

EEOC Confirms that Employers MAY Require Vaccines

Dec 17, 2020

On December 16, the EEOC issued long-awaited technical assistance and guidance related to the ability of employers to require its employees to receive the COVID-19 vaccination(s). The full text of that technical guidance (which includes issues both related to and unrelated to the vaccines) can be found here:

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

As discussed in the KWGD Legal Alert published prior to the EEOC guidance being released, there are many issues to consider before making the decision to mandate or even recommend that your employees receive the COVID-19 vaccine(s) but the technical guidance does provide a framework for evaluating some of the many issues employers ought to consider. It is not perfect and it is not comprehensive but it is something upon which to build our evaluations of this issue moving forward.

Some highlights of the guidance:

- The EEOC, to be clear, did not state that all employers may require vaccination. However, the EEOC did provide a great deal of guidance discussing how to deal with situations which are the result of an employer mandating the vaccine suggesting that there must be circumstances where employers are legally permitted to require the COVID-19 vaccine. The EEOC identifies only one scenario in which a mandatory vaccine would be permissible – when workers pose a “direct threat” to themselves or others by their physical presence in the workplace without being immunized against COVID-19.
- So, if your employees are capable of fully performing their current job duties remotely or without posing a direct threat to themselves or others, it does not appear that an employer can require those employee to receive the vaccine.
- The EEOC has taken the position that the COVID-19 vaccine is not considered a “medical examination” for the purposes of the Americans with Disabilities Act. That said, when pre-screening possible vaccine recipients, employers may elicit information about an employee’s disability. As a result, employers must show that the pre-screening process is “job-related and consistent with business necessity” by evidencing that they have “a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.” This likely will be dependent upon the employer and dependent upon the job held by the employee.
- There are circumstances where disability-related screening questions can be asked without having to satisfy the “job-related and consistent with business necessity” standard: (1) If the vaccination is offered on a voluntary basis, then the pre-vaccination screening must also be voluntary and (2) If an employee receives a vaccination as required by the employer through a third party that is not contracted with the employer (pharmacy or healthcare provider), the ADA’s “job-related and consistent with business

necessity” restrictions on disability-related inquiries would not apply to the pre-screening questions for the vaccination.

- If you do not provide the vaccine/facilitate the vaccination, requesting proof that an employee has received a COVID-19 vaccination is not a disability-related inquiry. However, asking any other questions (like why did an individual not receive a vaccine), may elicit disability-related information and would be subject to the ADA’s standard of “job-related and consistent with business necessity.”
- If an employee says they have a disability or require a religious accommodation resulting in their inability to receive the vaccine and comply with an employer’s vaccine requirement, companies must evaluate if refusing to take the vaccine poses a direct threat to the health and safety of individuals in the workplace.
- Employers can conduct an individualized assessment of four factors to determine if a direct threat exists: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood the potential harm will occur, and (4) the imminence of the potential harm.
- If an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or religious practice or belief, it may be lawful for the employer to exclude the employee from the workplace.

KWGD’s Labor and Employment Section will continue to provide guidance and analysis as it becomes available. If you have any questions, please contact any KWGD Labor & Employment Attorney for guidance and analysis at 330.497.0700.

NOTE: This general summary of the law should not be used to solve individual problems since slight changes in the fact situation may require a material variance in the applicable legal advice.