

EEOC Issues Guidance Regarding Mandatory Vaccinations

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Practices

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During the current pandemic, employers are constantly balancing business goals, safety needs and employment laws. Now that vaccines are becoming available, employers are evaluating whether to require vaccination of employees. From an employment-law perspective, there are multiple considerations, as summarized in one of our recent updates *Can, and Should, Employers Require that Employees be Vaccinated for Covid-19?*. The Equal Employment Opportunity Commission (EEOC) recently published additional guidance to employers about how to respond when an employee objects to being vaccinated based upon the employee's disability or religion.

Disability

The Americans with Disabilities Act (ADA) prohibits discrimination against an otherwise qualified individual with a disability. What happens in the workplace when an employee refuses mandatory vaccination because of the employee's disability? The EEOC's new guidance directs the employer to consider whether the un-vaccinated employee would pose a direct threat within the workplace 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." That involves the employer evaluating four factors:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

If the employer concludes that a direct threat exists, the next step is to consider ways to reduce that risk through reasonable accommodation. If that is not a viable option, however, then the employer must explore whether it is possible to reasonably accommodate the employee in other ways, such as reassignment or working from home. An accommodation is not reasonable if it poses an "undue hardship" on the employer.

Religion

For more than 50 years, Title VII has prohibited discrimination based on religion. If an employee objects to vaccination based upon a sincerely held religious belief or practice, an employer should consider whether reasonably accommodating the religious practice or belief is possible or whether doing so would pose an undue hardship. Under Title VII an “undue hardship” is something more than a de minimis cost or burden on the employer. If reasonable accommodation is not possible, then the employer could exclude the unvaccinated employee from the workplace.

Conclusion

These are challenging times for employers and employees. For those employers choosing to mandate COVID-19 vaccinations, they should carefully evaluate related issues, such as objections based on disability or religion, and consult with legal counsel as needed.