EEOC Issues Guidance on COVID-19 Vaccines and When Employers Can Mandate Such Vaccines for Their Employees



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On December 16, 2020, the U.S. Equal Opportunity Commission (EEOC) issued new guidance in the form of an updated technical assistance document ("TAD") entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." This updated guidance adds a new Section K on COVID Vaccinations which contains 9 Questions and Answers on a range of COVID Vaccine issues.

The key takaways from the Guidance are follows:

1. Employers can make COVID-19 vaccines mandatory, subject to certain exceptions and accommodations.
2. Employers must consider making reasonable accommodations for employees who claim they are unable to take the COVID vaccine because of a disability, pregnancy or a sincere religious belief. If the employee is unable to take the vaccine for one of these reasons, the employer must make an individualized assessment to determine whether allowing the unvaccinated employee in the workplace would pose a direct threat to the health or safety of the individual or others. If the employer determines that this unvaccinated employee poses a direct threat in that the employee will expose others to the virus at the workplace, the employer cannot exclude the employee from the workplace or take other adverse action unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk, so the unvaccinated employee does not pose a direct threat. A reasonable accommodation could include remote work or a leave from work or possibly social distancing and wearing a mask. If there is no reasonable accommodation, the employee can be excluded from the workplace.

3. Requiring an employee to produce evidence of vaccination does not violate the ADA; however, subsequent employer questions such as why an employee did not receive the vaccine could violate the ADA.
4. If the employer requires the employee to receive the vaccine from the employer or a third party with whom the employer has a contract, screening question are subject to ADA requirements so most employers would be well advised to require vaccination from a third party that the employer does not have a contract with.

Additional Practical Considerations:

- Employers should plan ahead. Although vaccine quantities are likely to be limited until late spring or summer, start considering whether you plan to encourage or require COVID vaccines. If you think you may require COVID vaccines, put policies in place to comply with the ADA and other legal requirements such as procedures and forms for what documentation will be required with a request for reasonable accommodation and how you will evaluate and respond to requests for a reasonable accommodation.
- If you require vaccines, we recommend that you pay employees for time spent getting vaccinated in order to avoid potential wage and hour claims. Also, be aware that you may be liable for a worker's compensation claim if the employee has a negative reaction to the vaccine unless Congress or an applicable state adopts liability protection for the employer.
- The CDC currently recommends that even after being vaccinated, employees should continue to wear masks, frequently wash their hands and practice social distancing.
- Unionized employers must generally bargain with the union over vaccination policies.
- Consider the effect on safety, operations and morale if you encourage or opt to require mandatory vaccinations.
- Remember, there are no court cases accepting this new EEOC's guidance, courts are not necessarily bound by EEOC guidance, EEOC guidance may change with a new administration, and Congress, state governments or other government agencies may weigh in on these issues in the future.

We urge our clients and friends to review this new guidance and seek legal advice if you have questions about interpreting your obligations or rights under applicable employment laws or if you need assistance in connection with determining whether to require mandatory COVID vaccinations, how to implement a mandatory vaccination policy or the many other legal issues relating to the COVID-19 pandemic.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's COVID-19 Resource Center. Readers with legal questions should consult the authors, John Vering (jvering@sb-kc.com), Mark Opara (mopara@sb-kc.com), or other shareholders in Seigfreid Bingham's Employment Law Group, including: Shannon Johnson, Brenda Hamilton, John Neyens, Julie Parisi, Christopher Tillery or associate Charles Heins or your regular contact at Seigfreid Bingham at 816-421-4460.