

Blog Post

Employers May Compel COVID-19 Vaccinations, But...

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Employers may require employees in the workplace to get a COVID-19 vaccine, according to newly issued [guidelines](#) from the EEOC. But employers may not necessarily terminate an employee who refuses.

While the vaccine may still be months away for most Americans, employers should prepare now for the issues that will arise, including those relating to pre-vaccination screening, administering the vaccine, and handling employees who object on medical or religious grounds. The EEOC guidelines, appearing as a new Q&A Section K in its Technical Assistance bulletin on COVID-19 addresses these and other issues, along with applicability of the Americans with Disabilities Act (ADA), Title VII, the Genetic Information Nondiscrimination Act (GINA), and more.

A Vaccine Is Not A Medical Exam

At the onset of the pandemic, employers were concerned with the ADA's limitation on medical examinations and inquiries. Medical examinations or inquiries may elicit information about a disability, and therefore are only permitted when "job-related and consistent with business necessity." An employer can meet that standard when the employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform

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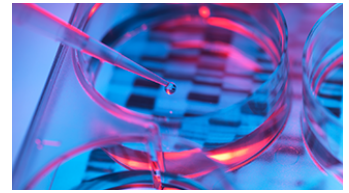
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essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.



Employers wanted to take steps to stop the spread of COVID-19 in the workplace without running afoul of the ADA. Could they ask about COVID-19 symptoms? Could they take employees' temperatures? In March 2020, the EEOC gave such screening the nod. While the ADA permits medical examinations and inquiries only when job-related and consistent with business necessity, the EEOC said the spreading pandemic met the standard due to the direct threat presented.

In the new guidelines, the EEOC confirms that employers may also administer a vaccine without running afoul of the ADA. Administering a vaccine is not a medical examination or inquiry because by simply administering a vaccine, an employer is not seeking information that might elicit information about a disability.

However, employers should note that while administering the vaccine alone may not amount to an ADA medical examination or inquiry, *pre-vaccination screening questions may*. The Center for Disease Control and Prevention (CDC) suggests that health care providers ask certain questions prior to giving the vaccine to determine whether an individual has a medical reason that would prevent the individual from receiving the vaccine. When an employer (or a health care provider hired by the employer) asks pre-vaccination screening questions, they may elicit information about an employee's disability. Hence, such inquiries must be job-related and consistent with business necessity. The EEOC says that to meet that standard, an employer should "have a reasonable belief, based on objective evidence, that an employee who does not answer the [pre-vaccination screening] questions, and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of themselves or others" in the workplace.

If an employer does not plan on administering the vaccine itself, it can require an employee to show proof of receipt of a COVID-19 vaccine. This would not be considered a disability-related inquiry under the ADA, again because it is not likely to elicit information about a disability. To avoid the inadvertent disclosure of disability-related information, an employer should instruct employees to limit the information provided to solely the proof of the vaccination.

If, however, an employer requests proof and follows up with questions when an employee does not receive the vaccine, including questions as to why the employee chose not to get a vaccine, this could elicit information about a disability. Any such inquiries are, again, subject to the “job-related and consistent with business necessity” requirements.

Medical Objections

The EEOC acknowledges that an employer may adopt a safety-based qualification, such as a policy requiring employees in the workplace to get a COVID-19 vaccine. But what if an employee claims to have medical condition which precludes getting the vaccine? In such circumstances, the EEOC says the employer must undertake an individualized assessment to see whether the employee is a direct threat due to “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” This assessment should address 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.” The EEOC notes that in order for a direct threat to exist, an employer must conclude that the employee being assessed will expose other employees to COVID-19 at work.

After that individualized assessment, if the employer determines that a direct threat exists, the employer

cannot take any action – including terminating, removing, or excluding the employee from coming to work – unless no reasonable accommodation exists that would either eliminate the risk the employee presents or reduce it to an acceptable level. Such an accommodation might include allowing an employee to work remotely, or to take leave under the Family First Coronavirus Response Act (which expires December 31, 2020) or under another applicable policy or law.

Employers should take steps now to train supervisors in recognizing and responding to requests for accommodation, even where an employee does not use the word “accommodation.” Employers should ensure that supervisors know that when an employee objects to a vaccination based on medical grounds, the employer should engage in the “interactive process” to explore whether there is a reasonable accommodation.

Religious Objections

Some employees may object to being vaccinated on religious grounds. Employers have a duty to provide a reasonable accommodation to employees who decline to be vaccinated based on a sincerely held religious belief, practice, or observation, unless it would cause an “undue hardship.” However an “undue hardship” in this context is vastly different than in the context of accommodating a medical disability; when it comes to religious grounds, the employer may establish an undue hardship if the burden is “more than *de minimus*.”

GINA Issues

Title II of the Genetic Information Nondiscrimination Act (GINA) governs the disclosure or use of genetic information by employers. It provides that employers may not use genetic information to make employment decisions, or acquire or disclose genetic information except in narrow circumstances. Such “genetic information” includes information about an individual’s genetic

tests; information about the genetic tests of a family member; information about family medical history; information about requests for, or receipt of, genetic services; and genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

While GINA is not implicated when an employer administers a vaccine, employers should be mindful that pre-vaccination screening questions may elicit information about genetic information. Accordingly, employers should avoid questions about family medical or genetic history. Employers who are not administering the vaccine themselves may simply opt to require proof of receipt of the vaccine instead.

Likewise, employers should be mindful that follow-up questions about why an employee did not get vaccinated should not seek family medical history or other information protected by GINA. While no formalized screening checklist has been created to accompany the COVID-19 vaccine, to avoid production of genetic information, employers requesting information should include the GINA model disclaimer to prevent the inadvertent disclosure of genetic information:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an

individual or family member receiving assistive reproductive services.”

Employers should keep in mind that any medical information obtained from an employee through screening, administration, or seeking proof of the COVID-19 vaccination should be kept confidential and maintained in a separate medical file.

Inform Your Employees When Administering a Vaccine Under an EUA

Vaccines are ordinarily made available by the Federal Drug Administration (FDA) through a vaccine licensure process. However, where there is a public health emergency and circumstances exist that justify the authorization of emergency use of unapproved products, the FDA may issue an Emergency Use Authorization (EUA) to allow unapproved medical products or unapproved uses of approved medical products to be used in an emergency to diagnose, treat, or prevent COVID-19 when there are no adequate, approved, and available alternatives. Both the Pfizer BioNTech and the Moderna COVID-19 vaccines have been approved by the FDA under the EUA, allowing their distribution in the U.S. The FDA is required to ensure individuals who choose to take EUA vaccines are informed about the benefits and risks of the vaccine, that it has been authorized for emergency use, and that taking an EUA vaccine is voluntary. It follows that an employer who administers a vaccine available under an EUA should provide such information to its employees. This information is typically provided to an individual in the form of a patient fact sheet at the time the vaccine is administered.

Conclusion

The EEOC guidelines merely set forth the EEOC’s position on mandatory vaccination programs. There are a host of other issues employers may want to consider before adopting one, including the timing of implementing a mandatory program and the potential liabilities that might result. For assistance

addressing mandatory vaccine programs or other issues in your workplace, contact your Akerman attorney.

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