

COVID-19 Vaccines: Considerations for Employers

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With three COVID-19 vaccines currently available in the U.S. under emergency use authorizations from the Food and Drug Administration, many employers are considering whether they can require that their employees be vaccinated, and, if so, whether they *should* mandate that their employees take the vaccine once they become eligible in order to be permitted to work onsite. In anticipation of the current large scale COVID-19 vaccine distribution, the Equal Employment Opportunity Commission (EEOC) updated its pandemic guidance relating to vaccination requirements in the workplace.[1] The EEOC guidance clarified that generally employers can require employees to receive a COVID-19 vaccine for the employee to be allowed to work onsite, however, employers must provide exemptions or accommodations for employees with a disability (under the Americans with Disabilities Act (ADA)) or a sincerely held religious objection (under Title VII of the Civil Rights Act (Title VII)) to the extent that such accommodations do not impose undue hardships on the employer.

Employers should also consider whether to provide paid leave to employees for the purpose of getting vaccinated. The Centers for Disease Control and Prevention (CDC) encourages employers to allow employees to get vaccinated during work hours or to take paid sick leave to get vaccinated. The EEOC has not issued guidance yet on permissible vaccine-related incentive programs, such as cash gifts for employees who get vaccinated. Until the EEOC provides updated guidance employers who want to incentivize their employees to get vaccinated could consider offering paid time off for time spent to receive the vaccine during the employee's regular working hours or vacation time to be used at a later date. Additionally, as of March 12, 2021, all New York employers are required to provide employees with paid vaccine leave of up to four hours per injection in order to get vaccinated.

Vaccine Requirements and Reasonable Accommodations

An employer who requires all employees to receive a COVID-19 vaccine has certain obligations when an employee indicates they are unable to receive a vaccine because of a disability or a sincerely held religious practice or belief. Before excluding from the workplace an employee who is unable to receive a vaccine due to a disability, the employer must first determine whether the presence of the unvaccinated employee would pose a "direct threat" to the health or safety of individuals in the workplace in accordance with the ADA. To determine whether the employee poses a direct threat the employer must conduct an individualized assessment of four factors:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

If, after conducting the direct threat assessment, the employer determines that an unvaccinated individual working on the employer's premises will pose a direct threat, for example by exposing others to COVID-19 in the workplace, the employer cannot automatically exclude the employee from the workplace unless there is no way for the employer to provide a reasonable accommodation (absent undue hardship) that

would eliminate or reduce the risk such that the unvaccinated employee does not pose a direct threat to health or safety of the employee or others. "Undue hardship" under the ADA is defined as significant difficulty or expense.

The EEOC's guidance explains that when determining whether accommodation options exist that do not constitute undue hardship, employers and employees should engage in a flexible, interactive process that includes "determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position." An employer's undue hardship consideration may also be impacted by the prevalence in the employer's workplace of employees who have already received a COVID-19 vaccine and the amount of contact the unvaccinated employee will have with others whose vaccination status could be unknown. The EEOC guidance also allows employers to rely on CDC guidelines in determining whether an accommodation that will not pose an undue hardship is available and acknowledges that there "may be situations where an accommodation is not possible" based on the facts surrounding particular job duties and workplaces.

If an employer determines that the direct threat cannot be eliminated or reduced to an acceptable level and no reasonable accommodation is available, then the employer may bar the employee from physically entering the workplace but may not automatically terminate the employee's employment. Instead, the employer must determine whether the employee is entitled to an accommodation, such as working remotely, or if not, whether the employee is eligible to take leave under the Families First Coronavirus Response Act or FMLA.

Employers are also required to provide a reasonable accommodation when they are notified that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving a vaccine unless doing so would pose an undue hardship under Title VII. "Undue hardship" under Title VII is a less stringent standard than under the ADA and has been defined as having more than a *de minimis* cost or burden on the employer. Although the EEOC's guidance explains that an employer should ordinarily assume that an employee's request for a religious accommodation is based on a sincerely held belief, if an employer has an objective basis for questioning the religious nature or sincerity of a particular belief, practice or observance, the employer would be justified in requesting "additional supporting information." As in the case of an employee who cannot receive a vaccine due to a disability, if there is no reasonable accommodation possible, then an employer may exclude the unvaccinated employee from the workplace and must determine whether the employee is eligible to work remotely or if any other rights apply under the equal employment opportunity laws or other federal, state, and local laws.

Proof of Vaccination

The EEOC guidance clarifies that employers may require employees to provide proof of vaccination without implicating the ADA. This is because requiring an employee to show proof of COVID-19 vaccination is not in and of itself the type of disability-related inquiry generally prohibited by the ADA—there are many reasons why an employee may not have been vaccinated that are wholly unrelated to a disability. However, follow-up questions, such as why the employee has not been vaccinated, may elicit information that is disability-related and would therefore be subject to the ADA standard that they be "job-related and consistent with business necessity." Employers should also take care when requesting proof of vaccination to warn employees not to provide any medical or genetic information as part of the proof in order to avoid implicating the ADA and the Genetic Information Nondiscrimination Act.

New York Paid Vaccine Leave Law

On March 12, 2021 New York's governor signed legislation providing public and private sector employees with a paid leave of absence for "a sufficient period of time" of up to four hours for each COVID-19 vaccination the employee receives, or up to eight hours if the employee receives the two-injection Pfizer or Moderna vaccine. The law mandates that employees must be paid at their regular rate of pay during vaccine leave. Additionally, employers cannot require employees to use other available leaves (such as sick or vacation leave) before providing employees with vaccine leave. However, employees may still be entitled to use other paid sick leave in connection with receiving a vaccine to

the extent the employee experiences side effects or feels unwell after receiving the vaccine. The law also prohibits discrimination or retaliation against employees who exercise their right to take vaccine leave.

The new legislation took effect immediately and expires on December 31, 2022. However, the legislation is silent as to both any retroactive effect and the type of documentation employers can request from employees seeking paid vaccine leave. While very little guidance is currently available, New York employers should implement the following best practices with respect to paid vaccine leave:

1. Update employee leave policies to reflect employees' entitlement to paid vaccine leave, including by indicating that employees are not required to use other available time off such as sick or vacation leave before using paid vaccine leave;
2. Decide whether to request proof of vaccination from employees who request paid vaccine leave, keeping in mind the need to warn employees not to provide any medical information as part of the proof in order to avoid implicating the ADA; and
3. Ensure that the employer's managers are aware of employees' right to paid vaccine leave and the relevant non-discrimination and retaliation provisions.

While New York is thus far the only state to require all employers to provide paid vaccination leave for all employees, employers in other jurisdictions with paid sick leave laws should consider whether they are required by state or local law to provide paid time off for an employee to get vaccinated if the employee has accrued sick leave. Additionally, the CDC recommends that employers encourage employees to get vaccinated by allowing employees to get vaccinated during work hours or implementing policies that allow employees to take paid leave to get vaccinated.

Conclusion

Given the various legal concerns implicated by employer vaccination policies, as well as the expansion of COVID-19 related paid leave policies, employers are encouraged to consult legal counsel to assist in evaluating whether to mandate, or merely encourage, employee vaccination and the implication of vaccination policies for their individual workplace, as well as reviewing and revising their paid leave policies to comply with evolving COVID-19 leave requirements.

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[1] The EEOC publication, "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*" is available here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

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