

EEOC Issues Guidance on Employer COVID-19 Vaccine Mandates

Working Together

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Last week, in our sister blog, *Education Law Notes*, we addressed the ability of an employer to mandate the COVID-19 vaccine for its staff. As discussed in that post, we were awaiting updated federal guidance that would specifically address the COVID-19 vaccine. As if on cue, on December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued “technical assistance” guidance addressing several COVID-19 related issues, including an employer vaccine mandate. The latest EEOC guidance provides greater clarity to possible religious or disability exemptions to any employer vaccine mandate (when such

vaccines are available).

DISABILITIES AND VACCINE EXEMPTIONS/ACCOMMODATIONS

The EEOC first addresses how an employer requiring vaccinations should respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination due to a disability. The EEOC construes the Americans with Disabilities Act (ADA) as providing that an employer must show that an unvaccinated employee would pose a direct threat at the worksite 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.” The EEOC then states that employers should conduct an individualized assessment of four factors in determining whether a direct threat exists (and whether unvaccinated individuals will expose others to the virus at a worksite):

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

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If an employer determines that the unvaccinated employee poses such a direct threat at the worksite, the employer still **may not** exclude the employee from the workplace (or take other action) “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.”

The EEOC then notes that if the unvaccinated employee poses a direct threat that cannot be reduced to an “acceptable” level, the employer may exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker’s employment. The EEOC notes that “**some** workers may be entitled to telework,” similar to what takes place with employees excluded from the workplace to quarantine as a result of a COVID-19 diagnosis or symptoms. The EEOC notes that employees who are not entitled to (or able to) work remotely may be eligible for leave under the Families First Coronavirus Response Act, the FMLA, or the employer’s policies.

The EEOC reminds us that employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship, which under the ADA means “significant difficulty or expense.” The EEOC specifically notes 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.” The EEOC is hinting that as more people are vaccinated (and where contact with unvaccinated persons is limited), the employer may have less justification for claiming that the unvaccinated employee cannot be accommodated in the workplace.

RELIGIOUS ACCOMMODATIONS

The EEOC also addresses how an employer should respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief. The EEOC opines that the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act (i.e., more than a *de minimis* cost or burden on the employer). The EEOC guidance states that while the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, 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.

SO WHAT IF AN EMPLOYER CANNOT EXEMPT OR PROVIDE A REASONABLE ACCOMMODATION TO AN EMPLOYEE WHO CANNOT COMPLY WITH A VACCINE MANDATE DUE TO A DISABILITY OR FOR RELIGIOUS REASONS?

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Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but there may be situations (in light of particular job duties and workplaces, and even OSHA standards) where an accommodation is **not** possible. Again, the EEOC states that it would be lawful for the employer to “exclude the employee from the workplace,” but this “does not mean the employer may automatically terminate the worker.” In those circumstances, the EEOC elliptically notes that employers “will need to determine if any other rights apply under the EEOC laws or other federal, state, and local authorities.” Since this scenario involved a presupposition that no accommodation is possible, it is assumed that the brake on termination is based upon *leave* that may be available. A person who just does not like or trust vaccines (divorced from religion) is NOT entitled to any accommodations.

WHAT DOES THIS ALL MEAN?

Interestingly, although the EEOC’s guidance is in a question-and-answer format, the agency never actually poses the question, “May an employer require employees to be vaccinated in order to enter the workplace?” Instead, the EEOC assumes that a mandate is permissible under the “direct threat” standard in the ADA and focuses its attention on non-discrimination and reasonable accommodation requirements. What is missing from the guidance is some quantification of what is an “acceptable level” of risk of exposure in the workplace. It could be that this is a function of 1) general community (and workplace) spread of the virus, 2) the nature of the workplace, including risk of exposure not only for fellow employees but also (potentially vulnerable) third parties, and 3) the availability and effectiveness of preventative measure (for example, enhanced PPE, greater isolation or distancing, or whether telework is a viable option). By way of example, the health care setting emerges as a place where employers will have greater leeway to have a vaccine mandate and exclude the unvaccinated from the worksite.

In addressing COVID-19 in general, the EEOC guidance notes that any prior temporary telework experiences could be a factor in assessing whether telework is a reasonable accommodation, based on whether the employee could (and did) perform the essential functions of the job while working remotely. It may be more difficult for an employer to deny telework as a reasonable accommodation where the employer has (effectively) relied upon a remote work arrangement during the pandemic. However, many jobs cannot be performed remotely.

Where the rubber hits the road will be where 1) the risk/threat to the safety and health of others from the presence of the unvaccinated employee is too high and cannot be ameliorated by other protective measures, 2) remote work or other accommodations are not possible, and 3) the employee exhausts all available leave provided by law, contract, or policy. While termination of employment might be justifiable under these circumstances, it may be safer to place the employee on an unpaid leave of absence. Indeed, as the vaccine (and so-called herd immunity) spreads, there may be less of a justification to outright exclude the unvaccinated employee from the workplace.

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*** Pullman & Comley has policy templates and other useful resources available to assist employers in considering and implementing their options and navigating the web of executive orders, laws, regulations, and other state and federal guidance related to COVID-19. Please contact our attorneys for assistance.

Posted in Centers for Disease Control (CDC), COVID-19, Vaccine

Tags: Americans with Disabilities Act (ADA), Civil Rights Act, Equal Employment Opportunity Commission (EEOC), Title VII