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The EEOC Confirms Employers Can Mandate a Vaccine, But Should They?

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This article reviews the highlights of the guidance issued by the Equal Employment Opportunity Commission after COVID-19 vaccines were approved and offers practical advice for employers considering rolling out a mandatory vaccination program for their employees.

The Equal Employment Opportunity Commission (“EEOC”) has updated its “Technical Assistance Questions and Answers” to help employers navigate the latest pandemic related challenges.¹ This article discusses highlights of the guidance, and offers practical advice for employers considering rolling out a mandatory vaccination program for their employees.

Before jumping on the mandatory vaccination bandwagon, employers should consider these important questions:

- Does your company need a mandatory vaccination program? Should you leave it to your employees to make their own decisions?
- If you decide to implement a mandatory vaccination program, how will you announce it, how will you roll it out, and what is the timing? Have you factored in that vaccines may not be available to all employees at the same time?

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- If you decide to implement a mandatory vaccination program, how will you handle requests for exemptions? What will you do with employees who refuse to be vaccinated?
- What are the pitfalls of a mandatory vaccination program?

CAN EMPLOYERS MANDATE THAT EMPLOYEES RECEIVE A COVID-19 VACCINE?

The answer is yes.

The EEOC's updated guidance now addresses issues regarding "mandatory vaccinations" and makes clear that employers can mandate that employees get the COVID-19 vaccination. The justification for mandating vaccination, especially during the pandemic, is based on the premise that unvaccinated employees present a "direct threat" to others in the workplace.

Many employers are already stating that once the vaccine is widely available they may mandate a vaccine before employees can return to the office. However, as will be discussed below, even if a mandatory policy is enacted, employees may nonetheless be entitled to exemptions on the basis of disability or religious accommodation.

DO EMPLOYERS NEED A MANDATORY PROGRAM?

The answer depends on your business.

If you run a business where your employees can safely work remotely or socially distance, you may not need it right away. On the other hand, if you run a retail business, school, a restaurant, or any similar business where employees circulate among each other or deal with the public, a mandatory vaccination program may be beneficial to your operation. Many retail and customer facing industries believe that it will be a good advertisement if they can say that their employees are all vaccinated.

Whatever the approach, employers should not jump in without weighing the costs and benefits. Things to consider include administrative costs, challenges to implementing a mandatory program, such as training and legal compliance.

HOW WILL YOU ROLL IT OUT AND WHEN?

Here again, messaging and timing must be carefully considered. Right now, vaccines are only available to frontline healthcare workers. Thus, if your business does not fall into that category, you will need to wait

until vaccines are available to your workforce to institute a mandatory program. Even then, you may have to allow for a vaccine rollout over time, and only make the mandate applicable to those employees who are eligible to receive a vaccine.

In the early months of 2021, practical questions about fairness may arise. For example, if an employee wishes to comply but a vaccine is not available to them, should they be excluded from the workplace? Employers adopting a mandatory program will likely face, and should be prepared to handle a number of similar questions.

Next let's look at the issues surrounding employees receiving the vaccination.

IS THE VACCINATION A MEDICAL EXAM?

The answer is no, it is not a medical exam.

The EEOC says the vaccination is not a medical exam, which is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." The guidance provides: "[I]f a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination."

CAN WE ASK AN EMPLOYEE FOR PROOF OF VACCINATION?

The answer is yes, employers can require proof of vaccination.

But employers must still be careful and make sure that requests for proof of vaccination do not go too far. The guidance expressly warns against probing questions: "Employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability, and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity.'"

The EEOC has also advised that you warn employees not to provide any medical information as part of the proof of vaccination.

Employers should anticipate requests for exemptions.

WHAT ABOUT THE EMPLOYEE WHO IS JUST AFRAID?

Many people, including some of your employees are scared and reluctant to take the vaccine, and will provide all sorts of excuses to avoid it.

Generally, you will not have to accommodate an employee, unless they suffer from a disability or raise a legitimate religious objection.

However, as a practical matter you should think about how you will handle an exemption request. Are you going to terminate or bar such employees from your workplace? Will you try to accommodate, even if not required by law? The answer to these questions will vary for every business, but they should be considered before you implement a mandatory program.

Remember, your best employees may fall into this category, as may a poor performer. The key to avoiding pitfalls is to be consistent in your approach to evaluating and granting exemptions.

HOW SHOULD EMPLOYERS HANDLE REQUESTS FOR AN EXEMPTION BASED ON A DISABILITY?

This is where implementation of a mandatory vaccine program gets tricky. We know that the ADA requires employers make reasonable accommodations to employees with disabilities. But what do you do if an employee has a disability that precludes them from taking the COVID-19 vaccine – such as an allergy? How do you balance the need to accommodate with the threat that employee may pose to other workers?

The EEOC provides guidance. Below are the steps employers must take:

1. Require the employee documentation to substantiate the need for the accommodation, through a doctor's note. You can then evaluate whether the request is legitimate.
2. Determine whether allowing the unvaccinated employee to come to work will prove a "direct threat" to the workplace.

"Direct threat" is defined as a "significant risk of substantial harm . . . that cannot be eliminated or reduced by a reasonable accommodation." Factors to consider are: duration of the risk, severity of the potential harm, and the likelihood and "imminence" of potential harm.

The EEOC has explained that a determination about whether an individual presents a direct threat can "include a determination that an unvaccinated individual will expose others to the virus at the worksite."

Note: If there is no direct threat that can be documented, do not continue to question 3. You should grant the exemption. Also, as more employees are vaccinated, does the direct threat posed by a few unvaccinated employees disappear? These are questions that remain to be answered.

3. Assuming you can document there is a direct threat, you must then engage in the interactive process to determine whether you

can provide a reasonable accommodation, one that will not pose an undue hardship to your business.

Possible alternative accommodations include, providing PPE to the employee, or allowing the employee to work remotely.

IF EMPLOYERS CAN'T ACCOMMODATE A DISABILITY THROUGH AN EXEMPTION, CAN THEY TERMINATE?

The answer is maybe, but only as a last resort.

The EEOC states: "If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace."

An employer pursuing a mandatory program, therefore, should make sure they continue to meet their obligations under the ADA, and state law equivalents, to engage employees in the interactive process and think critically about how the potential harm of having an unvaccinated employee in the workplace can otherwise be mitigated.

HOW SHOULD EMPLOYERS HANDLE REQUESTS FOR ACCOMMODATION BASED ON RELIGION?

Title VII requires that employers accommodate an employee's sincerely held religious belief, practice, or observance prevents them from taking a vaccine, unless doing so would present an undue hardship on the company ("more than *de minimis* cost").

However, the requirements for religious accommodations are somewhat easier on employers than disability accommodations, as not every sincerely held conviction will meet Title VII's standard. That said, the EEOC has said in the past that an employer should start with the assumption that a request for a religious accommodation is legitimate, and should be accommodated – absent an undue hardship.

You may be wondering whether you can question the request if the employee never spoke about or claimed to practice a religion, or if the employee behaved in a manner which is inconsistent with the professed religious belief, or question the timing of the request. The answer is, employers can probe into an employee's requests and ask for supporting information when they "have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance."

WHAT ABOUT POLITICAL BELIEFS?

The answer is no.

Social, political, economic philosophies, as well as personal preference are not protected by Title VII.² At least one federal court has held that being an “anti-vaxxer” is not a religious belief.

CAN EMPLOYERS DENY AN EXEMPTION IF IT WOULD POSE AN UNDUE HARDSHIP ON THE BUSINESS?

The answer is yes, an employer can refuse to provide an exemption if it would pose an “undue hardship.” What constitutes an “undue hardship” varies depending upon the context in which the exemption is sought.

CAN EMPLOYERS BAR EMPLOYEES FROM THE WORKPLACE, OR TERMINATE, IF THEY CANNOT ACCOMMODATE?

Unfortunately, the best answer the EEOC can provide is maybe.

First, understand that these are two different things. Barring from the workplace is exclusion from the office or store or restaurant where the employee works. If an employee can work from home, that may not mean termination. Obviously, in the case of a retail or hospitality business, an employee who cannot come in cannot do their job, so they would not need to be paid, and could be fired.

It is more than likely that there will be situations where employers cannot provide an exemption or accommodation for safety reasons, or because of undue hardship. In these cases, an employer can lawfully exclude the employee from the workplace, but cannot automatically terminate the employee.

WHEN CAN EMPLOYERS TERMINATE?

The answer, frankly, is after you have documented that you cannot accommodate and have considered all reasonable options.

Before terminating an employee with a disability, consider whether you want to place them on an unpaid leave or there is any alternative to firing. If there is no end in sight to the need for this leave – such as may be the case with an employee who has a condition that will preclude then from taking the vaccine – termination may be the only alternative.

Employers should remember to carefully document why they cannot accommodate. For example, if remote work as an accommodation

cannot be granted, employers have to lay out specifically why the job cannot be done remotely. As set forth in the EEOC guidance, the employer's obligation will be "to determine if any other rights apply under the EEO laws or other federal, state, and local authorities."

FINALLY, WHAT ARE THE PITFALLS TO A MANDATORY PROGRAM?

There are many good things about a mandatory vaccine program, such as giving your employees, clients and customers a sense of security and normalcy, and allowing those who want to work in-person the ability to do so. However, as outlined above, employers should really think through the need and administration of such program before implementing. Think about:

- How will you announce this?
- How will you train your managers to handle employee questions?
- What about employee relations, think about the morale of those who feel "forced" to take a vaccine? What about those who want a vaccine, but cannot get it and feel excluded?
- If an employee is accommodated, how can you make sure that succeeds? How do you prevent feelings of exclusion or jealousy?

Employee compliance may present an even bigger issue. Public opinion on the COVID-19 has been mixed. Although employers may be prepared for challenges premised on religious or disability based accommodation, they are more than likely going to face concerns from employees who just don't want to be vaccinated. While employees personal preferences do not require an accommodation, employers who enact a mandatory vaccination program may be charging head first into a morale problem, especially when trying to mandate vaccination for employees who have already been working for months safely relying on PPE and employer adherence to CDC guidelines.

Legal compliance is also likely to present a risk. Employers may for the first time be implementing a vaccination program or handling exemption requests, all of which implicate overlapping federal, state, and in some cases local laws. There are many areas where an employer can go wrong, and where managers, if not properly trained, can do or say things which create a risk of liability.

Employers that choose to take the mandatory approach should expect and be prepared to comply with state and federal laws, and are advised to work with legal counsel to create a plan.

NOTES

1. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
2. See EEOC Informal Discussion Letter: Title VII Religious Accommodation, available at <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250>.

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