

COMPLIANCE ALERT

CAN EMPLOYERS REQUIRE EMPLOYEES TO GET A COVID-19 VACCINE?

Employers encouraged by the FDA's emergency approval of a vaccine to stop the spread of COVID-19 should think carefully before instituting a policy requiring employees to get the vaccine, providing the vaccine to their employees or requiring their employees to provide proof they have received the vaccine. There are many laws that must be considered which may impact the employer's decision. Some of the laws to consider are Equal Employment Opportunity (EEO) laws such as Title VII of the Civil Rights Act and regulations put in place under the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act. The Genetic Information Nondiscrimination Act (GINA) Title II should also be considered.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated their site which **provides technical assistance with regard to COVID-19**, specifically, section K questions and answers addressing vaccinations.

In regard to the ADA, the EEOC has stated that administering a coronavirus vaccine which has been federally authorized is not considered a medical examination. For employers, this is a change from previous guidance which did not allow an employer to require medical exams unless the medical exam was job related and consistent with business necessity.

Another ADA provision is that an employer may not ask an employee disability related questions that are not business related and consistent with business necessity.

The screening questions that may be required to receive the coronavirus vaccine could prompt the employee to provide information related to their disability. If an employer decides to administer COVID-19 vaccines, the pre-screening questions must be shown to be job-related and consistent with business necessity except in two situations. First, if the vaccine is provided to employees on a voluntary basis and it is the employees decision whether to answer the pre-screening questions. Second, when the employer has a third party administer the mandated vaccine without a contract with the employer.

The ADA does allow employers to have a qualification standard to ensure the workplace is safe and that individuals do not create a direct threat to the safety and health of others. Employers are allowed to exclude employees from the workplace if they pose a direct threat. Therefore, if there are employees who, due to religion or disability will not be vaccinated, such employees may be excluded from the workplace. The employer would need to be able to show there is a significant risk to other employees that cannot be reduced or eliminated by a reasonable accommodation for the employee who did not receive the vaccine.

Employers are required to provide reasonable accommodations to employees with disabilities or employees with sincerely held religious beliefs, refusing the vaccine, unless providing the accommodation creates an undue hardship on the employer. The burden of proof would be on the employer to show

they could not accommodate the employees' request for an accommodation based upon cost or difficulty. Employers considering making vaccination a condition of employment need to determine what types of accommodations they can and will make for employees requesting accommodations. If the employee can perform work from home, this could be considered a reasonable accommodation that would limit the risk to others. Other types of accommodations are assigning an employee to a new role, moving an employee to a confined area of the workplace or flexible scheduling.

The EEOC guidance indicates that GINA is generally not implicated if the employer requires vaccines because employees are not providing genetic information. If pre-screen questions related to genetic information are asked, GINA could be triggered. Employees should be cautioned to not provide genetic information.

Other considerations for employers are provisions of union contracts that may dictate the ability to require vaccines and that employee confidentiality must be maintained.

So, the answer to the question of whether employers can require employees to get the COVID-19 vaccine is **yes**, provided that all laws are followed and employers do not discriminate against employees in any way. Keep in mind, however, that the vaccine may not be available for some time (other than to high risk groups).

What employers can do:

- ▶ Require employees to get vaccinated
- ▶ Request proof that employee has received the vaccination
- ▶ Administer the vaccine at the workplace when available

What employers cannot do:

- ▶ Ask follow up questions as to why employees have not received the vaccine, when due to disability or religious beliefs
- ▶ Ask pre-vaccine screening questions when administering the vaccine at the workplace unless able to show inquiry is job related and consistent with business necessity unless vaccination and screening are voluntary or provided by a third party
- ▶ Ask pre-vaccine screening questions about family medical history which could implicate the employer under GINA

What employers must do:

- ▶ Provide reasonable accommodations that do not create an undue hardship for employees requesting an accommodation for not receiving the vaccination to those with a disability or for religious beliefs