

EEOC Issues Guidance on COVID-19 Vaccine

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Employers have been waiting for weeks or longer to find out if the federal Equal Employment Opportunity Commission would be making sweeping changes to its guidance on mandatory vaccinations for employees.

They found out the answer on Wednesday is, "No."

With a few exceptions, the EEOC [made no changes to the previous guidance](#) crafted during the 2009 swine flu epidemic. The commission stayed with the general position that with some exceptions and necessary accommodations, employers may choose to mandate vaccinations for its employees. Accommodations include an employee's disability or sincerely held religious belief.

Some highlights from the new guidance:

The EEOC does not consider the administration of the vaccine to be a medical examination under the Americans with Disabilities Act. However, the EEOC cautioned that asking an employee medical questions as part of the pre-screening process could elicit information about a disability or genetic information. If the employer mandates the vaccine, the employer must show that the pre-screening questions are job-related and consistent with business necessity. The employer does not need to satisfy the "job-related and consistent with business necessity" requirement if the employee receives a mandated vaccine from a third party - such as a pharmacy - that does not have a contract with the employer to administer the vaccine.

Employers are permitted to require employees to show proof of receipt of a COVID-19 vaccine. Again, employers are cautioned to avoid eliciting information that would reveal a disability or genetic information, such as asking why an employee did not receive a vaccination. Employers should warn employees not to have a third party provide the background medical information to the employer as part of the proof of vaccination.

Genetic Information Nondiscrimination Act. The EEOC cautioned employers that if it or its contractors ask pre-screening questions about genetic information, then it will implicate the Genetic Information Nondiscrimination Act. According to the EEOC, the best practice would be to have a non-contracted third party conduct the pre-screening and administration of the vaccine to avoid any possible violation of GINA.

An employer is allowed to have a safety requirement that an employee "shall not pose a direct threat to the health or safety of individuals in the workplace." An 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 eliminated or reduced by reasonable accommodation." Employers must conduct an individualized assessment based on four factors:

- The duration of the risk

- The nature and severity of the potential harm
- The likelihood that the potential harm will occur
- The imminence of the potential harm

Considering that the EEOC has already considered the COVID-19 pandemic to meet the direct standard, meeting this standard should not be difficult.

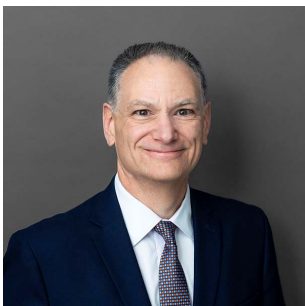
Accommodations, not firings. If an employer determines that an unvaccinated employee poses a direct threat, the employer cannot automatically terminate the employee's employment. The EEOC provides that the employer must determine if the employee may be entitled to an accommodation, such as telework or a leave of absence. Other accommodations may include the three major COVID-19 prevention measures from the CDC - mask wearing, frequent hand washing and social distancing. If the unvaccinated employee poses a direct threat and cannot be accommodated, the employer can terminate the employee's employment, but this should only be done as a last resort and after consultation with legal counsel.

If you have questions on anything concerning the EEOC's new guidance, please [contact me](#) or anyone in the [Barley Snyder Employment Practice Group](#).

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The views expressed in this alert are those of each individual author and do not necessarily reflect the views of the firm or the firm's clients. The approach to the COVID 19 pandemic is particularly challenging and is evolving and, in many cases, can be controversial. Any views expressed in this alert are not intended to advocate for or endorse a particular governmental response to the pandemic.

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