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BLOGS

COVID-19;Workplace Policies;Workplace Safety

EEOC Updates Guidance on COVID-19 Vaccinations

The Equal Employment Opportunity Commission (EEOC) has issued an important [update](#) to its COVID-19 guidance. Most notably, the update provides long-awaited guidance on mandatory vaccination policies and vaccination incentives—both of which we discussed in earlier [blog posts](#) and [client alerts](#).

Mandatory Vaccinations

The EEOC's updated guidance makes clear that, under employment discrimination laws, an employer can require its employees to be vaccinated for COVID-19 before physically entering the workplace, subject to the reasonable accommodation provisions of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act. An employer may need to provide a reasonable accommodation for employees who cannot get vaccinated for COVID-19 because of a qualifying disability, pregnancy, or a sincerely held religious belief, practice, or observance. According to the EEOC, these reasonable accommodation requirements apply whether the employer's vaccine policy requires employees to get their vaccine directly from the employer or on their own in the community.

If an employer institutes a mandatory vaccination requirement, any employee who seeks an exemption due to disability must request an exemption from the vaccine requirement. The employer then may assess whether the employee's inability to get the COVID-19 vaccine would pose a "direct threat" to the health and safety of the workplace, as employers do not have to tolerate a "direct threat" under disability discrimination law. In assessing "direct threat," the employer should take into account a variety of factors such as, the duration of any risk, the nature and severity of the risk, the likelihood that the harm will occur, the imminence of the harm, current medical knowledge on COVID-19 risks, and the nature of the work environment and how that impacts risks such as the type of work environment, the level of interaction between employees, the percentage of vaccinated employees, and the prevalence of the virus in the community at the time. Proving a "direct threat" is a stringent burden and, even where concerns exist about safety risks, the employer must also assess whether providing a reasonable accommodation—such as allowing the employee to wear a mask, improving ventilation in the work area, or permitting the employee to work remotely—would eliminate the threat without imposing an undue hardship on the employer. In the context of a disability-related reasonable accommodation, an undue hardship means "significant difficulty or expense" for the employer.

The reasonable accommodation analysis for employees who cannot receive a required COVID-19 vaccine because of religious beliefs is similar to the disability-related assessment, but there are some key differences. First, the "direct threat" defense is unique to the ADA, and therefore only applies to disability-related exemption requests. Second, the "undue hardship" standard is different. Under Title VII, which governs religious accommodation issues, courts have typically held that "undue hardship" is demonstrated where the employer has more than minimal cost or burden—a less stringent standard than the ADA standard. Moreover, unlike under the ADA where medical provider data can be required to verify existence of a disability, employers cannot require outside verification of the employee's religious belief. Generally, the employer should assume that the employee's request for a religious accommodation is based on a sincerely held belief, practice, or observance, and should not ask for evidence or proof supporting the employee's



request. With these considerations in mind, employers should engage in an interactive process with an employee seeking a religious exemption from a COVID-19 vaccination requirement to determine whether a reasonable accommodation exists that does not create an undue hardship on the employer.

Title VII also protects the rights of pregnant workers. Specifically, under Title VII, women affected by pregnancy, childbirth, and related medical conditions must be treated the same as other workers with similar abilities or disabilities to work. Accordingly, if an employee seeks an exemption from a vaccine requirement because of pregnancy, the employer must make sure that any exemption-related accommodations offered to other employees with a similar ability to work are offered to the pregnant employee as well. As the EEOC guidance explains, “a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or disability to work.”

Vaccination Incentives

The EEOC also updated and clarified its guidance for employers who wish to provide incentives to employees to obtain COVID-19 vaccinations. Specifically, the EEOC’s new guidance makes clear that employers can offer incentives to employees to voluntarily provide proof that they received a vaccination on their own from an outside provider rather than through the employer. According to the EEOC, documentation of this kind is not a disability-related inquiry under the ADA or an unlawful request for genetic information under the Genetic Information Nondiscrimination Act (GINA).

The updated guidance distinguishes, however, incentives that are associated with a vaccination administered by the employer or its agent. According to the EEOC, pre-vaccine screening questions constitute a disability-related inquiry. As such, any employer-administered or employer-contracted vaccine program includes disability inquiries that implicate the ADA and GINA. As a result, incentives associated with a program of this nature cannot be “so substantial as to be coercive,” because participation in any disability inquiry must be voluntary. According to the EEOC, a “very large” incentive could make employees feel coerced to participate. Unfortunately, the updated EEOC guidance does not provide specific information as to what constitutes a “substantial” or “very large” incentive. Past EEOC regulations that are no longer effective, however, capped any incentive in the form of a health insurance premium discount and stated that other types of incentives should be limited to something in the cost range of a water bottle. Absent new EEOC regulations, there is uncertainty about what size of incentives are permissible and employers should seek legal counsel.