

## EEOC Issues New Guidance for Employers on COVID-19 Vaccine Programs

On December 16, 2020, the United States Equal Employment Opportunity Commission (EEOC) issued guidance for employers on COVID-19 vaccination programs that employers may be contemplating as the vaccine becomes more widely available in the coming months. There is an interplay between certain federal anti-discrimination laws, particularly the Americans with Disabilities Act (ADA), Title VII of the Civil Right Act of 1964 (Title VII), and the Genetic Information Nondiscrimination Act (GINA), and vaccinations in the workplace which the EEOC addresses in the newly issued guidance.

### **ADA & Vaccination Programs**

Generally, the ADA prohibits an employer from conducting medical examinations of its employees. The EEOC has previously defined a medical examination as “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” In the recently published EEOC guidance, it is not considered an “examination” within the meaning of the ADA when an employer or a third party contracted by the employer administers a COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA). The EEOC reasons that administering a COVID-19 vaccination to an employee is viewed as an employer protecting the employee against contracting COVID-19 and not as the employer seeking information about an individual’s impairments or current health status.

Even so, there is a risk that an employer’s pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries. According to the EEOC, to avoid any such risk, an employer administering a COVID-19 vaccine must be able to demonstrate that the pre-screening questions to employees are “job-related and consistent with business necessity.” This standard is satisfied where the employer has an objectively reasonable belief that an employee’s unsuitability to receive a vaccination because of his or her refusal to answer the pre-screening questions poses a direct threat to the health or safety of the employee or others. Where a safety-based job qualification such as a vaccination requirement disproportionately impacts those with a disability, 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.” 29 C.F.R. 1630.2(r).

Disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement in two instances. The first instance arises when an employer offers vaccination to employees voluntarily. To meet this exception, the ADA requires that the employee’s decision to answer pre-screening, disability-related questions is completely voluntary. See 42 U.S.C. § 12112(d)(4)(B). The second instance can occur when the vaccination is a requirement of employment, and then, a qualified third-party administering the vaccination (e.g., pharmacy or other health care provider) may ask disability-related screening questions so long as the third party and employer are not in contact.

An employer requesting or requiring an employee to show proof of receipt of a COVID-19 vaccination is unlikely to constitute a disability-related inquiry. An employer asking additional questions, such as why the employee did not receive the vaccination, could elicit information about a disability. In such cases, the additional questions would be subject to the ADA’s “job-related and consistent with business necessity” standard.

### **Title VII & Vaccination Programs**

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Title VII prohibits religious discrimination and obligates employers to provide reasonable accommodations to employees based upon sincerely held religious beliefs. In the event that an employee is unable to receive a COVID-19 vaccination because of a sincerely held religious belief, an employer is required to provide a reasonable accommodation for the religious belief, practice, or observance unless the employer can demonstrate that it would pose an undue hardship. Courts have defined “undue hardship” under Title VII as having more than a *de minimis* (too trivial or minor to merit consideration) cost or burden on the employer.

Notably, under both Title VII and the ADA, where reasonable accommodations are not possible for an employee who cannot receive a COVID-19 vaccine, it is lawful for the employer to exclude the employee from the workplace. The EEOC indicated that if there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace.

However, this does not mean that an employer may automatically terminate the employee. The employer should first determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For instance, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to other forms of accommodations such as performing their current position remotely.

### **GINA & Vaccination Programs**

Title II of GINA provides that employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

The EEOC indicated that an employer who either (1) administers a COVID-19 vaccination, or (2) requires proof of receipt of a COVID-19 vaccination does not implicate Title II of GINA. The EEOC reasons that the administration of the vaccination does not involve the use of genetic information to make employment decisions. Nevertheless, an employer may violate GINA if administering the vaccine requires pre-screening questions that inquire about genetic information.

**Comment:** As the COVID-19 pandemic is an ever-evolving situation, the Weber Gallagher Employment Group will continue to provide updates.

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