

FIRM NEWS

EMPLOYER ALERT: EEOC PROVIDES GUIDANCE ON WORKPLACE POLICIES MANDATING COVID-19 VACCINATIONS

Detroit, Michigan
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Yesterday afternoon, the EEOC updated its on-going COVID-19 guidance to respond to ever-increasing questions about whether employers can require employees to vaccinate against COVID-19. The updated guidance suggests that mandatory COVID-19 vaccination policies – with certain exceptions – are permissible. The EEOC’s updated guidance can be found [here](#) (see specifically Questions K.1 through K.9).

The Vaccine Itself is OK, but Necessary Pre-Vaccination Questions Might Not Be

The guidance confirms that the COVID-19 vaccination itself does not constitute a “medical examination” under the Americans with Disabilities Act (ADA), nor does it implicate the Genetic Information Nondiscrimination Act (GINA). With that being said, the EEOC warned that pre-screening vaccination questions could implicate both laws, if the employer or a contractor of the employer is asking the questions. Such pre-screening questions are recommended to health care professionals by the CDC to ensure there is no medical reason that would prevent a person from receiving the vaccination. To avoid this issue, the EEOC suggests either offering vaccinations to employees on a voluntary basis, or allowing non-contracted third parties (such as pharmacies or the employees’ own health care providers) to administer the vaccines.

Asking for Proof of Vaccination is Not Prohibited

The EEOC also confirmed that “[s]imply requesting proof of receipt of a COVID-19 vaccination” is not a disability-related inquiry under the ADA and does not seek genetic information under GINA. Caution is advised here, because the EEOC noted that follow-up questions about why an employee did not receive a vaccination could elicit information about either a disability or genetic data. The EEOC advises warning employees not to provide any medical or genetic information as part of their proof. Providing that warning in writing also could provide a defense for employers that receive such information through inadvertent disclosure.

Duty to Accommodate Employees who Refuse based on Disability or Religious Grounds

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Employees who refuse vaccination because of a disability or sincerely held religious belief, practice, or observance may be entitled to reasonable accommodations. The ADA permits employers to exclude from the workplace unvaccinated employees only if those employees present a “direct threat” that cannot be reduced to an acceptable level through reasonable accommodation. The “direct threat” analysis requires employers to consider: (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. Possible accommodations might include protective gear or moving the employee to a more isolated area. Even where reasonable accommodation will not allow the employee to remain in the workplace, the employer cannot “automatically terminate” the employee, but must consider other accommodations that would allow the employee to continue working, such as telework or leave under the Families First Coronavirus Response Act, Family and Medical Leave Act or other employer-provided leave policies.

This guidance from the EEOC comes with the caveat that it applies to COVID-19 vaccinations that have been “approved or authorized” by the Food and Drug Administration. Presently, COVID-19 vaccines have received only Emergency Use Authorization from the FDA. The EEOC has, however, declined to opine on whether Emergency Use Authorization means that the vaccine has been “approved or authorized,” deferring instead to the FDA on that matter. Further, the EEOC points out that, what might be “job related and consistent with business necessity” as well as what might pose a direct threat to the health and safety of workers, may be dependent on a number of evolving factors, such as then-existent global pandemic conditions and the number of other workers in a specific location who have already been vaccinated or are otherwise immune. So, while it would appear that most employers can, for now, mandate vaccination for entry into the workplace, until vaccines receive full FDA approval and become widely available, employers should continue to monitor the situation for further developments. Those employers that choose to make vaccination mandatory should remain vigilant to ensure that their procedures are ADA- and GINA-compliant. Nemeth Law will continue to report on any updates on these issues.