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The COVID-19 Vaccines Are Here – What Do Employers Need to Know and Consider?



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Infectious disease experts have a saying: Vaccines don't save lives, vaccinations do. As the Federal Drug Administration (FDA) has approved the first COVID-19 vaccine, employers eager to get back to normal may want to mandate vaccinations. Yet, it has been reported that a sizable number of Americans are hesitant to be vaccinated, and news of some adverse reactions may give rise to more angst.

Still, employers have obligations to their employees, including a duty under OSHA to keep their employees safe while at work, to customers and to others who have access to the workplace. If employers want to make vaccinations mandatory, can they force their employees' hands (or, more accurately, their arms)?

If you're considering vaccination issues at your company, now is the time to act.

EEOC Updates Guidance as the Vaccine Rolls Out

In 2009, during the H1N1 pandemic, the EEOC issued guidance entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." Beginning in March 2020, the EEOC began updating that guidance to address the burgeoning coronavirus pandemic. See "[What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws](#)." On December 16, 2020, the EEOC added FAQs specifically addressing the issue of vaccinations in the workplace (Updated Guidance).

The EEOC makes a number of significant points in the Updated Guidance:

- Vaccines are not medical examinations under the Americans with Disabilities Act (ADA).
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry under the ADA.
- *Employers can make vaccination mandatory.*
- Employers that make vaccination mandatory may have to make reasonable accommodations for a sincerely held religious belief or practice or for a disability, unless the accommodation would be an undue hardship.
- Certain vaccination pre-screening questions might constitute a disability-related inquiry.

A Vaccination Is Not a Medical Examination

Vaccinations are administered to protect everyone from something (in this case, COVID-19). Unlike a medical examination, such as a blood test, they do not seek personal information about a specific individual's health. Therefore, per the Updated Guidance, vaccinations are not medical examinations and can be mandated (with exception). This finding is important because the standard that must be met for requiring an employee to have a medical exam is significant.

Proof of Vaccination Is Not a Disability-Related Inquiry

In the Updated Guidance, the EEOC states that simply asking for proof of the vaccination is not a disability-related inquiry that violates the ADA. However, while an employer can require proof, they should take care to avoid inadvertently receiving disability-related information while doing so. The EEOC suggests that an employer “may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.”

Additionally, the recipient of the proof should not ask any supplemental, health-related questions such as why an employee did not receive the vaccine, as those questions could elicit information about the employee's disability.

Vaccinations Can Be Required Under the ADA

As the EEOC states in its Updated Guidance, the “ADA allows an employer to have a qualification standard that includes ‘a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.’ ” Such a safety-based qualification standard can include a vaccination requirement.

However, if a vaccination requirement “screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat ... ‘to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’ ”

Exposure to COVID-19 as a Direct Threat

Certain workplaces are at high risk for infection and spread of COVID-19. Long-term care facilities in the United States have been particularly impacted by the virus, accounting for a staggering 40% of all deaths. For such workplaces, the conclusion that COVID-19 presents a direct threat is obvious.

In other workplaces, the answer may be more complex. In the Updated Guidance, the EEOC stated that “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.” This is a fact-intensive inquiry over the population at work, considering the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact the employee has with others, such as customers, clients or vendors, whose vaccination status could be unknown.

According to the EEOC, an employer that wants to require vaccinations 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.*’ ” (emphasis added) Consider, for example, a telemarketing company that does not have an office and has always had all of its employees work remotely. Under such circumstances, the telemarketing company may struggle to show a direct threat.

Accommodating a Disability

So, if you have concluded that unvaccinated employees present a direct threat, there remains the issue of a reasonable accommodation. As HR professionals know, the ADA requires employers to make reasonable accommodations so that qualified individuals with disabilities can perform the essential functions of their jobs. Such an accommodation could include, for example, modifying a workplace tardiness standard to allow an employee with a disability some flexibility in reporting time (absent an undue hardship). The same could be true with a mandatory vaccination policy. If an employee cannot be vaccinated due to disability (which could include pregnancy) or a sincerely held religious belief, the EEOC states that the employer cannot exclude the employee from the workplace, or take any other action, unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the risk.

The EEOC uses a host of factors to determine whether undue hardship exists, including the “type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.” Ask yourself: Would requiring the employee to wear a mask work? Could that employee work at home until the United States reaches herd immunity? Are there other accommodations that

might be effective (such as social distancing, working in an office with a door, etc.)?

Accommodating a Sincerely Held Religious Practice or Belief

Additionally, under Title VII, the employer may have to provide a reasonable accommodation where an employee's sincerely held religious belief, practice or observance prevents the employee from taking the vaccine if doing so does not impose more than a de minimis cost – a lower burden than the ADA, but one that requires employers to consider and analyze the request.

In the Updated Guidance, the EEOC counsels that the definition of religion is broad and that employers faced with such a request should “ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief.” However, should an employer have an “objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance,” the employer may require the employee to provide additional, supporting information.

Issues Related to Vaccination Screening

The EEOC warns that a pre-vaccination medical screening is likely to elicit information about a disability. For example, current CDC vaccination protocol includes asking questions about prior vaccinations, as well as contraindications including allergies, prior reactions to vaccines and underlying immune system problems. Therefore, employers who administer a vaccine themselves (or via a contractor) would have to show that the questions are “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, does not receive a vaccination, will pose a direct threat to their own or others' health or safety.

However, as to this issue the EEOC provided several safe havens. First, it stated that if the vaccination program was voluntary, then the disability-related screening questions would also be considered voluntary and would not violate the ADA. The EEOC also stated that when an employee receives an employer-required vaccination “from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider,” then the employer cannot be held liable for those same pre-vaccination questions. Therefore, employers who wish to mandate the vaccine should consider keeping the process of vaccination at arm's length.

Other Considerations

Employees who are disciplined or terminated for not being vaccinated may have rights beyond the ADA and Title VII. OSHA's position on mandating flu vaccines is that such requirements are permissible but employees who refuse vaccination because of a reasonable belief that they have a medical condition that creates a real danger of serious illness or death may have recourse under OSHA's whistleblower laws. Additionally, under the National Labor Relations Act, unionized workforces may have the right to negotiate any mandated vaccine as a term or condition of employment. Furthermore, compensation issues – for the vaccination as well as time off to be vaccinated – may arise.

Employers should also be mindful of state and local laws, such as paid sick leave, that may trigger financial obligations. Potential liability issues could arise if an employee has an allergic reaction to or becomes sick due to vaccination. Finally, while the federal government has said the COVID-19 vaccine will be free in 2020 and 2021, regardless of insurance, employers may want to provide free, onsite vaccinations should they be required in future years.

Steps Employers Can Take Now

1. Draft a Vaccination Policy

Employers should draft a policy – whether mandatory or voluntary – so that employees clearly understand the company's vaccination protocol and its safety-related purpose. The policy should include language that the employer will reasonably accommodate employees who request an exemption on the basis of a disability or sincerely held religious belief, practice or observance. Reporting and recording procedures should also be set forth. Consequences for failing to adhere to the vaccination policy should be explained. Finally, the company should revisit any existing vaccine policy to ensure consistency.

2. Anticipate Accommodations

Employers should anticipate accommodation requests and consider workable solutions. Working from home may be a reasonable accommodation if the employee has done so over the past year. Indeed, the EEOC guidance states that remote work should be considered before termination. Additionally, if the employee can socially distance and wear PPE in common areas, this may also be deemed a reasonable accommodation, and one generally involving little difficulty or expense.

3. Train HR and Supervisors

HR and supervisors must be trained to understand the obligations to engage in an interactive process when an employee seeks a vaccination-related accommodation. First, they must recognize a request when they hear one. Additionally, the EEOC guidance reminds managers and supervisors that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

If you would like more information or would like to discuss these issues further, please contact a member of Gould & Ratner's [Human Resources and Employment Practice](#).