

EEOC GUIDANCE AND OTHER CONSIDERATIONS FOR COVID VACCINATION POLICIES

TO: ICRMT Members
FROM: O'Halloran Kosoff Geitner & Cook, LLC
RE: EEOC Guidance and Other Considerations for Vaccination Policies
DATE: December 18, 2020

Public employers that are considering whether to implement a COVID-19 vaccination policy should review guidance recently issued by the Equal Employment Opportunity Commission (EEOC) in its publication "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws." (Guidance can be accessed [here](#)—See Section "K"). The guidance addresses how the Americans with Disabilities Act (ADA), Title VII, and Title II of the Genetic Information and Nondiscrimination Act (GINA) may apply with respect to vaccination policies. In addition to the matters addressed in the EEOC guidance, public employers should consider workers' compensation obligations, collective bargaining requirements, and constitutional issues when determining whether to implement a vaccination policy.

ADA, GINA and Title VII Considerations

The EEOC clarifies in its guidance that a COVID vaccination, in and of itself, is not a "medical examination" under the ADA, but the screening questions that must be asked before the vaccine is given may implicate both the ADA's provision on disability-related inquiries and GINA's prohibition on gathering information about an employee's genetic information. The extent to which the ADA and GINA are implicated depends on whether the employer mandates the vaccine, administers it in-house, or simply requires that employees provide proof of vaccination from a third party provider.

Considerations when the employer mandates the vaccine AND administers it in-house:

The health-related screening questions that must be asked before an employer-mandated vaccine is administered in-house will be subject to ADA standards for disability-related inquiries. Therefore, the pre-screening questions must be job-related and consistent with business necessity. To meet this standard, the employer must have a reasonable belief based on objective evidence that an employee who does not answer the questions, and therefore does not receive the vaccine, will pose a direct threat to the health and safety of the employee or others. Moreover, GINA prohibits an employer from gathering information about an employee's genetic information or family medical

history. If screening questions elicit such information, an employer might be in violation of GINA.

Considerations if the employer offers the vaccine in-house on a voluntary basis:

Disability-related screening questions can be asked without satisfying the ADA requirement that they be “job-related and consistent with business necessity” when the vaccine is provided in-house on a purely voluntary basis. GINA also likely would not be implicated if the vaccination was part of a purely voluntary wellness program. But keep in mind that if an employee chooses not to answer the screening questions, which prevents the employee from getting the vaccine, the employer may not retaliate against the employee for refusing to answer the questions.

Considerations when the employee receives a mandatory vaccine from a third party:

The ADA and GINA restrictions on screening questions do not apply when the employee receives the vaccine from a third party, like a pharmacy or healthcare provider, so long as the employer has no contractual relationship with the third-party. Therefore, employers who choose to implement a mandatory vaccination policy may wish to have their employees get the vaccine from a third party and simply have the employee provide proof of the vaccination to the employer. If the employer is not involved in the administration of the vaccine, it will avoid potential ADA or GINA violations with respect to health-related inquiries.

Reasonable accommodation requirements under the ADA and Title VII:

Employers who choose to mandate vaccinations should also be aware of their obligation to reasonably accommodate employees with disabilities who cannot receive the vaccine, as well as employees whose firmly-held religious beliefs preclude them from being vaccinated. If an employee cannot receive the vaccine due to a disability, the employer must evaluate both the risk posed by the unvaccinated employee and the potential reasonable accommodations that would reduce the risk. If the employer determines that the unvaccinated individual will pose a direct threat to the health and safety of the employee or others, the employer must engage in the interactive process with the employee to determine whether a reasonable accommodation could be made so that the unvaccinated employee does not pose a direct threat.

In cases where an employee refuses to be vaccinated based on religious beliefs, the EEOC guidance states that the employer should ordinarily assume that the employee’s request for a religious accommodation is based on firmly-held religious beliefs unless

the employer has an objective basis to question either the sincerity or the religious nature of the employee's beliefs. Employers then must engage in the interactive process with the employee to determine whether a reasonable accommodation can be made.

Workers' Compensation Considerations

In addition to the information set forth in the EEOC guidance, employers should consider the potential for workers' compensation claims as a result of employer-mandated vaccines. An employee who is required in the course of employment to receive a COVID vaccination and who sustains an illness or injury as a result of the vaccination may have a compensable claim under the Workers' Compensation Act. The law on this particular issue in the age of this pandemic is continually evolving, so it is recommended that employers consult with their counsel should any such claim be made and before deciding to accept or deny the claim. The COVID vaccine has been approved by the FDA for emergency use only. Because it is a new vaccine, it is uncertain whether there will be side-effects that have yet to be discovered.

Collective Bargaining Considerations

Employers should also consider their collective bargaining obligations. Collective bargaining agreements with employee unions may require an employer to engage in negotiations with the union before it implements a mandatory vaccination policy.

Constitutional Considerations

Public employers should be aware that their employees have constitutional rights which may be implicated by a mandatory vaccination policy. The Fourth Amendment protects employees against unreasonable searches and seizures. The Fourteenth Amendment protects against deprivations of life, liberty and property without due process of law. Generally speaking, in contexts unrelated to COVID, constitutional challenges to government-mandated school vaccination policies have been unsuccessful. But it is uncertain whether such precedent would apply to a constitutional challenge in a public employment setting.

Consult with Counsel

Employers should consult with their legal counsel and consider the risks and benefits before determining whether to implement a COVID vaccination policy. The employer should consider whether to require or merely encourage employees to get vaccinated. Employers should weigh the risks involved with in-house versus third-party

administration. Employers should also consider whether to make policy determinations now, or take a “wait and see” approach since additional information will become available during the vaccine roll-out.