

## Resources

### **EEOC Issues Technical Assistance Regarding Vaccination and Anti-Discrimination Laws**

**December 17, 2020**

Ever since the beginning of the COVID-19 pandemic, the promise of an effective vaccine has been held out as a key component to a return to normality. Now, with the Pfizer vaccine approved, and the Moderna vaccine on the path to approval shortly, employers have begun struggling to determine what their legal obligations are towards employees who refuse to be vaccinated. While we have addressed these issues recently in a Dec. 16 webinar, the EEOC issued guidance to employers in the form of a Technical Assistance Bulletin to clarify how employers should address employee objections to vaccination that arise under Title VII of the Civil Rights Act, the Americans With Disabilities Act, or the Genetic Information Nondiscrimination Act. While that guidance is not binding upon employers or the Courts, it is nonetheless useful to employers contemplating the legal restrictions that may exist in addressing vaccination in the workplace.

#### **Vaccines and the ADA**

The EEOC's Bulletin contains several important pieces of guidance for employers about how vaccination programs interact with their obligations under the ADA. First, the EEOC makes clear in the Bulletin that administering a vaccine is not, in itself, a medical examination prohibited by the ADA. However, if an employer is asking the questions suggested by the CDC as a precursor to administration of the vaccine, those questions alone are likely to be considered by the EEOC to be disability-related inquiries. That means that if the employer is administering the vaccine (or having a contractor do it on its behalf), the screening questions must be "job related and consistent with a business necessity." That is, the employer has to be able to show that an employee who refuses to answer the questions (and therefore is not vaccinated) poses a direct threat to the health or safety of themselves or others. This issue is avoided if the employer simply requires an employee to be vaccinated against COVID-19, but does not provide the vaccination itself, however. The EEOC's Bulletin is clear that simply asking an employee to show proof that they have received COVID-19 vaccination is not a disability-related inquiry.

The Bulletin also provides guidance about what an employer should do if an employee indicates that they are unable to receive the COVID-19 vaccination because of a disability. Under those circumstances, according to the EEOC, the employer must determine whether allowing the employee to return to work unvaccinated would pose a direct threat to themselves or other employees. Even if there is a finding of direct threat, however, the employer may not automatically terminate the employee. Just as in other areas of reasonable accommodation, the employer must determine whether there are other accommodations that may permit the employee to perform the essential functions of their job without imposing a threat to others. For many, continuing to work from home, where they are unable to expose co-workers to COVID, may be such an accommodation.

#### **Vaccines and GINA**

The EEOC also made clear that simply administering a COVID-19 vaccination to an employee does not implicate the Genetic Information Nondiscrimination Act. However, like the ADA, if the process of administering the vaccine requires an employee to answer questions that would disclose genetic information, those questions would be prohibited by law. For purposes of GINA, "genetic information" is defined as:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease in a family member (e., family medical history);

- Information about requests for genetic services; or
- Genetic information about a fetus carried by an individual or family member, or an embryo held by an individual.

At this point, knowing the types of questions that are being posed as a prerequisite to vaccination, it does not appear that GINA will be implicated by the current vaccine administrative procedure.

### **Vaccines and Title VII**

Finally, the EEOC recognized that employees may refuse objections because of bona fide religious objections to vaccination. In such cases, the EEOC requires the employer to permit an employee to accommodate the religious objection unless it would impose an undue hardship. In this context, an “undue hardship” is defined as having more than a *de minimus* cost or burden on the employer.

If you have questions regarding the EEOC guidance or any other information in this alert, please contact Jim Hermon (313-568-6540 or [jhermon@dykema.com](mailto:jhermon@dykema.com)), Elisa Lintemuth (616-776-7532 or [elintemuth@dykema.com](mailto:elintemuth@dykema.com)) or your Dykema relationship attorney.

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Labor & Employment

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