

EEOC Issues Updated Guidance For Employer COVID-19 Vaccination Programs. Employer Vaccination Programs Must Include Certain Employee Exemptions To Be Compliant With the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII)

Diane Marie O'Malley, Partner, Hanson Bridgett LLP

On December 11, 2020, the Food and Drug Administration granted Emergency Use Authorization (EUA) for Pfizer's COVID-19 vaccine. On December 17th, it recommended issuing an EUA for Moderna's COVID-19 vaccine.

We previously noted the EEOC's position that, under the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII), an employer may not require all employees be vaccinated. In its March 2020 Guidance, the EEOC stated that, barring undue hardship, an employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him/her from taking the influenza vaccine.

The EEOC similarly took the position that employers must consider accommodating employees who claim an exemption from a vaccination based upon a "sincerely held" religious belief against the vaccine.

The EEOC specifically noted in its March 2020 Guidance: *As of the date this document is being issued, there is no vaccine available for COVID-19.*

There is now a vaccine available. On December 16th, the EEOC updated its Guidance to specifically address COVID-19 vaccine issues. The new Guidance reiterates the medical/disability condition and sincerely held religious belief exemptions and provides a possible further exemption based upon the fact that the FDA authorized the vaccine's use under its EUA. Thus, it seems clear that CALA members must be prepared to engage in an interactive process with any employee who raises concerns based upon these exemptions.

The New EEOC Guidance

Below is a quick summary of the Guidance. The Guidance does specifically state "*The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.*" Thus, CALA members should keep on top of any federal, state and local health orders addressing vaccines and talk with counsel before proceeding with a vaccination program.

1. Medical Examinations and Questions

The EEOC Guidance confirms that *administering* the vaccine is not a medical examination and, thus, not subject to laws related to unlawful medical examinations. The Guidance further notes,

however, that the CDC recommends that "health care providers" should ask certain questions before administering the vaccine to ensure there is no medical reason that would prevent the person from receiving the vaccine and, thus, the Guidance points out that "*pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are "job-related and consistent with business necessity."*

With regard to whether an employer may ask those pre-screening disability-related questions, the EEOC distinguished between whether the vaccine is mandatory or not. If the employer is implementing a mandatory program, an employer would have to show that an employee who refuses to answer the question and does not receive a vaccine will present a direct threat to himself/herself or others. This part of the Guidance is confusing, given the fact that the EEOC has already stated that COVID-19 presents a direct threat in the workplace.

On the other hand, if the vaccination program is voluntary, the EEOC Guidance states that the employee's decision to answer pre-screening, disability-related questions *also must* be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d).

Finally, the EEOC does confirm that asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. The EEOC warns, however, that any follow up questions might elicit disability related information and, thus, employers need to be careful to make sure employees are not providing medical information.¹

2. Mandatory Vaccinations, Exemptions and Accommodations

The EEOC continues to maintain that employees may have medical or religious based reasons for not wanting to be vaccinated and that employers must attempt to accommodate those employees.

a. Medical/Disability Related Exemption

The EEOC has long held that an employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him/her from taking the vaccine. For example, qualifying medical exemptions may include allergies to vaccine components or a history of Guillain-Barre syndrome. An employer can require some documentation, such as a health care provider indication of a medical condition (not identified) that would be negatively impacted by the vaccination.

If an employee claims to have a disability related objection to the vaccine, the Guidance provides that, before taking any adverse action, employers must have evidence 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

¹ The Guidance does confirm that administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of the Genetic Information Nondiscrimination Act because it does not involve the use of genetic information. Make sure that there are no pre-screening questions regarding genetic information, such as family medical history as those inquires may violate the Act.

accommodation.” 29 C.F.R. 1630.2(r). In that regard, the Guidance provides that employers consider the following:

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: 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. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

The Guidance warns that, if an employer determines that the employee is a direct threat, "the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat."

Not surprisingly, the Guidance warns that if the direct threat cannot be reduced to acceptable level, the employer can exclude the employee from the workplace, but not before the employer looks to alternatives – remote work or a leave of absence. Also, is there some way to have them remain at work such as additional PPE or additional testing? The Guidance does provide the following helpful information regarding this accommodation issue:

The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN’s materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

The EEOC does acknowledge that there are situations where an accommodation is not possible. CALA members might have an argument regarding impossibility of accommodation that non-senior living provider employers would not have. Certainly, this is a discussion to have with counsel.

b. Sincerely Held Religious Practice Or Belief Objection

The EEOC Guidance continues to recognize the exemption from vaccination for employees who have a "sincerely held" religious practice or belief that forbids them from getting vaccinated. The Guidance states that the employer could exclude that employee from the workplace, but warns against automatic termination. As with the disability exemption, an employer should engage with the employee claiming a religion objection to determine whether they can be accommodated. The same accommodations noted above would be relevant topics in that discussion.

As far as documentation, the Guidance provides that "the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information." The

Guidance does not define what information would constitute an “objective basis” for questioning an employee’s religious belief.

3. Impact of the Emergency Use Authorization (EUA) Nature of the Vaccine

The EEOC Guidance specifically notes that the FDA would cleared these new COVID-19 vaccines for use under its emergency use authority.² The Guidance, however, does not take a stance on the mandatory nature of the vaccine in light of the EUA nature of the vaccine other than to quote directly from the FDA website, which specifically states:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

Therefore, it appears, although the Guidance does not explicitly state, that the FDA’s direction to health care providers administering the vaccine regarding the EUA nature of the vaccine, may impact an employer’s ability to make the any vaccine mandatory at this time for employees who object to it based on this ground.

Conclusion

CALA members should consult with their counsel before implementing their staff vaccination programs to discuss and determine the parameters of those programs especially given the added implication of the vaccine being issued under the FDA's EUA. (i.e, discuss exemptions, opt-outs, individual assessments, and accommodation options.) All the issues we raised in our previous article regarding a vaccine program also remain in play when implementing a vaccination program (union environments, workers' compensation, OSHA and state and local laws).

The Guidance can be found here. Section K is the pertinent update on COVID-19 vaccines: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² An Emergency Use Authorization (EUA) is a mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic. Under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives. See <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained>