

## EEOC Issues COVID-19 Vaccine Guidance

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued a [guidance](#) pertaining to COVID-19 vaccination in the workplace. This guidance focuses on the interplay between mandatory vaccination programs and the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII). Following are the key takeaways for employers:

### **Pre-Vaccination Screenings are "Disability-Related Inquiries" that May Disclose Information about a Disability**

Employers that require employees to receive a COVID-19 vaccination from the employer, or through a third-party contactor, must treat pre-vaccine screening questions as "disability-related inquiries" under the ADA as the questions are likely to elicit information about a disability. Questions in these pre-vaccination screenings must be "job-related and consistent with business necessity." Moreover, employee medical information obtained as part of a vaccination program must be kept confidential.

If any employee chooses to get a vaccine from a pharmacy, health care provider or other thirdparty not contracted by their employer, the pre-vaccination screening would not be a disability-related inquiry subject to the above requirements.

### **The Direct Threat Assessment Applies when Considering Requests for Accommodations**

If an employee requests an accommodation under the ADA (or Title VII as discussed below) to not participate in a mandatory vaccination program, the employer must show that the employee, if unvaccinated, will pose a *direct threat* to the health or safety to themselves or others.

An individual poses a direct threat where there is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation." This will require a case-by-case assessment into whether the unvaccinated employee will expose others to the virus at the worksite. Employers should then assess whether they can provide a reasonable accommodation that would eliminate or reduce this risk. One such accommodation might be remote work, but employers should also consider on-site accommodations. Employers and employees should engage in the interactive

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process to determine if there is a reasonable accommodation that does not impose an undue hardship on the employer (significant difficulty or expense).

If there is no way for the employer to provide a reasonable accommodation that eliminates or reduces the substantial risk of the direct threat of the spread of COVID-19 to themselves or others, the employer can exclude the unvaccinated employee from the workplace. However, the EEOC guidance is clear that employers should not automatically terminate these employees, but instead consider whether they are protected by other laws, including state and federal EEO laws.

### **Employers Should Follow the Standard Process for Religious Accommodations**

Under Title VII, an employee with a "sincerely held religious belief" against vaccines may be legally exempt from being vaccinated. An employer does not have to honor an employee's religious accommodation requests if the accommodation would pose an undue hardship to the employer. In the religious accommodation context, an accommodation constitutes an undue hardship when it imposes more than *de minimis* cost on the employer's business operations. This can include an accommodation that would pose a health or safety risk in the workplace.

The EEOC has reiterated that because the definition of religion under Title VII is "broad and protects, practices, and observances with which the employer may be unfamiliar," employers should generally assume an employee's request for a religious accommodation is based on a sincerely held religious belief. However, if the employer has an objective basis to question the religious nature of the sincerity of the employee's particular belief, practice or observance, the employer can request additional information from the employee.

### **For Most Employers, Voluntary Vaccination May Be the Best Policy**

While the EEOC's guidance makes clear that employers can mandate the COVID-19 vaccine, as discussed in our previous [alert](#), the best route for employers that are not in high-risk industries like the health care industry may be a voluntary vaccination program. Unlike mandatory vaccination programs, voluntary vaccination programs do not trigger the ADA's requirements to demonstrate that the pre-vaccination screenings are "job-related and consistent with business necessity," nor do they require the employer to assess accommodations and make the "direct threat" showing.



A mandatory vaccination program in lower-risk settings likely could result in an increased availability of accommodations under the ADA and Title VII as such employers have alternative accommodations that reduce the risk of COVID-19 in the workplace. For instance, employers in an office setting can reduce the spread of COVID-19 through other means besides vaccinations, such as social distancing, mask wearing, use of enclosed office spaces and remote work.

In light of these available strategies for reducing risk of exposure in the workplace, employers should consider whether a mandatory program is appropriate for their specific workplace and how such a program would impact both employee morale and operations (if, for example, a number of employees had to be excluded from the workplace for refusing to take the vaccine). For most employers outside of high risk health industries, a voluntary program may be the most practical, as it will reduce the risk of potential discrimination or retaliation claims under Title VII and the ADA.

If you have questions about EEOC's guidance on vaccinations in the workplace, please contact Shannon (Toole) West, Britany Lopez Naleid or an attorney in Reinhart's Labor and Employment Practice.

Please visit Reinhart's [Coronavirus Resource Center](#) for additional up-to-date information.

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