

Employment Alert! EEOC Issues Guidance on Employer Vaccination Policies

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Hall Estill Newsletter

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Employers who have not already done so should immediately begin evaluating whether their business is legitimately in need of a mandatory COVID-19 vaccine policy, or whether they should adopt a voluntary policy encouraging employees to take the vaccine. Under federal law, employers must have a reasonable belief that a mandatory vaccine policy is required because an employee's ability to perform essential job functions will be impaired by COVID-19 or an employee will pose a direct threat due to COVID-19. Additionally, employers with a mandatory vaccine policy should be prepared to respond to employees who request exception to the policy. Whether to adopt a mandatory or voluntary vaccination policy is likely an easy determination for healthcare providers, but not so easy for other kinds of employers who are outside the healthcare industry.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) announced its position relating to employer mandated COVID-19 vaccines. Initially, the EEOC reaffirmed that federal "EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions." It is clear from the EEOC announcement that, under specific circumstances, employers can mandate a COVID-19 vaccine but may not mandate that all employees take the vaccine regardless of employee medical conditions and religious observances.

Courts have reviewed similar issues related to mandatory vaccine policies for the flu and for other diseases as well. Under federal law, courts have found that employees were not exempt from mandatory vaccine policies when their medical condition did not rise to the level of a disability under the ADA or their anti-vaccine philosophy was not a sincerely held religious belief. Courts determining federal law claims have also not exempted employees from mandatory vaccine policies when to do so would impose an undue hardship on employers such as healthcare providers whose patients would be placed at risk if exposed to employees with a contagious disease.

Significantly, the EEOC reminded employers that employees who cannot be vaccinated for COVID-19 because of a disability or sincerely held religious belief, cannot be automatically terminated from employment. The ADA and Title VII require that employers engage in an interactive process to determine whether there is a reasonable accommodation available that allows the unvaccinated employee to continue in her or his employment.

In its December 16, 2020, statement, the EEOC also announced its determination that the administration of a vaccination is not a medical examination under the ADA. However, “the pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability.” Thus, if an employer is administering the vaccine or has retained a third party to do so, the employer must first establish that the pre-screening questions that are asked of employees are “job-related and consistent with business necessity.” In other words, the employer must have a reasonable belief that employees who do not answer the questions and, thus, are not vaccinated, “will pose a direct threat to the health or safety of her or himself or others.” This determination need not be made by the employer if the vaccine is purely voluntary.

Employers should also closely examine applicable state law requirements. Many states have laws relating to vaccine requirements. In the context of other vaccines, a small number of states have allowed individuals, such as school age children, to be exempt from mandatory vaccines based solely on their parents’ personal beliefs or the belief of the child. Hall Estill will continue to keep you updated as the events continue to unfold.

If you need any assistance or have any questions regarding other issues, please contact your [Hall Estill Attorney](#) directly.

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