

Can Employers Require COVID-19 Vaccinations?

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Shortly after the CDC granted emergency use authorization of COVID-19 vaccines, the EEOC issued new guidance outlining how employers could lawfully and mandatorily require employees to get vaccinated before returning to a worksite or bar unvaccinated employees from the worksite.

Essentially, the EEOC's roadmap detailed how, under Title VII and the Americans with Disabilities Act (ADA), employers could enact policies requiring vaccinations when an employee with a deeply held religious belief or an underlying disability could elect not to receive a vaccine and require that an employer accommodate them. Such employees must receive reasonable accommodations, including potential exemption from returning to the worksite rather than termination of employment.

As written by the EEOC, "If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under EEO laws or other federal, state and local authorities."

At any time that the ADA is involved, employers must engage in an individualized, interactive process with the employee to determine if the employee poses a direct threat to the workplace and the health and safety of others because they are not vaccinated. When an employee objects to the vaccination on religious grounds, employers should similarly explore accommodating the employee's request provided that doing so poses no "undue hardship." According to the EEOC and many courts, the accommodation must not require more than a "de minimis" cost to the employer.

The EEOC also explained in its guidance that requiring vaccination will not be deemed a medical examination. However, employers electing to administer or provide vaccinations at the worksite must take steps to avoid asking questions or obtaining information that could turn the vaccination process into a medical exam and potentially violate the ADA if the requested information reveals (or could reveal) a disability. To avoid

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such potential claims, “best practices” recommend that employers require proof of vaccinations rather than administer the vaccination themselves.

Consistent with this conclusion, the Society of Human Resources Managers reported that 61% of U.S. employers will encourage employees to take the vaccine but not require it, while 64% of employees want to get vaccinated. It appears that employers and employees appear to be currently aligned on this important public health issue.