

LABOR RELATIONS

Expert Analysis

Updated EEOC COVID-19 Vaccination Guidance

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 vaccine guidance. As the COVID-19 pandemic continues, the rate of vaccination and gradual reopening of the economy have become a source of hope for the country and a welcome change for employers. As employers welcome workers back to the office, they are met with an array of new and untested queries on federal equal employment opportunity (EEO) laws. The EEOC's updated guidance answers some of these questions.

Vaccine Programs

Many employers are actively considering whether vaccines should be mandatory or voluntary for their workforces. The EEOC confirmed in its updated guidance that, from its perspective, employers may require



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that all employees physically entering a workplace be vaccinated for COVID-19. Employers who generally require vaccines must still allow either exemptions from their vaccination policy or reasonable accommodations for those with disabilities or certain religious beliefs. More commonly, COVID-19 vaccination has been made a voluntary act by employers rather than a mandated one. However, at least some employers have adopted mandatory vaccination programs.

In *Bridges v. Methodist Hospital*, a case recently filed in Texas state court, 117 hospital workers sued their employer over a mandatory COVID-19 vaccination policy. The plaintiffs argue that they should not lose their jobs for opting out of a “medical experiment,” emphasizing

that the three COVID-19 vaccines—Pfizer-BioNTech, Moderna, and Johnson & Johnson—in the United States are approved by the Food and Drug Administration (FDA) under Emergency Use Authorization (EUA). Federal law 21 U.S.C §360bbb-3 allows for the use of medical products in emergency situations and 21 U.S.C. §360bbb-3(e)(1)(A) requires that a person being administered a product approved under an EUA be advised of his or her right to refuse administration of the product.

While the EEOC has given approval of mandatory COVID-19 vaccination policies under EEO law, the courts have not yet ruled on whether employers may mandate vaccines provided under the FDA's EUA power, and outcomes may vary by state. However, it is worth noting that mandatory flu vaccinations have been upheld in the past for health care organizations such as in *LaBarbera v. NYU Winthrop Hospital*, No. 2:18-cv-6737 (E.D.N.Y. 2021). In this case a pregnant woman was terminated from her job at NYU Winthrop Hospital for her non-compliance with

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the hospital's mandatory Flu Vaccination Policy. The plaintiff's pregnancy presented no complications and the defendant determined a normal pregnancy was not a legitimate medical exemption to their vaccination policy. Defendant's motion for summary judgment was granted and the case dismissed.

In addition, Pfizer-BioNTech and Moderna are both currently in the application process for a Biologics License Application (BLA) to gain full FDA approval. Johnson & Johnson plans to apply for a BLA later this year. Once these vaccines are fully approved, employees will lose this potential theory of recovery.

Incentives

Employers may encourage employees and their families to receive the COVID-19 vaccine by providing resources, raising awareness of the benefits of vaccination, and addressing commonly asked questions and concerns. According to the EEOC, encouraging employees to receive the vaccine does not violate EEO laws. Incentives have become a popular mechanism to entice people to become vaccinated. Incentives can be both positive rewards or negative penalties. Employers may offer incentives to persuade employees to voluntarily submit COVID-19 vaccination documentation from a third party. Employers may also offer incentives for employees to receive

COVID-19 vaccination directly from the employer or its agent. Incentives should not be so large that it would pressure employees to disclose sensitive medical information during the pre-vaccination screening questions. Under the Genetic Information Nondiscrimination Act (GINA), employers may not offer incentives to employees for family members to receive a vaccine directly from the employer or its agent. Employers or their agents may vaccinate employees' family members if no incentives are provided. However, according

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to the EEOC, employers may offer incentives to employees for providing third-party documentation of a family member's vaccination status.

Reasonable Accommodations

Regardless of the decision to make vaccination mandatory or voluntary, reasonable accommodations or exemptions to certain policies must continue to be made in accordance with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and Title VII as amended by the Pregnancy Discrimination Act (PDA). In

a workplace where vaccination is mandatory, certain employees might be entitled to a reasonable accommodation. An employee with a disability who does not get vaccinated due to his or her disability may be entitled to a reasonable accommodation under the ADA as long as the accommodation does not prove to be an undue hardship on the employer's operation of business. Under Title VII, an employee who is not vaccinated due to a sincerely held religious belief might also be entitled to a reasonable accommodation as long as the accommodation is not an undue hardship to the employer. For Title VII cases, undue hardships are defined as having more than a minimal cost or burden on the employer. For ADA cases, the standard is higher, as undue hardship means a significant burden or expense on the employer. Pregnant employees are covered under Title VII; pregnancy-related medical conditions might also trigger the ADA. Reasonable accommodations can take many forms but some examples might include requiring the employee to wear a face mask or partake in daily COVID-19 testing, the restructuring of marginal job duties, reassigning the employee to a different position, giving the employee the option to telework or take leave, making shift schedule changes, or temporarily relocating workers. Other reasonable accommodations could, depending

on circumstances, include changes to the physical workspace such as installing plexiglass dividers, rearranging furniture for social distancing and creating one-way aisles.

Employers should remain flexible in working with employees to find a reasonable accommodation, but are not required to provide an accommodation unless the employee is covered under the ADA or Title VII. In *Corwin v. City of New York*, No. 157166 (Sup. Ct. N.Y. Cnty. Sept. 25, 2020), a group of teachers in New York City sought an order declaring the COVID-19 Accommodation Policy issued by the New York City Department of Education arbitrary and capricious. Petitioners wanted to telework for various reasons due to the COVID-19 pandemic, but not for any reasons that qualified under the ADA or Title VII. The COVID-19 Accommodation Policy explained that those asking for an accommodation must have an underlying condition or disability that prevented them from safely working during the pandemic. The court held that the COVID-19 Accommodation Policy was rational and that petitioners were not eligible for remote work under the policy.

Employee Privacy

Under the ADA, information about an employee's vaccination status is confidential medical information and must be kept in strict confidence.

Employees are allowed to bring in documentation proving their vaccination status as long as the information is kept secure and confidential. It is recommended by the EEOC that if employers collect and maintain a log of employee vaccination statuses, they store the information in a secure location separate from personnel files. This treatment applies whether the employee is vaccinated by the company, its agent, or a third-party provider. If an employee receives a reasonable accommodation, this information is also confidential.

The administering of a vaccine is not considered a medical examination under the ADA. If an employer chooses to offer vaccinations to its employees either itself or through an agent, any pre-screening vaccination questions likely qualify as disability-related inquiries which are not allowed by the ADA. If an employer requires vaccination and the pre-screening questions are challenged by an employee, the employer must justify the questions as job-related and necessary for business. If vaccination is voluntary, the answering of pre-screening questions must also be voluntary for the employee. If an employee refuses to answer a pre-screening question, employers are allowed to refuse to administer the vaccine.

Title II of GINA prohibits employers from using employee genetic information in all types of employment

decisions. According to the EEOC, Title II is not implicated when an employer requires an employee to receive a COVID-19 vaccination or when an employer requires confirmation of vaccination status from a third party. Pre-vaccination screening questions would implicate GINA if family medical history questions were asked.

Concluding Thoughts

As vaccination rates rise in the United States and employees begin to return to offices, employers should continue to stay up to date with the latest EEOC guidance. The COVID-19 pandemic will continue to affect the workplace for the foreseeable future. As litigation around these subjects proliferates, a body of case law will also begin to develop giving a clearer sense of the court system's opinion on many of these pandemic era issues.