
EMPLOYMENT ALERT

Can You Mandate That Your Employees Get The Covid-19 Vaccine?

On December 16, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued guidance for employers on workplace laws and the COVID-19 vaccine. In a nutshell, the EEOC has said that employers can require mandatory vaccines as long as the employer: (1) allows employees to receive the vaccine from a third party that does not have a contract with the employer and (2) follows accommodation requirements under the Americans With Disability Act (“ADA”) and Title VII.

Under the ADA, employers may not require employees to undergo medical examinations, with some exceptions, and employers may not make disability-related inquiries. The EEOC has stated that a vaccine is not a medical examination and that asking employees about whether or not they have received the vaccine is not a disability-related inquiry. This requires, however, the employer to be completely removed from the administration process. This includes removal from any vaccine related pre-screening questions. Those, like the administration of the vaccine itself, should be handled by a third party that does not have a contract with the employer to administer the vaccine.

Of course there may be reasons why an employee cannot be vaccinated. These could be disability related and/or religious objections of the employee that must be accommodated to the extent required under the law. The EEOC opined that for disability related objections, if the vaccine requirement screens out an individual with a disability, the employer must show that an unvaccinated employee 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 reduced by reasonable accommodation.” The EEOC then provided four (4) factors to consider to determine if an employee would pose a “direct threat”:

- (a) the duration of the risk;
- (b) the nature and severity of the potential harm;
- (c) the likelihood that the potential harm will occur; and
- (d) the imminence of the potential harm.

Included in the determination that an employee would pose a “direct threat” is the necessary conclusion that “an unvaccinated individual will expose others to the virus at the worksite.” Even with such a determination, the employee may not be excluded from the worksite unless there is “no way” to provide a reasonable accommodation that would eliminate or reduce the risk posed. This, of course, raises the possibility of remote or telework work and the possibility of leave so long as the accommodation does not cause undue hardship to the employer. Determining whether an accommodation would cause undue hardship will require consideration of the number of employees vaccinated, contact with unvaccinated employees, CDC recommendations for effective accommodations and OSHA standards and guidance.

For employees objecting to receiving the COVID-19 vaccine for religious reasons, employers are required to provide an accommodation under Title VII, unless the accommodation would cause the employer an undue hardship. In certain scenarios, employers may question whether the request for religious accommodation is sincere. One federal court has said that being “anti-vaccinations” is not a religious belief. If an employer doubts that an employee’s request for an accommodation is due to a sincerely held religious objection, an employer may request documentation.

There are still many questions that remain unanswered regarding mandating COVID-19

vaccines. For instance, as California employers know, California law does not always go hand in hand with federal law. Thus, we are awaiting guidance on whether California will adopt an interpretation of the Fair Employment and Housing Act consistent with the EEOC guidance.

If you have any questions or would like any additional information concerning this, or any of the other COVID-19 related laws that are going into effect, please contact Tonya D. Hubinger.



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