

## EEOC Says Employers May Mandate COVID-19 Vaccinations – Subject to Limitations

Update

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With one pharmaceutical company already receiving emergency use authorization for its COVID-19 vaccine, and a second drug maker apparently on the cusp of receiving authorization, employers, eager to return to normal business operations, are considering whether they can require that their employees be vaccinated. In analyzing this issue, employers are looking to the Equal Employment Opportunity Commission (EEOC) for direction on their ability to require vaccinations, given the legal protections under the Americans with Disabilities Act (ADA) and other federal employment laws.

On Wednesday, December 16, 2020, the EEOC delivered welcome news in the form of a revised pandemic guidance concluding that employers generally can mandate that employees receive a U.S. Food and Drug Administration (FDA)-authorized or approved COVID-19 vaccine.

**That EEOC guidance**, however, includes a variety of cautionary instructions for employers, including for example, potential restrictions on disability-related questions and recognized protections that must be afforded to employees seeking exemption from vaccination requirements due to medical conditions or sincerely held religious beliefs.

The following summary of the guidance provides some helpful information for employers on this complex topic:

### **1. Can an employer require that employees receive one of the new FDA-authorized COVID-19 vaccinations?**

ANSWER: Generally, yes. The EEOC stated that equal employment opportunity laws “do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities’ guidance and suggestions.” However, there are potential complications that employers must consider before implementing a mandatory vaccination program.

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The EEOC confirmed that vaccination itself is not a medical examination, but it also pointed out that certain medical-related questions need to be posed to an individual before the vaccine is given to assure that the person does not have a medical condition that makes the vaccine unsafe. The EEOC explains that those questions can constitute “disability-related inquiries” regulated by the ADA, which employers may only ask under certain circumstances.

Notably, the EEOC indicates that the limitations on asking those disability-related inquiries do not exist when the vaccine is given (and the questions posed) by a third party that is not controlled by the employer such as a pharmacy or healthcare provider rather than by the employer directly or by a healthcare provider working under contract for the employer. It also explained that it is permissible for an employer to offer the vaccination to employees on a voluntary basis, provided that the employee’s decision to answer pre-screening, disability-related questions is entirely voluntary.

Certainly, the most significant limitation on a mandatory program is that the employer has to ensure that it properly considers requested exemptions by an employee from the vaccination requirement because of the worker’s (i) sincerely held religious beliefs protected under Title VII or (ii) medical conditions which make receipt of the vaccine dangerous or otherwise inappropriate for that individual consistent with the reasonable accommodation requirements of the ADA.

***2. Can an employer ask an employee if he or she has already received the vaccine or, similarly, require proof that the employee has been vaccinated?***

ANSWER: Generally, yes. The EEOC guidance explains that these particular questions do not constitute a “disability-related inquiry” because an employee may choose not to have the vaccine for a variety of reasons wholly unrelated to any medical condition. However, an employer has to meet certain requirements if it wants to find out why an employee has not received the vaccine. Questioning the employee about the reasons that individual has not been vaccinated does constitute a “disability-related inquiry” because of the possibility that it will elicit information about a disability.

That inquiry can only be made, according to the EEOC, if the question is “job-related and consistent with business necessity” as provided under the ADA. To meet this job-relatedness standard, the employer will need to establish that the worker’s failure to be vaccinated would pose a “direct threat” to the well-being of that employee or others with whom the employee would have contact as part of his or her job duties. Language elsewhere in the EEOC pandemic guidance suggests that an employer should be able to establish that “direct threat” standard if the employee has significant contact with other workers or third parties as part of performing his or her job duties.

### **3. Can an employer have its own medical staff or a contracted healthcare provider conduct the vaccinations?**

ANSWER: Generally, yes. The EEOC guidance does not suggest an employer is barred from having its own in-house vaccination program or contracting directly with an outside healthcare provider to administer the vaccinations to the company's employees. However, as indicated above, the EEOC does indicate that there are potential limitations on the employer either directly, or through a contracted service provider, asking pre-vaccination medical questions. For that reason, some employers may mandate the vaccine but not administer it directly to employees.

### **4. Can an employer fire an employee who refuses to be vaccinated?**

ANSWER: Possibly, in limited circumstances. The EEOC guidance reminds employers that it will need to make reasonable accommodations to employees seeking an exemption due to disability-related reasons or religious objections and will need to follow the established reasonable accommodation process under either the ADA or Title VII before taking any adverse employment actions. The EEOC cautions employers that if it can establish that an employee who is not vaccinated poses a direct threat (that cannot be accommodated without an undue hardship), the employer can exclude the employee from the worksite, *but the employer cannot terminate the employee without further consideration of the employee's legal protections or other possible accommodation, including whether the employee can perform his or her job remotely*. In assessing hardship, the EEOC noted that the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

### **5. Does the EEOC guidance mean that all employers should adopt a mandatory vaccination program?**

ANSWER: Not necessarily; a mandatory vaccination program may not be the best choice for many employers. First, any such program would require that employers implement appropriate procedures with respect to processing of disability and religious accommodation requests. Any employer with a mandatory vaccine program must ensure that there is no retaliation against employees who request an accommodation under the ADA or Title VII. There may also be retaliation protection under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights for an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine).

Further, polling data continues to show that a significant percentage of Americans prefer not to receive the COVID-19 vaccine. Some employees, for example, may be wary of the vaccine given how rapidly it was developed. As a way of recognizing this issue, the EEOC guidance points out that the FDA

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authorization for these COVID-19 vaccines is only pursuant to the Emergency Use Authorization standard—which is different than an FDA approval (licensure) of a vaccine—and therefore these vaccines have not received all of the prolonged consideration by the FDA that is typical of common vaccinations such as the vaccines for seasonal influenza or chickenpox.

As a result, employers mandating the vaccine should be prepared for some resistance from employees. Additionally, it is important to remember that the EEOC guidance is only that—guidance—and not a law. Consequently, some employees may still legally challenge mandatory vaccination programs under various theories and there is no guarantee that a court will react favorably to a particular legal challenge. There are also, as explained above, important legal nuances and limitations with a mandatory program even under the EEOC's guidance.

Also, while not an EEO issue, for employers with a unionized workforce, the employer must consider bargaining requirements prior to unilaterally implementing a mandatory vaccine policy. Additionally, employers may need to consider state law obstacles to mandatory vaccination in some jurisdictions.

What is clear is that if an employer wants to pursue a mandatory vaccination program, the company's management, together with its legal and HR teams, should engage in significant planning and develop a program detailing how the process will work from beginning to end and carefully consider the potential legal limitations identified by the EEOC in its guidance.