

## COVID-19 Vaccinations: Legal Considerations for Employers

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December 17, 2020

With the recent approval for emergency usage of the COVID-19 vaccine in the United States, employers may consider mandating or administering COVID-19 vaccinations when they become available for workplace safety reasons or perhaps just to return to some semblance of "business as usual." Whether employers can or should require the vaccination will depend on several factors.

The Occupational Safety and Health Act (OSHA) commands employers to ensure that the workplace is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." This "general duty clause" may impose a duty on employers to take steps to prevent employees from contracting or spreading COVID-19 in the workplace. While it has not yet issued any guidance concerning COVID-19 vaccination, the Occupational Safety and Health Administration has published **guidance** recommending that employers promote vaccination and make vaccines readily accessible to employees to prevent the spread of the flu virus in the workplace. However, the Administration has not mandated vaccines at this point.

Employers considering implementing mandatory COVID-19 vaccination policies should keep in mind several legal issues associated with such a mandate. First, employers must be cognizant of their obligations under federal and state anti-discrimination laws. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidance **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws** to include new information addressing how the COVID-19 vaccination interacts with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and the Genetic Information Nondiscrimination Act (GINA). The updated guidance applies previous EEOC Guidance to several COVID-19-specific issues:

### **Medical Examinations and Inquiries**

- The administration of a COVID-19 vaccine to an employee by an employer (or a third party with whom the employer contracts to administer a vaccine) is not a "medical examination" for purposes of the ADA.
- Pre-vaccination medical screening questions asked by the employers or a contractor on the employers' behalf for mandatory COVID-19 vaccination are subject to the ADA standard for disability-related inquiries, which requires a showing that the questions are "job-related and consistent with business necessity."
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. However, follow-up questions such as why an individual did not receive a vaccination may elicit information about a disability and thus would be subject to the ADA's standard that they be "job-related and consistent with business necessity."

### **Direct Threat/Reasonable Accommodation Analysis Under the ADA**

- If an employer mandates COVID-19 vaccinations in the workplace and an employee indicates that he or she is unable to receive a COVID-19 vaccination due to a disability, the employer must conduct an individualized assessment to determine if that employee poses a direct threat to the workplace.

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- If an employer determines that such an employee poses a direct threat, the employer must determine whether a reasonable accommodation can be provided to reduce the direct threat without causing undue hardship. Note that this determination will depend on an individualized assessment that takes into consideration factors such as whether the employee can be isolated from other employees, whether others in the workplace are vaccinated, and the like.
- If the direct threat cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean that the employer may automatically terminate the employee. Rather, an employer must determine if there is any other reasonable accommodation available, such as being able to work remotely or take leave provided by laws and workplace policies.

### **Religious Objections to Vaccination**

- If an employer requires COVID-19 vaccinations and an employee indicates that he or she is unable to receive a COVID-19 vaccination because of a "sincerely held religious practice or belief" (as opposed to simply being against or afraid of vaccinations), the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an undue hardship under Title VII. This is a much lower standard than under the ADA, and generally requires only a "de minimis" accommodation.
- If an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccination policy because of a sincerely held religious practice or belief, the employer may exclude the employee from the workplace. However, this does not permit automatic termination of employment; instead, the employer will need to determine if any other rights apply under EEO laws or other federal, state, and local authorities.

### **GINA Considerations**

- 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 GINA. However, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical history, may violate GINA.

There are other legal issues outside the discrimination context, which employers should take into consideration before mandating or administering COVID-19 vaccinations in the workplace:

- Public employers should be mindful of the limitations of governmental actions imposed by federal and state constitutions. These include the protection against regulation of religious beliefs in the First Amendment to the U.S. Constitution and the protection against state deprivation of certain liberty interests in the Fourteenth Amendment to the U.S. Constitution.
- Worker's compensation laws may require the employer to pay for vaccine-related injuries if the employee is vaccinated at the employer's request.
- Under state tort law, employers may owe a duty of care to employees, vendors and clients who enter the workplace and business. The actual duty depends on what is considered "reasonable" at any given time, a standard that changes.

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- A unionized employer may have to bargain with the union regarding a mandatory vaccination policy. On a related note, the employer must evaluate whether it would violate the National Labor Relations Act to issue corrective action to employees (unionized or not) who engage in protected concerted activity in opposition to an employer's mandatory vaccination policy.

If you have questions about legal considerations for mandating or administering COVID-19 vaccinations in the workplace, please contact your Miller Canfield attorney or any of the authors of this alert.