Vaccinations in the Workplace: What Can Be Required of Employees

By Adam Gutbezahl on June 4, 2021



The "new normal" following the COVID-19 pandemic appears just across the horizon. The number of active COVID-19 cases continues to decline. Traffic is increasing. The sun is coming out and temperatures are rising (aside from Memorial Day weekend). This return to normalcy is helped in great part by the large number of people in the Bay State who have elected to receive the COVID-19 vaccination. More than two-thirds of Massachusetts' population has received at least one dose, and more than half of the Commonwealth's residents have been fully vaccinated. As people return to their pre-COVID routines, the question arises as to whether an employer can require an employee in that population of unvaccinated individuals to be vaccinated before returning to the workplace.

On May 29, 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") updated previously 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. The updated guidance answers many questions raised by employers about the ability to require that employees receive the COVID-19 vaccination before returning to the physical workplace.

According to the EEOC, an employer may require all employees physically entering the workplace to be vaccinated. Employers also may offer incentives to employees to receive the vaccine. For employees claiming to be vaccinated, an employer may require documentation or other proof of vaccination. Employers should remember that information about an employee's vaccination status is confidential medical information. Therefore, any documentation retained by an employer about an employee's vaccination status must be kept confidential and stored separately from the employee's personnel files.

As with just about everything in the law, certain exceptions and limitations exist. The Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII") require an employer to provide reasonable accommodations for employees who do not get vaccinated because of a disability or a sincerely held religious belief. An employer must provide a reasonable accommodation that does not pose an undue hardship (i.e., significant difficulty or expense) on the operation of the employer's business. Any vaccination requirement imposed by an employer therefore must enable an employee to request a reasonable accommodation pursuant to the ADA or Title VII. Examples provided by the EEOC for reasonable accommodations include having the employee: (1) wear a mask; (2) work at a social distance from colleagues or non-employees; (3) work a modified shift; (4) get periodic COVID-19 tests; (5) telework; or (6) accept reassignment.

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Under the ADA, an employer may still require an employee with a disability be vaccinated to return to the workplace if the employer can demonstrate that the individual would pose a "direct threat" to the health and safety of the employee or others in the workplace. This requires an individualized assessment of the employee's present ability to safely perform the essential functions of the job by considering (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must then consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat.

The EEOC suggests as a best practice that any employer requiring vaccination notify all employees that the employer will consider requests for reasonable accommodation based on an individualized basis. Employers should also be aware that it is unlawful under the ADA for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee requesting an accommodation.

Just as medical understanding of COVID-19 has evolved over time, so have the legal implications of actions taken in response to the pandemic. Therefore, the actions permitted by employers – including the EEOC's recommendations – are subject to change.

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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