



EEOC RELEASES GUIDANCE ABOUT COVID-19 VACCINE

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On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) released guidance relative to the COVID-19 vaccine and an employer's obligations with respect to the vaccine under the Americans with Disabilities Act (ADA), Title VII, and the Genetic Information Non-Discrimination Act (GINA). The reality is that the vaccine will likely, for the foreseeable future, only be available under what is called an Emergency Use Authorization (EUA), which is granted by the FDA and is different than "approval" by the Food and Drug Administration (FDA). While the limited availability of the vaccine means that many employers may not encounter these issues for a while, and while it is likely we will see additional guidance on this issue, it is a good idea to keep up to date so that you can put a plan in place for your workplace when the time comes.

A common question has been whether employers may require employees to receive the COVID-19 vaccine. While the EEOC does not directly answer that question in its guidance, the wording of the guidance assumes that employers may do so for a vaccine that has been approved or authorized by the Food and Drug Administration. In fact, the EEOC starts off the guidance with the statement that the vaccine is not a "medical examination" for the purposes of the ADA and, by itself, is not something that is regulated by the statute or the EEOC. The EEOC does warn, however, that any pre-vaccination inquiries would constitute a "medical examination" and as such, must be "job-related and consistent with business necessity" and, if they involve questions that seek genetic information, may run afoul of GINA. If an employer wishes to make the vaccination voluntary, so long as the employee's decision to answer the questions is voluntary, then they need not meet the "job related and consisted with business necessity requirement." The standard would also not apply if the vaccination – whether voluntary or mandatory – was being administered by a third-party such as an employee's health care provider or a wellness clinic. If the employee refuses to answer the pre-vaccination inquiries, the employer may decline to administer the vaccine, but may not retaliate against, intimidate, or threaten the employee for refusal to answer the questions.

If the employer does mandate the vaccination for its workforce, it also may request proof of the receipt of the vaccination without running afoul of the ADA or GINA. It may not ask any related questions, and the EEOC recommends that employers warn their employees not to provide any medical information when tendering the proof of receipt of the vaccine so as to implicate the ADA or GINA.

Requiring the vaccine when it becomes available may raise additional issues under the ADA and Title VII. An employer is permitted to have a safety-based qualification standard such as a requirement that all employees be vaccinated. However, if that standard screens out or would tend to screen out an individual with disability, it is up to the employer to show that allowing the employee to forego the vaccine 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 eliminated or reduced by reasonable accommodation." The EEOC recommends looking at 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. Obviously, the "potential harm" here is the exposure of the virus to those in the workplace. The employer must then determine that there is no accommodation that would eliminate or reduce the risk. If there is not, and the direct threat cannot be otherwise eliminated, the employer then must look as to whether the employee can reasonably work outside the work environment, such as remote work. Note that leave under the Family Medical Leave Act, the Families First Coronavirus Response Act, or employer policy may apply in this situation as well. At the end of the day, if there is no reasonable accommodation available, only then may the employer terminate the employee.

An employer must also reasonably accommodate an employee who has a sincerely held religious belief that would prohibit them from receiving the vaccine. If an employee identifies a sincerely held religious belief, practice, or observance that would prevent or prohibit them from receiving the vaccination, the employer must accommodate the employee unless to do so would pose an "undue hardship," which is defined as "more than a de minimis cost or burden" on the employer. While the EEOC recommends that an employer "ordinarily assume"





that an employee's expressed religious belief is sincerely held, if the employer has an objective basis for questioning the religious nature or sincerity of a particular belief, practice, or observance, it can request additional information from the employee. Note that a generalized objection or opposition to vaccines, a political belief, or personal opposition to a requirement that a vaccine be received would not rise to the level of a "religious belief."

Keep in mind also that just because an employer can require the COVID-19 vaccine does not mean that it necessarily should. You should evaluate your workplace and determine if such a requirement, as a practical matter, is feasible. What will you do if a large portion of your workforce refuses to get the vaccine? What happens if employees band together to oppose the requirement? What if you have decided to keep most or all of your employees remote for the foreseeable future? These are questions to address before the issue becomes a reality. Roetzel is here to help, so feel free to contact any of the listed attorneys with questions.

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