLICKING HERE](#).

Americans With Disabilities Act ("ADA") and Vaccinations

The EEOC has determined that vaccinations are not "medical examinations" under the ADA, and asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. Under the EEOC's guidance, employers may request that employees provide proof of receipt of a COVID-19 vaccination because that request, by itself, is not likely to elicit information about a disability. However, the EEOC cautions that subsequent questions from an employer, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." Thus, the EEOC cautions that employers who require employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider would be prudent to warn the employee not to provide any medical information as part of the proof.

Although asking for proof of a vaccination is permissible, pre-screening vaccination questions, such as questions asked prior to administering the vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination, are likely to elicit information about a disability, and, therefore, are subject to the ADA standards for disability-related inquiries. Employers (or a contractor on the employer's behalf) may only ask pre-screening vaccination questions if the questions are "job-related and consistent with business necessity." This means that an employer (or a contractor on the employer's behalf) who asks pre-screening vaccination questions must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and does not receive the vaccine will pose a direct threat to the health or safety of himself or others.

There are two exceptions to this requirement under which pre-screening vaccination questions are permitted without a showing that they are "job-related and consistent with business necessity." First, if the vaccination is offered to employees on a voluntary basis, an employee's decision to answer pre-screening disability-related questions must also be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against the employee for failing to answer the questions. Second, if the vaccinations are provided by a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA's restrictions on such inquiries do not apply.

ADA and Title VII Issues Regarding Mandatory Vaccinations

As we previously stated, employees may object to an employer's mandatory vaccination policy based either on a disability or religious beliefs.

Disability

If an employee objects to mandatory vaccination on the basis of a disability, the employer must show that the unvaccinated employee would pose as 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." As in any ADA "direct threat" defense, the employer must consider: 1) The duration of the risk; 2) The nature and severity of potential harm; 3) The likelihood that the potential harm will occur; and 4) The imminence of the potential harm.

If the employer determines that an individual cannot be vaccinated due to a disability poses a "direct threat" at the worksite, the employer must consider whether a reasonable accommodation exists that would eliminate or reduce the risk. This may include allowing the employee to work from home or to isolate them such that they would not have contact with their co-workers or the general public. If the employer cannot reasonably accommodate the employee's accommodation request, at that point, the employer can physically exclude the employee from the worksite. The EEOC indicates that managers and supervisors should be trained on how to recognize an accommodation request from an employee with a disability. Obviously, they may not disclose an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

Religious Objection

If the employee is objecting to mandatory vaccination on the grounds that they hold a sincerely held religious practice or belief which prohibits vaccination, the employer must also consider reasonable accommodation. Under Title VII, the employer's burden is less than under the ADA. In this case, the accommodation cannot pose more than a "de minimis" cost or burden on the employer. The EEOC believes that most employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, the employer has an objective basis for questioning either the religious nature of the particular belief, practice, or observance, the employer would be justified in asking for additional supporting information. This might include an examination of whether the employee has acted in a manner inconsistent with his professed belief, i.e., been vaccinated for other diseases or whether there is some doctrinal authority like a text, or religious authority that supports his or her religious opposition to being vaccinated.

Mandatory Vaccinations and GINA

The EEOC also indicated that administering a COVID-19 vaccination to employees or requiring them to provide proof that they have been vaccinated does not implicate Title II of the Genetic Information Non-Discrimination Act ("GINA"). If, during pre-vaccination screening, the employer asks questions likely to elicit information about a disability or about genetic information, such as questions regarding the immune systems of family members, it is possible

that it may implicate GINA. The employer may want to reformulate the questions or its need for the answers. If the pre-vaccination questions do not include any questions about genetic information or family history, then asking them does not implicate GINA. If an employer requires proof from the employee that they have received a vaccination from their own healthcare provider, the employer may want to warn the employee not to provide any genetic information as part of that proof.

Contact Us

[Fraser Stryker's Labor and Employment Law attorneys](#) are available to answer questions and assist clients in preparation for, or response to, any legal issues related to COVID-19 and employees. Please reach out to us at (402) 341-6000 for further assistance.

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