

EEOC Provides New Guidance on COVID-19 Vaccinations

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The Equal Employment Opportunity Commission (EEOC) recently published new guidance for employers regarding workplace COVID-19 vaccination policies. This guidance does not authorize nor does it prohibit mandatory vaccination policies. Rather, it provides guidance to employers who ultimately implement such policies. Decisions as to whether or not to implement such a policy may be impacted by factors such as legal requirements, governmental and public health authority recommendations or mandates, industry standards, the need to maintain a safe workplace, vaccine availability, etc. Employers should continue to monitor developments relating to these issues as we anticipate additional guidance may be forthcoming when the vaccine becomes more readily available over the next several months.

In its guidance, the EEOC cautions that any vaccine pre-screening questions that correlate with a mandatory vaccine policy, may seek or elicit disability-related information. Such information will implicate the protections of the Americans with Disabilities Act and other laws. Any medical information obtained by employers in connection with a vaccination program or policy must be kept confidential.

The EEOC guidance also makes clear that employees may be entitled to exemptions from employer mandated vaccination policies if they have a qualifying disability and/or a bona fide religious belief. Pursuant to the Americans with Disabilities Act, as well as applicable state laws, qualified individuals with a disability may be entitled to a reasonable accommodation from their employer unless the reasonable accommodation creates an “undue hardship” on the employer. Similarly, absent undue hardship, employees with religious beliefs may be entitled to an accommodation under Title VII or similar state or local laws. In the case of an employee who declines to get vaccinated on the basis of disability, the employer should determine whether the unvaccinated individual would pose a direct threat, or “a significant risk of substantial harm to the health and safety of the individual or others” in the workplace. Factors to consider in examining whether the employee poses a direct threat are: (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 emphasizes that a finding of a direct threat risk does not authorize an employer to automatically terminate the unvaccinated employee. Rather, the EEOC states that to the extent possible, the employer should consider whether a reasonable accommodation can be provided, such as in the form of allowing the employee to work remotely or take a leave absence. It is therefore pertinent that employers seek legal counsel before taking any action against an employee who cannot or chooses not to get vaccinated.