



***Equal Employment Opportunity Commission
Issues Guidance on Covid-19 Vaccines and Employees***

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding the propriety of an employer requiring Covid-19 vaccinations of employees without violating equal employment opportunity laws, including the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act.¹ Prior to the issuance of this guidance, it was particularly unclear whether mandatory Covid-19 vaccination of employees would be viewed as generally appropriate under the “direct threat” provisions of the ADA (that an unvaccinated employee could pose a “direct threat” to the health and safety of others). The EEOC guidance indicates, though with some caveats and restrictions, that mandatory vaccination policy for employees is permissible.

While the decision to implement a mandatory vaccination policy must be individually analyzed and carefully implemented for each business, the recent EEOC guidance does provide additional clarity. Pursuant to the ADA, an employer may impose a “qualification standard” upon any position of employment, so long as that standard is consistent with job duties and business necessity, and does not unnecessarily screen out individuals with disabilities. Requiring a Covid19 vaccination would be a “qualification standard” – a condition of employment. In the event that the qualification standard does screen out any individual with a disability, the employer must show that the un-vaccinated employee would pose a “direct threat to the health or safety of individuals in the workplace” in order to make vaccination a condition of employment. In the case of Covid-19, the EEOC guidance tends to indicate that an unvaccinated individual could be deemed to pose a “direct threat” as set forth in the ADA in any situation where they were exposed to other employees or customers, and therefore an employer could impose mandatory Covid19 vaccination as a qualification standard.

If an employer chooses to make vaccination mandatory for all employees, and it has an employee with a disability who refuses the vaccine, the employer must *demonstrate* that the unvaccinated person would pose a “direct threat” due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”² Such a determination requires a four-factor individualized analysis meant to accurately assess the actuality of the direct threat. In most situations involving any level of in-person human interaction, an employer could likely find that an unvaccinated employee poses a “direct threat” – that the employee would expose others to the virus at the worksite. Even so, the employee may be excluded from the worksite or terminated only if the employer cannot make reasonable accommodations for them, allowing them to maintain their employment, without undue hardship to the employer.

¹ See, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² See, 29 CFR 1630.2(r).

In the event that an employee cannot be vaccinated due to their religious beliefs, Title VII requires that an employer must provide reasonable accommodation for the employee unless the accommodation would cause “undue burden.” Undue burden is defined as creating something beyond minimal cost or burden on the employer.

In summary, employers can likely create mandatory Covid-19 vaccination policies for employees, but reasonable accommodations for disability or religious beliefs must be meaningfully explored and implemented if reasonably possible. For recreation-based businesses, where interaction with customers and other staff is virtually unavoidable for most employees, such reasonable accommodations may be difficult or impossible to make. However, to the extent that an employer can avoid the employee exposing others to the virus without undue hardship (for example, allowing a reservationist to work from home), the employer must make those accommodations. In all cases, this analysis must be individualized and case-specific. This article is meant to assist you in planning whether or not to impose a mandatory vaccination requirement, but designing and implementing such a policy requires further legal guidance.

While we now have useful guidance from the EEOC on the issue of mandatory employee vaccination under federal laws within the EEOC’s purview, state laws or other case-specific federal laws may apply.³ There may also be OSHA or worker’s compensation issues that could arise based on an employer’s decision regarding Covid-19 vaccination.

For recreation-based businesses, many practical considerations should be evaluated prior to making a decision on implementing a mandatory policy. It is certainly easier for an employer to achieve 100% vaccination *voluntarily* rather than by mandate, as voluntary compliance will eliminate the necessity for detailed legal analysis discussed above. Recreation businesses often also employ individuals for whom rigid, corporate policies are off-putting and generally not well received. In order to determine whether a mandatory vaccine policy is necessary and appropriate, employers may want to analyze practical considerations first:

- 1) If you choose to strongly recommend a vaccine, would you achieve 100% *voluntary* compliance among employees? What if you reimbursed employees for the cost of the vaccine, and made it easy for employees to visit a vaccination center?
- 2) Does your organizational culture tend to focus on community and customer health with success? Could you publish or provide vaccine information to employees, and then survey employees on whether they will voluntarily get vaccinated?
- 3) For the employees you think may not want to get vaccinated, would a personal phone call assist in the conversation prior to implementing mandatory policies?

³ There are additional legal issues under the ADA relative to how you implement a vaccine policy that are outside of the scope of this article, including ensuring that the employees are vaccinated (and only asked medical and disability related questions) by a third-party provider, such as a pharmacy or clinic not associated with or contracted by the employer.

- 4) If you decide to require vaccination, can you anticipate how you might make reasonable accommodations for employees who have disabilities or religious beliefs preventing vaccination?
- 5) How will you determine whether an employee has a disability under the ADA or a religious belief protected by Title VII?
- 6) What would constitute an “undue burden” in terms of reasonable accommodation of employees who don’t want to be vaccinated?

Generally speaking, it will be beneficial for employers to analyze these issues before deciding whether to make employee Covid-19 vaccination mandatory. If an employer does determine to mandate vaccination, a written policy compliant with the ADA and Title VII is important, and a strategic and legally compliant plan for analyzing the case of an employee who refuses to vaccinate should be implemented ahead of time.

Please contact us if you need assistance developing a Covid-19 mandatory vaccination policy and procedures, or if you have questions regarding the issues covered in this update.

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