

**THOUGHT LEADERSHIP**

LEGAL UPDATES

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# EEOC Issues COVID-19 Vaccine Guidance, Allowing Employer Mandates

Widespread COVID-19 vaccination is considered critical for many employers to return employees to work safely and resume normal business operations in the future. As such, many employers have been asking whether they can require, incentivize or encourage employees to get vaccinated, and what liabilities they may face if they choose any of these options.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued updated COVID-19 guidance for employers related to administration of the much-anticipated COVID-19 vaccines. In light of the Food and Drug Administration's (FDA) recent emergency authorization of Pfizer's COVID-19 vaccine and likely authorizations of additional vaccines, the EEOC answered several questions ranging from whether employers can require employees to provide proof of vaccination to how employers should respond to employees who indicate that they cannot get vaccinated because of a disability.

**The EEOC's guidance clearly indicates that employers can make COVID-19 vaccination a condition of employment.** However, as employers with mandatory flu vaccination programs are already familiar, employers with mandatory programs must consider exemptions for employees who have disability-related or religious objections, as well as any state-specific exemptions. The EEOC's guidance focuses primarily on three topics: disability-related inquiries, accommodations, and the Genetic Information Nondiscrimination Act (GINA).

The following are important takeaways for employers to consider as they continue to develop their vaccination plans and protocols:

**Mandatory vaccination programs.** The EEOC guidance clearly indicates that employers can require employees to get the COVID-19 vaccine, as long as employers consider potential exemptions for employees with disabilities and religious objections.

**Accommodations requests.** The EEOC guidance recommends that members of management responsible for communicating with employees about vaccination requirements be ready to recognize an accommodation request and refer employees to those responsible for engaging in the interactive process. As one might expect, for disability-related requests, the process should be individualized and include determining whether documentation is needed to support the accommodation. It should also include considering possible options for accommodation given the nature of the employee's position and the employer's workforce.

For exemptions based on religion, the guidance reiterates that the definition of religion under Title VII of the Civil Rights Act is broad, and therefore employers should assume requests for religious accommodations are based on sincerely held beliefs. However, if an employer has an *objective* basis to question the religious nature of the request or whether the belief is sincerely held, then the employer can ask for additional supporting information.

**Direct threats.** In April, the EEOC issued guidance related to medical testing, advising that employers could test employees for COVID-19 "because an individual with the virus will pose a direct threat to the health of others." The EEOC's guidance related to vaccines is not quite as clear. Instead, in response to the question – "What can an employer do if an employee raises a disability-related objection to mandatory vaccination?" – the EEOC indicated that employers should first determine whether an unvaccinated employee poses a direct threat by examining four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

An employer who reaches the conclusion that an unvaccinated employee poses a direct threat because the employee will expose others at work to the virus is required to determine next whether a reasonable accommodation can be provided to mitigate the direct threat. Examples of accommodations may include strict mask wearing, routine testing and social distancing.

Only when a reasonable accommodation will not reduce or eliminate the direct threat can an employer exclude an employee from the workplace. And, even then, the EEOC recommends that the employer not terminate employment, but rather “determine if any other rights apply under the EEO laws or other federal, state, and local authorities.” For example, the employer may have to accommodate by allowing the employee to telework.

**Proof of vaccinations.** The EEOC’s guidance confirms that employers may request proof of vaccination from employees. Doing so is not a disability-related inquiry. However, employers should refrain from asking follow-up questions regarding the reason an employee has not been vaccinated, because doing so could elicit information about a disability. Such inquiries would be subject to the Americans with Disabilities Act’s (ADA) job-related and consistent with business necessity requirement.

The EEOC also opined that requesting proof of vaccination does not implicate GINA. It appears the EEOC provided this guidance because some COVID-19 vaccines use mRNA technology, which has raised questions about genetics. Because the Centers for Disease Control and Prevention (CDC) has explained that mRNA vaccines do not interact with our DNA, the EEOC clarified that requesting proof of vaccination does not implicate GINA’s prohibitions on using, acquiring or disclosing employees’ genetic information.

**Administration of the vaccine.** While there is currently a very limited supply of COVID-19 vaccines available, and it is unclear whether employers will be given the option of administering the vaccine on-site at workplaces in the near term, the EEOC opined that if an employer administers the vaccine, then doing so does not constitute a medical examination.

Again, employers should be careful about ancillary questioning, including pre-vaccination medical screening. If screening questions are asked by an employer, or a contractor on the employer’s behalf, and the answers to those questions could reveal information about a disability, then the employer must show that the inquiry is job-related and consistent with business necessity *unless*: (1) vaccination and screening questions are voluntary (e.g., the employee can back out without

retaliation), or (2) the employee receives the employer-required vaccination from a third-party that does not have a contract with the employer (e.g., a pharmacy or other healthcare provider).

Employers must keep any employee medical information obtained in the course of the vaccination program confidential.

Relatedly, the EEOC advised employers to be careful when administering pre-vaccination questions so as not to run afoul of GINA. For example, if a screening question asks about family medical history, then GINA potentially could be implicated, and under such circumstances, employers may want to refrain from administering the vaccine themselves. Unfortunately, it is not clear yet what screening checklists for contraindications will be provided with all COVID-19 vaccines, so employers should monitor those closely before deciding to administer.

### **More questions and more employer vaccine resources**

As employers are grappling with whether to mandate, encourage or incentivize COVID-19 vaccination in their workplaces, they clearly have a myriad of legal, logistical and business concerns to consider. Among them are potentially running afoul of the ADA, Title VII and GINA.

While the EEOC answered several questions on the minds of many employers, many more questions remain. For example, will employers who require or administer vaccines face civil liability for adverse reactions or side effects from the vaccines? Will employers be subject to workers' compensation claims if they encourage or require vaccination?

Our Husch Blackwell lawyers continue to analyze these and other questions and will provide relevant legal alerts as more information becomes available. We have a number of vaccine-related resources for employers available and coming soon, including:

Our recorded Dec. 16 webinar: COVID-19 Vaccines for Your Workplace - What You Should Know and How to Prepare (note: the webinar occurred just prior to the new EEOC guidance and so does not include the updates above).

An upcoming complimentary vaccine planning checklist.

Customized vaccine policies for your workplace, available soon.

### **Contact us**

With questions or for more information, please contact Brittany Falkowski, Avi Meyerstein, Tim Hilton, Jenna Brofsky or your Husch Blackwell attorney.

**CARES Act, COVID-19 & Return-to-Work Guidance**

Husch Blackwell provides guidance regarding COVID-19 updates, the CARES Act, and rapidly changing state-by-state orders, including those that impact stay-at-home and return-to-work protocols. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.