COVID-19 Vaccinations in the Employment Setting

By Adam Gutbezahl on December 21, 2020



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Over the last week, the United States saw a heartening advancement in the COVID-19 situation: the distribution and administration of a vaccine. This exciting development suggests a return to "normal" may, in fact, be on the horizon. At the same time, many questions remain concerning the COVID-19 vaccination in the employment context. Can an employer require an employee to receive the vaccination before returning to work? What questions can an employer ask an employee about receiving the vaccination? What options are available if an employee refuses to receive the vaccination? What if an employee does not receive the vaccine because of a disability or sincerely held religious belief?

On December 16, 2020, the U.S. Equal Employment Opportunity Commission ("EEOC") published guidance, titled "**What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws**." The EEOC is the federal agency responsible for enforcing federal laws regarding employment discrimination and harassment. This guidance addresses many questions held by employers and provides some useful information for companies to consider as the vaccine becomes more readily available.

According to the EEOC guidance, an employer may require employees get the COVID-19 vaccination to return to work or remain on the job. An employer may even demand employees show proof of vaccination. If an employee refuses to get vaccinated, then an employer can prevent that person from returning to the workplace or potentially terminate the employee. Companies should know, however, that some important exceptions and qualifications apply. Businesses seeking to require proof of vaccination – or even intending to provide the vaccination to employees – should make sure their actions comply with the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act ("Title VII"), and the Genetic Information Non-Discrimination Act ("GINA").

An employer could provide the vaccine to employees, either in its own capacity or through a third-party contracted to perform the task. Administration of the vaccine by an employer (or a contracted third-party) does not qualify as a "medical examination" under the ADA because the employer is not seeking information about an employee's impairments or current health status. Pre-vaccine screening questions, however, may implicate the ADA's provisions on disability-related inquiries. Therefore, any screening questions must be "job-related and consistent with business necessity." Please note that this requirement on the screening questions only applies if the employer requires vaccination and administers it themselves (or through a contracted third-party). If receipt of the vaccine is voluntary or the employee gets the vaccine through a separate third party (for example, a pharmacy), then the ADA is not implicated by the screening questions.

An employer can ask an employee to provide proof of vaccination. The EEOC guidance

provides caution as to how an employer makes such a request or demand. First, to avoid implicating the ADA, the EEOC advises employers to warn employees that any proof of vaccination should not contain any other medical information. Second, if an employee tells an employer he or she did not receive the vaccination, then the employer should avoid asking the employee to explain why not. The ADA includes restrictions on when and how much medical information an employer may obtain from an employee. Asking an employee to explain his or her decision may result in the employee disclosing information about a disability, which then implicates the ADA. Avoiding the question (and ensuing explanation) thus avoids potential violations. Likewise, by keeping the proof of vaccination short and simple, an employer can avoid any unintended legal hurdles.

The EEOC guidance addresses two instances where a person's decision not to receive a vaccination may be protected under the law: an employee not getting the vaccine due to a disability (protected by the ADA) or sincerely held religious beliefs (protected by Title VII). Employers may ask an employee for documentation or information supporting a claim of disability or sincerely held religious beliefs. In either situation, an employer cannot automatically terminate the employee for not getting vaccinated. An employer can, however, exclude the unvaccinated employee from the workplace. This requires a showing through objective evidence that the employee would pose a "direct threat due to a significant risk of substantial harm" to other employees "that cannot be eliminated or reduced by reasonable accommodation." An employer therefore must try to accommodate the return to the workplace of an unvaccinated employee on the basis of disability or sincerely held religious beliefs, unless there is no reasonable way to do so. At that point in time, such an employee may be excluded from the workplace. Again, this does not mean the employee can automatically be terminated. Rather, an employer must provide reasonable accommodations for the employee to continue to work, such as working remotely, working at a different location, or taking permissible leave.

Finally, administration of the vaccine does not implicate GINA; however, employers should be aware that pre-vaccine screening questions may pose an issue. GINA prohibits an employer (or third-party contractor) from asking employees questions about genetic information. This includes questions about an employee's immune system or the medical history of an employee's family. As more forms of the vaccine receive approval, it is possible that screening questions may seek this type of information. If an employer elects to administer the vaccine to its employees, then it should be sure to review the screening questions and make sure they do not trigger GINA.

As with just about everything affected by COVID-19, the situation continues to evolve at a rapid pace. Therefore, additional guidance, including potential state regulations, are likely on the horizon. The EEOC guidance provides valuable information, but should also be considered as a first step. As the EEOC states, "[e]mployers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves." As the situation develops, so will the legal implications.

Have a question regarding COVID-19 in the workplace or other employment issues? ***Adam Gutbezahl*** *is a member of Ruberto, Israel & Weiner's* ***Employment Practice Group*** *and* ***Litigation Practice Group****. He can be reached at* ***agg@riw.com****, (617) 570-3502, or on Twitter at @gutbezahl.*

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