

Employment Law Update: EEOC Issues Guidance Regarding COVID-19 Vaccine in the Workplace

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On December 16, 2020, the EEOC published its highly anticipated [guidance](#) regarding the COVID-19 vaccine in the workplace. The guidance addresses employment law issues related to the vaccine under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and Title II of the Genetic Information Nondiscrimination Act (GINA).

The new guidance provides instruction for employers regarding situations where an employee indicates that he or she is unable to take the vaccine due to a disability. First, the employer should determine if the unvaccinated employee poses a “direct threat” to the workplace, meaning that the employee poses a “significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

Employers should conduct an “individualized assessment” of the

following four factors to determine whether a “direct threat” exists:

1. Duration of the risk
2. Nature and severity of the potential harm
3. Likelihood that potential harm will occur
4. Eminence of potential harm

Recall, however, that the [EEOC has already classified](#) COVID-19 as a “direct threat” in the workplace. Thus, it is unclear going forward how the EEOC will apply its previous “direct threat” determination to an employer-mandated vaccine requirement. Until additional clarifying information is published by the EEOC, employers should individually analyze each employee’s request for a reasonable accommodation using the above factors.

If a reasonable accommodation exists that would eliminate the risk that the unvaccinated employee poses a direct threat to the workplace, and the reasonable accommodation does not cause undue hardship on the employer, the employer should allow the unvaccinated individual to continue working, utilizing the reasonable accommodation. However, if an employer can show that the unvaccinated employee poses a “direct threat,” and the employer cannot provide a reasonable accommodation absent undue hardship, the employer may exclude the employee from the workplace. Exclusion from the workplace does not automatically mean an employer may terminate the unvaccinated employee. The EEOC guidance specifically states that allowing an employee to perform current work remotely is an acceptable reasonable accommodation for an unvaccinated employee.

The EEOC guidance also reminds employers of the importance of frontline supervisor training:

“Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation

request from an employee with a disability and know to whom the request should be referred for consideration.”

Employers whose managers and supervisors lack training on the proper response to reasonable accommodation requests may expose themselves to liability under the ADA. Further, the guidance cautions employers that disclosing information regarding reasonable accommodations or disabilities to anyone without a need to know violates the ADA.

Moreover, the guidance makes clear that pre-vaccination medical screening questions will likely elicit information about a disability from the patient. Thus, if an employer or a third-party contractor of the employer asks the pre-vaccination medical screening questions, the questions will be considered “disability-related” under the ADA. Therefore, employers must show that these disability-related screening questions are “job-related and consistent with business necessity.” To achieve this, an employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and thus is not vaccinated will pose a direct threat to the health and safety of himself or others.

Additionally, the guidance clarified that, under Title VII, employers must provide a reasonable accommodation for employees who refuse the vaccine based on a sincerely held religious belief, practice or observance, unless the reasonable accommodation would cause an “undue hardship” on the employer. An “undue hardship” means anything more than a “de minimis” cost or burden on the employer. If the employer has an objective basis for questioning the religious nature or the sincerity of a belief, practice or observance, the employer may request additional information from the employee. If there is no reasonable accommodation available, an employer may lawfully exclude an employee who refuses the vaccine based on a sincerely held religious belief. Again, exclusion from

the workplace does not mean an employer may automatically terminate the employee. As always, employers must determine if the employee has other rights under the Equal Opportunity Employment laws or other federal, state or local authorities.

Lastly, the guidance made clear that requiring the vaccine itself does not constitute a “medical examination under the ADA or implicate Title II of GINA. Employers should consult with their employment counsel for additional guidance on addressing concerns about the COVID-19 vaccine in the workplace. Phillips Murrah’s labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients.

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