

EEOC Releases Guidance on Mandatory Vaccinations

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With Pfizer's COVID-19 vaccine receiving emergency approval from the FDA, and emergency approval for Moderna's vaccine expected shortly, many employers are wondering whether they can require employees to receive the vaccine once it becomes available to the general public.

On December 16, 2020, the Equal Employment Opportunity Commission ("EEOC") released **guidance** addressing this question and several others. Employers are well-advised to review Section K of the guidance in its entirety because it contains many important considerations.

Based on the guidance, it is apparent the EEOC believes employers may require employees to be vaccinated, subject to two primary exceptions. Specifically, an employer may not require employees to be vaccinated if the employee has a disability and/or a sincerely-held religious practice or belief that prevents him/her from receiving the vaccine.

What If An Employee Has A Disability?

If an employee has a disability that prevents him/her from getting vaccinated, the employer must first determine whether allowing an unvaccinated employee in the workplace poses a "direct threat" to the health or safety of the employee or others in the workplace. To determine whether a direct threat exists, employers must assess four factors: the duration of the risk; the nature and severity of the potential harm; the

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likelihood that the potential harm will occur; and the imminence of the potential harm. Notably, the EEOC advises that an employer's conclusion "that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite."

If the unvaccinated employee is found to present a direct threat, the employer must attempt to provide the employee with a reasonable accommodation, absent an undue hardship. For example, the employer could permit the employee to telework (assuming the employee can perform the essential functions of his/her job while teleworking). If, following an interactive dialogue, no reasonable accommodation that would eliminate the direct threat to the workplace is identified, the employer could exclude the employee from physically entering the workplace. However, an employer may not automatically terminate the employee simply because the employee is physically excluded from entering the workplace.

What If An Employee Has A Sincerely Held Religious Belief?

If an employee states that his/her sincerely held religious belief, practice, or observance does not allow him/her to receive a vaccine, employers are required to provide a reasonable accommodation under Title VII of the Civil Rights Act, unless such an accommodation would pose an undue hardship on the employer. If, after engaging in an interactive dialogue with the employee, no reasonable accommodation exists, then an employer, under the EEOC's guidance, may lawfully exclude the employee from the physical workplace. As with a disabled employee, the fact that an employer may exclude an unvaccinated employee who holds a sincerely-held religious belief from the workplace does not mean that it may automatically terminate the employee's employment.

These are complex, fact-specific issues. Please do not hesitate to contact any member of Mirick O'Connell's Labor, Employment, and Employee Benefits Group if you need assistance navigating this process. We are here to help!