

Potential Legal Issues Raised by Employer-Mandated COVID-19 Vaccinations

As vaccinations against Coronavirus Disease 2019 (COVID-19) become more widely available, many employers are determining how to reopen their physical worksites safely.

Employers may be asking as part of this planning process whether they may require employees to receive a COVID-19 vaccination as a condition of returning to work. In general, employers have discretion to fix and enforce terms of employment, including safety qualifications. This discretion is subject, however, to application of anti-discrimination and labor laws, contractual obligations, and other regulations.

This alert discusses recent federal guidance on these topics, and other legal issues that mandatory vaccinations potentially implicate.

On December 16, 2020, the United States Equal Employment Opportunity Commission (EEOC) issued public guidance about the application of federal anti-discrimination laws to employer-mandated COVID-19 vaccinations, including the Americans with Disabilities Act (the “ADA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”). The EEOC advised that while these laws do not prohibit employer-mandated COVID-19 vaccinations *per se*, they do require employers to undertake individualized risk assessments and offer reasonable accommodations to protect the legal rights of employees who cannot or will not be vaccinated for medical or religious reasons. In addition, employers should be aware of the ADA’s restrictions on disability-related inquiries when engaging in vaccination discussions with employees. Finally, employers also need to take into account any other laws, including state anti-discrimination laws or contractual obligations to employees that may affect their authority to mandate vaccination, such as collective bargaining agreements and employment contracts.

ADA protections for employees who decline vaccination due to a disability¹

The EEOC advises that employers may, consistent with the ADA, impose COVID-19 vaccination requirements that screen out or tend to screen out employees with disabilities,² and may exclude such unvaccinated employees from the workplace. Before doing so, however, the employer must first determine that unvaccinated employees would pose a “direct threat” of “significant risk of substantial harm to the health or safety” of other individuals.³ A determination that unvaccinated employees would expose others at the worksite to COVID-19 likely qualifies as such a threat.

¹ Title I of the ADA applies to private employers with 15 or more employees, state and local government employers, employment agencies, and labor unions. A state law, such as the Washington Law Against Discrimination, covers employers with eight or more employees. Some local ordinances may cover even smaller employers.

² “Disability,” in this context, refers to an individual who has a physical or mental impairment that substantially limits one or more major life activities. 29 C.F.R. 1630.2(g).

³ To determine whether an individual would pose a direct threat, the employer must consider: “(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.” 29 C.F.R. 1630.2(r). Employers must base this assessment “on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available

Second, the employer must, prior to excluding the unvaccinated employee from the workplace, assess whether a reasonable accommodation can eliminate or reduce the risk to an acceptable level without imposing an undue hardship⁴ on the employer. Accommodations might include personal protective equipment use and social distancing, remote work, or reassignment on a temporary or permanent basis to a position that does not require vaccination. Employers may, according to EEOC, rely on recommendations from the Centers for Disease Control and Prevention when determining whether effective accommodations that do not impose undue hardships are available under the circumstances.

Lastly, even assuming no accommodation exists that would allow the employee to return to the physical workplace, the employer should not take further adverse action against the employee, such as termination, before evaluating whether other federal, state, or local legal authorities entitle the employee to other accommodations such as remote work or unpaid leave.

Apart from these considerations, the EEOC also cautions that employer-mandated vaccinations may, under certain circumstances, implicate the ADA's provisions governing disability-related inquiries. For instance, if an employer directly administers vaccinations to employees, or contracts with a third party to do so, pre-vaccination medical screening questions may elicit information about an employee's disability, and therefore qualify as a "disability-related" inquiry. Accordingly, the employer would need to satisfy the ADA's requirement that the disability-related inquiry is "job-related and consistent with business necessity"—that is, the employer "would need 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 [themselves] or others."

And, gathering personal health information of an employee may involve the privacy rights of the employee under other state and federal legislation and whether that information may be compiled and to whom it may be disclosed, if at all.

If an employer instead requires that employees receive vaccination from an outside pharmacy or health care provider (or makes vaccination voluntary), the ADA's restrictions on disability-related inquiries would not apply to pre-vaccination medical screening questions. However, certain information, like receipt of an employee's medical information as proof of vaccination, could trigger these ADA provisions. The EEOC recommends that employers warn employees not to provide this type of information as part of offering proof of vaccination, and that employers, in all instances, keep confidential any employee medical information obtained during the vaccination program.

Title VII protections for employees who decline vaccination on religious grounds

If an employee objects to receiving a mandatory vaccine because of a sincerely held religious belief, practice, or observance, Title VII (like the ADA) requires the employer to explore whether a reasonable

objective evidence." *Id.* While EEOC public guidance are not binding on either state courts construing state laws or on federal courts construing the ADA and Title VII, they are recognized authority to which some deference is owed.⁴ In the ADA context, "undue hardship" refers to "significant difficulty or expense." The EEOC has posted further guidance on how to assess undue hardship [here](#).

accommodation that does not pose an undue hardship⁵ for the employer might be possible. Because Title VII offers broad protections to religious beliefs and practices with which an employer may be unfamiliar, employers should, in the absence of an objective basis for questioning a religious accommodation request, assume the request is sincere.

If an employer cannot provide a reasonable accommodation to an employee who refuses vaccination on religious grounds, the employer may lawfully exclude the employee from the workplace. The employer may not, however, automatically terminate the employee. Rather, as in the ADA context, employers should carefully consider the potential application of other employee rights arising from federal, state, or local legal authorities.

EEOC's full guidance materials (posted [here](#)) provide further information and links to employers, which include guidance on recognizing accommodation requests, engaging with employees, and assessing possible accommodation options. Employers should carefully consult these resources as part of evaluating the potential implementation of a mandatory vaccination program.

Additional Considerations for Employers

In addition to the ADA and Title VII, an employer should also assess other federal, state, and local authorities that may be implicated by a mandatory vaccination program. For instance, as the EEOC notes, the Families First Coronavirus Response Act, the Family Medical Leave Act, and employer policies may also affect or qualify the options lawfully available to an employer, as may other labor laws.

Employment contracts or collective bargaining agreements may also restrict an employer's ability to impose a vaccination requirement on employees or deal with the consequences of such a requirement, including the obligation to bargain the impact of this requirement.

In sum, employers considering a mandatory vaccination policy should consult with counsel, and carefully assess the feasibility in light of the full scope of potentially applicable laws and regulations. An employer may ultimately determine that a voluntary program can sufficiently protect employee safety while effectively avoiding the potential legal issues raised by mandatory vaccinations.

If you have any questions regarding this information, please contact:

B. Gerald Johnson	Gerry.Johnson@pacificallawgroup.com	206.245.1700
Curtis M. Leonard	Curtis.Leonard@pacificallawgroup.com	206.245.1707
Jamie L. Lisagor	Jamie.Lisagor@pacificallawgroup.com	206.245.1734
Tobias D. Tobler	Tobias.Tobler@pacificallawgroup.com	206.602.1215

Dated: March 2, 2021

⁵ Courts have so far interpreted "undue hardship" in the Title VII context, as one having "more than a *de minimis*" cost or burden on the employer—a lower standard than in the ADA context.

A Note: This publication is for informational purposes and does not provide legal advice. It is not intended to be used or relied upon as legal advice in connection with any particular situation or facts. The information herein is provided as of the date it is written.

Copyright © 2021 Pacifica Law Group LLP. All rights reserved.

To subscribe to our mailing list, please contact Mia Wiltse at Mia.Wiltse@pacificallawgroup.com.