



THE EEOC ISSUES GUIDANCE ON COVID-19 VACCINES

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On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued updated guidance related to employer use of COVID-19 vaccines. This is important and timely guidance for employers who are beginning to obtain access to vaccines. The guidance explains the interplay between various federal employment laws and the availability of the vaccines.

Specifically, as it relates to the Americans With Disabilities Act (“ADA”), the EEOC states that the vaccine is not a medical examination. However, employers should be asking pre-screening questions to ensure that there is no medical reason that would prevent the person from receiving the vaccination. Information obtained from those pre-screening questions is medical information that must be kept confidential pursuant to the ADA. For employers who offer the vaccine on a non-mandatory basis, if an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

For employers who require the vaccine, if an employee claims to have a disability that would make it unsafe to receive the vaccination, the employer must either accommodate the employee or the employer 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 accommodated. Employers should conduct an individualized assessment to determine whether a direct threat exists: (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; and (iv) the imminence of the potential harm. If an employer determines that an employee who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace unless there is no reasonable accommodation that would eliminate or reduce this

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risk so the unvaccinated employee does not pose a direct threat. The EEOC notes that the number of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

As it relates to the Title VII of the Civil Rights Act, an employer will be required to accommodate an employee's sincerely held religious belief, practice, or observance that prevents the employee from receiving the vaccination unless it would similarly pose an undue hardship. EEOC guidance explains that the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer can request additional supporting information.

Regarding the Genetic Information Non-discrimination Act ("GINA"), an employer or a medical provider hired by the employer asking pre-vaccination questions could violate the Act if there are any questions about genetic information (including family medical history). If that is the case, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves. This is because GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information.

The EEOC is careful to state that the federal employment laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.

For more information, read the EEOC's guidance here: [\[link\]](#)