

May Employers Require COVID Vaccinations? The EEOC Speaks

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This week, as the first COVID-19 vaccines are being administered worldwide, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance concerning COVID-19 vaccinations and the workplace (Guidance). While itself lacking the force of law, the Guidance provides answers to many questions employers have raised concerning their ability to require employees to be vaccinated, as well as considerations for employers wishing to offer the vaccine to their employees. Below we analyze key takeaways from the Guidance, as well as other legal and practical considerations associated with COVID-19 vaccination and the workplace.

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The Guidance provides employers some (limited) absolutes, including that:

- There is no *per se* bar to requiring employees to be vaccinated as a condition of employment.
- There is no *per se* bar to employers (or, more realistically, medical providers contracted by employers) administering the vaccines to employees.
- The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.
- Requiring employees to provide proof they have been vaccinated or administering a COVID-19 vaccine to employees does not implicate the Genetic Information Nondiscrimination Act (GINA).

Despite these absolutes, as detailed below, parsing through the caveats within the Guidance, as well as what is left unstated by the Guidance, leaves a much more complex picture of employer rights and obligations relating to vaccination and the workplace.

1. May Employers Require Employees to be Vaccinated?

Generally, yes, but employers must be mindful of disability and religious accommodation requirements:

ADA Accommodation Requirements

Employers imposing mandatory vaccination requirements will be required to provide reasonable accommodations to employees who cannot receive a COVID-19 vaccination for medical reasons. Keeping an employee out of the workplace because she is not vaccinated would require the employer to show that the employee would pose a “direct threat” due to a “significant risk or substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

Even if the employer determines that a direct threat exists, a worker who cannot be vaccinated for medical reasons cannot be excluded from the workplace “unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.” “Undue hardship” under the ADA is defined as “significant difficulty or expense.”

Even if reasonable accommodations are not available to allow an unvaccinated employee to resume working in the workplace, this does not mean employers are necessarily free to terminate the employee. Instead, the employee may be entitled to other accommodations, such as working remotely. While permitting employees to work from home indefinitely had historically not been required of employers under ADA case law, now that many employers have permitted employees to work from home for extended periods due to the pandemic (and have erected the policies and infrastructure to do so), going forward it may be more difficult for employers to argue they cannot accommodate employees in this way.

Title VII Religious Accommodation Requirements

The Guidance provides that if an employee objects to being vaccinated due to a sincerely held religious belief, practice, or observance, then the employer must provide a reasonable accommodation, unless doing so would pose an undue hardship on the employer. An “undue hardship” under Title VII is defined as “having more than a *de minimis* cost or burden on the employer.” The Guidance notes that if an employer “has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.”

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Even beyond these considerations, employers considering mandating vaccination must develop a plan to handle situations where employees refuse to comply, even without a religious or disability objection. Enforcing a mandatory vaccination policy to terminate some non-compliant employees but not others raises a significant risk of discrimination claims. As a practical matter, this means that a mandatory vaccination policy could, in some circumstances, force an employer’s hand to dismiss its star performers/producers who are unwilling to comply.

Bottom Line: Whether an employer should enforce a mandatory vaccination policy will depend on the employer and its unique considerations. All employers considering mandatory vaccination programs, however, must plan ahead and develop a plan for dealing with accommodation requests and employee resistance that are likely to occur.

2. Are There Legal Risks if an Employer Does Not Mandate Vaccination Among Employees?

Maybe, but it is too early to tell.

OSHA’s “General Duty Clause” requires employers to furnish a workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm” to employees. It is plausible that this requirement will be interpreted to require some employers to mandate that employees be vaccinated. This would be more likely in the event that mandatory vaccination becomes the norm, either overall or in particular industries. However, we are aware of no such interpretation to date.

Bottom Line: It is likely premature for employers considering mandatory vaccination to weigh the risk that not imposing this requirement will expose them to OSHA liability.

3. May an Employer Administer the Vaccine to Employees?

Yes, but doing so raises a host of legal risks and compliance obligations that call into question whether doing so is worthwhile.

- The Guidance makes clear that, although administration of the vaccine is not a “medical examination” for purposes of the ADA’s limitations on employer-administered medical examinations, prescreening questions—which are recommended by the CDC—may implicate the ADA’s provisions on disability-related inquiries. Therefore, pursuant to the Guidance, if an employer administers the vaccine, it must show that such pre-screening questions are “job-related and consistent with business necessity.” To meet this standard, an employer would need to have “a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.”
- An employer offering the vaccine to employees could avoid these requirements if the vaccine is offered on a truly voluntary basis (and, therefore, the employee’s decision to answer pre-screening, disability-related questions is also truly voluntary).
- Whether voluntary or involuntary, an employer is still required to keep any employee medical information obtained in the course of the vaccination program confidential.
- *However*, the Guidance also suggests that prescreening questions *may* impermissibly elicit information about an employee’s genetic information in violation of Title II of GINA. While noting that it is not yet clear what screening checklists will be provided with COVID-19 vaccinations, the Guidance goes so far as to provide that if the questions do include questions about genetic information (including family medical history), then **employers should not administer the vaccines themselves**. Given the likelihood that responsible prescreen questions would include questions about family medical history, the Guidance’s interpretation of GINA may, for all practical purposes, sound the death knell for employer-provided vaccination programs.

Even beyond these considerations, employers considering administering the vaccine to employees will want to have the employees sign waiver of liability agreements and should consult their liability insurers regarding possible insurance coverage in the event of damages claims arising from the vaccine.

Bottom Line: The legal, regulatory, and practical hurdles and risks associated with employers administering a COVID-19 vaccine to employees—whether done directly by the employer or through a medical provider contracted by the employer—likely render such a program inadvisable for most employers, absent a compelling, particularized reason to do so.

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We will continue to monitor evolving guidance and developments in this rapidly developing area.

If you have additional questions or need further assistance, please reach out to any of the attorneys listed below, or your Winston relationship attorney.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

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