

EEOC Issues Guidance On Whether Employers Can Require Employees To Receive A COVID-19 Vaccine

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Based on welcome news that the COVID-19 vaccine may be available to the public in the coming months, many employers are beginning to consider whether mandatory vaccinations can be incorporated into existing strategies to protect the workforce. The short answer is that there is currently nothing to prohibit employers from requiring employees to receive the vaccine. Nevertheless, employers should be cautious about requiring vaccinations as there are many variables to consider.

What is Emergency Use Authorization?

On December 11, 2020, the Food and Drug Administration (FDA) issued an Emergency Use Authorization (EUA) for the first COVID-19 vaccine. Employers should understand that FDA gave EUA for the two COVID-19 vaccines, which is different than the FDA's full approval process that would otherwise apply in a non-emergency scenario. Because the vaccines have received EUA approval, the FDA will require persons be informed that the approval is under an EUA and the known and potential benefits and risks, including risks that are unknown. This information should be given by the entity administering the vaccine. Therefore, employers who do not employ front line workers, such as those in healthcare, assisted living and police and fire, should consider waiting to mandate receiving a COVID-19 vaccination until a vaccine receives full approval by the FDA.

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Discrimination Laws

On December 16, 2020, the EEOC released new guidance for employers who want to mandate employees to take the COVID-19 vaccine. According to the EEOC, employers can require employees to receive a COVID-19 vaccine, with some caveats.

Employers must consider employee requests for exclusion from a vaccination requirement as an accommodation for a disability or religious beliefs. If an employee requests an accommodation, the employer must engage in the interactive process to determine whether the accommodation is a reasonable one and whether it imposes an undue burden. However, employers may exclude an unvaccinated employee from physically entering the workplace if the unvaccinated employee poses a “direct threat to the health or safety of individuals in the workplace” that cannot be eliminated or reduced through an accommodation. Arguably, an unvaccinated employee may pose a direct threat if that employee would expose others in the workplace to COVID-19. The EEOC cautions that employers should not automatically terminate the employment of an unvaccinated employee who poses a direct threat to the workplace or because of a sincerely held religious belief without first determining whether there are other accommodations that can be made for that individual, such as the ability to work remotely. In addition, employers should recognize that many workplaces have operated safely throughout the pandemic prior to the availability of a vaccine, which underscores that a “direct threat” determination should not be applied reflexively.

Additionally, the Americans with Disabilities Act (ADA) and the Genetic Information Non-Disclosure Act (GINA) prohibit employers from asking questions that may elicit information about an employee’s disability or genetic information. Although administering the COVID-19 vaccine alone does not implicate GINA because it does not involve the use of genetic information to make employment decisions, pre-screening questions before an employee is administered the COVID-19 vaccine may elicit an employee’s genetic information, or an employee’s disability. Employers can avoid this issue by retaining a third-party like a pharmacy to administer the vaccine where the employer is not provided the answers to the pre-screen questions. Also, the ADA does not apply to voluntary programs and if the employee has the option of answering the questions or declining to do so.

Employers can still require proof of vaccination, but it may get murky if an employee cannot receive the vaccine and an employer asks why, because the question may be a prohibited disability-related inquiry or the answer may elicit an employee’s genetic information. Employers who must ask why should warn the employee not to provide any medical or genetic information as part of the proof in order to avoid

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implicating the ADA or GINA.

OSHA And Labor Considerations

Employers can expect that OSHA would require employers to provide information to employees about the benefits of a COVID-19 vaccine, if the employer were to require employee vaccinations. Depending on the circumstances, OSHA may provide “whistleblower” type protections to employees who refuse vaccines based on having expressed safety-related concerns. Similarly, the National Labor Relations Board (NLRB) might protect employees (even in a non-union setting) who engaged in “protected concerted activities” regarding an employer’s vaccination program. Given the numerous reports in the news relating to safety concerns and possible public distrust, employers should anticipate some resistance to vaccination requirements and, if such concerns arise, will need to consider whether employees who object are engaged in protected conduct. In a unionized workforce, vaccination programs may be considered a mandatory subject of bargaining under the National Labor Relations Act.

What Do Public Health Officials Say?

Public health officials have long recommended that persons receive an annual seasonal flu shot, and the EEOC has said that flu shots can be required by employers (subject to the accommodation requirements explained above). With respect to the COVID-19 vaccine, the CDC is not recommending that all persons get vaccinated at this time because priority should be given to front line workers and at-risk populations. The CDC also explained that immunity for persons who have had COVID-19 may only last for 90 days. Therefore, persons who have had COVID-19 may still have to get vaccinated.

Ultimately, employers should also determine whether there are any requirements or mandates from state and local public health officials. For example, the Illinois Department of Public Health has stated that private employers can require employees to receive the vaccine, but, currently, there is no federal or Illinois mandate that everyone receive a COVID-19 vaccine.

Takeaway

Because the timeline for vaccines to become readily available remains unclear, we expect that firmer guidance on vaccination programs will be forthcoming soon, which may include details relating to liability protections available to employers that offer or require vaccines. Also, because employers may face accommodation requests or pushback about safety concerns, employers should begin planning now. At a minimum, employers should begin identifying legal standards, job duties or responsibilities that might

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require a mandatory vaccination requirement.

Also, based on the number of exceptions that may come into play, unless employees are legally required to have been vaccinated, in many cases it may be preferable to simply encourage all employees to be vaccinated and to facilitate employee vaccinations. We will continue to monitor these issues and provide updated information, when available.