

CLIENT ALERT

December 2020



Employers Can Require COVID-19 Vaccination

The Pfizer and Moderna COVID-19 vaccines have been authorized for emergency use by the FDA. In anticipation of future availability of the COVID-19 vaccine to the general public, the EEOC has issued guidance on whether an employer can make vaccination mandatory for employees, and how mandatory vaccinations would intersect with protections afforded under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII).

Employers Can Require Employees to Be Vaccinated

As many healthcare employers have known (and acted on) for years, an employer may require employees to be vaccinated unless the employees have a medical condition or religious belief that would prevent them from receiving a vaccination. Both the EEOC and OSHA have confirmed the legality of an employer choosing to implement a mandatory vaccination policy. In its December 16, 2020 updated Q & A (found [here](#)), the EEOC confirmed that an employer's vaccine requirement is legal as long as the employer complies with the ADA and Title VII for employees who refuse to get the vaccine.

OSHA issued a letter in 2009 (found [here](#)) explaining its policy on mandatory flu shots. In that letter OSHA stated that while it would not require employees to get vaccinated, an employer may do so. OSHA does stipulate in the letter that employers cannot retaliate against employees who refuse to take the vaccine because of a reasonable belief of serious illness or death due to a medical condition the employee may have.

Mandatory Vaccination Policy Must Comply with ADA and Title VII

In addition to medical waivers, any employer crafting a mandatory vaccination policy will need to consider protections for religious liberties guaranteed by Title VII. The protections afforded employees by the ADA and Title VII mean any employee who refuses to be vaccinated on medical or religious grounds must be given reasonable accommodations in lieu of vaccination. The accommodations could include allowing the employee to telecommute, requiring the employee to wear masks when in the presence of others, or moving the employee to a remote workstation that is a safe distance from other employees. An employee who has a legitimate reason for refusing to get vaccinated may be excluded from the workplace only if reasonable accommodations are not possible, or those reasonable accommodations would cause the employer undue hardship.

Pre-Screening Questionnaires Could Cause Problems

Requiring employees to get vaccinated or provide proof of vaccination is not considered a medical exam for ADA purposes. Also, as the vaccine does not interact with a person's DNA in any way, such a policy would not implicate the Genetic Information Non-Discrimination Act (GINA). However, a pre-vaccination medical questionnaire could trigger GINA if the questionnaire seeks generic information (such as questions about the immune systems of an employee's family members). A questionnaire would likely contain questions that would be subject to ADA standards for disability-related inquiries as well.

These potential problems triggered by pre-screening questionnaires are an issue to keep in mind when deciding whether to provide vaccines to employees, or whether to have employees independently seek out a vaccination on their own from a third party and then provide proof of said vaccination. The latter approach would shield an employer from any problems that could arise from questions asked on a pre-screening questionnaire.

Collective-Bargaining Concerns

For employers who are part of a Collective Bargaining Agreement, the question of whether or not vaccines can be mandated is one that likely needs to be bargained over between the employer and the employee union's representatives, since it would arguably create a change in working conditions.

Employer Policies

If your organization is interested in adopting a policy on vaccinations—whether it be mandatory or merely strongly encouraged—please contact an attorney at Ottosen DiNolfo. We can also provide a form that we recommend requiring employees to sign if they are declining the vaccination.

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