

Electronic Alert

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EEOC Issues Guidance on COVID-19 Vaccinations

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The Equal Employment Opportunity Commission (EEOC), as anticipated, is permitting mandatory COVID-19 vaccinations, with some exceptions.

The EEOC released guidance answering important questions on how COVID-19 vaccinations interact with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Genetic Information Nondiscrimination Act (GINA).

Here are the main takeaways:

Medical Examinations & Disability-Related Inquiries

The COVID-19 vaccine is not a medical examination. Neither is asking an employee for proof of vaccination. This means employers are free to require and administer the vaccine without having to meet ADA standards for medical examinations.

However, pre-screening vaccination questions may be subject to the ADA restrictions for disability-related inquiries. The EEOC emphasized the distinction between situations where an employer-required vaccine is administered by the employer (or a third party with whom the employer contracts to administer a vaccine), and situations where an employee voluntarily receives the vaccine or receives an employer-mandated vaccine from an unrelated third party, such as a pharmacy or other health care provider.

If an employer requires *and* administers a COVID-19 vaccine, any pre-screening vaccination questions likely to elicit information about a disability must comply with the ADA requirement that such questions be job-related and consistent with business necessity. To satisfy this requirement, an employer needs to have “a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.” In contrast, this requirement does not apply to disability-related screening questions that are asked by either (1) an employer who offers the vaccine on a voluntary basis, or (2) by a third party (that does not have a contract with the employer), such as a pharmacy or other health care provider.

Employers that do not administer the vaccine are allowed to ask employees for proof of vaccination—it is not a medical examination or disability-related inquiry under the ADA. However, if the manner in which an employer requests proof may elicit information about a disability, it will be subject to the ADA standard for disability-related inquiries. The EEOC encouraged employers to expressly warn employees not to provide any medical information with proof of receipt of a COVID-19 vaccination. To avoid implicating the ADA, employers should essentially ask for a “yes” or “no” with respect to

proof of vaccination and not why an employee has not received the vaccine to avoid gathering any medical-related information.

ADA & Title VII Accommodations

The EEOC affirmed that employers must provide reasonable accommodations for employees with an ADA-covered disability or sincerely held religious belief that prevents them from receiving a vaccine. However, employers are not required to provide a disability accommodation that would pose a direct threat to the health or safety of other employees. If an employee's ADA-covered disability prevents them from receiving a vaccine, the employer must show that an unvaccinated employee would pose a direct threat to other workers and the threat cannot be eliminated or reduced by reasonable accommodation. Even if an accommodation cannot eliminate or reduce an unvaccinated employee from presenting a direct threat to the workplace, the employee may be entitled to other reasonable accommodations such as remote work.

Likewise, employers do not have to provide a religious accommodation if it would pose an "undue hardship," which is defined under Title VII as having more than *de minimis* cost or burden on the employer. (Note that the standard for "undue hardship" is different for religious accommodations than for disability accommodations.) The EEOC encouraged employers to assume that an employee's request for religious accommodation is based on a sincerely held religious belief. But, employers are justified in requesting additional information if the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.

The EEOC also noted that administering a COVID-19 vaccine does not violate Title II of the Genetic Information Nondiscrimination Act (GINA), but pre-screening questions that ask about genetic information may violate GINA.

For any questions relating to navigating COVID-19 in the workplace, contact Amy Angel or Natalie Pattison at 503-228-0500, or at aangel@barran.com or npattison@barran.com.