

In Brief

EEOC UPDATES GUIDANCE ON VACCINATIONS

Written by [Todd K. Hayden](#), [Catherine R. Locallo](#) and [Tyler J. Bohman](#)

In the days since the first COVID-19 vaccinations were administered to healthcare workers in the U.S., the [Equal Employment Opportunity Commission \(“EEOC”\) issued new guidance for vaccinations in the workplace](#). The guidance document explains how an employer’s vaccine program interacts with and implicates anti-discrimination statutes like the ADA, Title VII, and the *Genetic Information Nondiscrimination Act* (“GINA”). It also provides parameters for employers who wish to require/administer vaccines.

The EEOC guidance implies that employers may mandate a COVID-19 vaccine for employees at this time. However, it is unclear whether an employer mandate is permissible because the current COVID-19 vaccines have only been approved by the FDA via Emergency Use Authorization (“EUA”) procedures, rather than full approval and license. FDA guidance provides that for vaccines approved under an EUA, individuals must receive certain notifications about the vaccine, *including notice of their right to opt out*. Until such a time when the FDA or Secretary of Health and Human Services issues additional guidance to clarify this notice requirement, it is questionable whether employers may require employees to be vaccinated for COVID-19 at this time. When a standard FDA approval is issued for one or more of the COVID-19 vaccines, employers will have a much clearer basis to consider mandating that employees be vaccinated. In addition to this regulatory limitation, there is also a limitation on supply as the vaccine is not widely available and may not be for many months. Thus, until further regulatory relief and increased

availability of a vaccine, employer mandates may be premature.

In the meantime, the EEOC’s new guidance addresses several issues that employers will likely encounter if they adopt a vaccination program. The EEOC explains that whether the vaccine is administered by the employer or an employer-contracted third-party, any prescreening questions must be “job-related and consistent with business necessity” to avoid eliciting unnecessary information about a disability in potential violation of the ADA. This is important as some prescreening questions will be necessary to determine if the employee is at increased risk of an adverse reaction to the vaccination. Such discussions can trigger ADA protections as they potentially involve the disclosure of a disability.

If an employee asserts that they cannot receive the vaccine because of an ADA-protected disability, employers must engage in the interactive process with the employee to determine whether they can provide a reasonable accommodation. This could include a discussion of other protective measures such as testing, symptom screening, masking, social distancing, etc. Notably, when an ADA-protected disability prevents an employee from receiving a vaccine, and no reasonable accommodation is possible, employers must evaluate on a case-by-case basis whether having the unvaccinated employee reporting to work poses a “direct threat” to the employee or others. If so, and the risks cannot be “reduced to an acceptable level,” employers may exclude an employee from the workplace, but may not necessarily be able to terminate their employment because of

other federal, state, or local EEO protections. Similarly, when sincerely held religious beliefs protected by Title VII prevent an employee from receiving a vaccine, an employer must try to accommodate those beliefs unless the accommodation causes an undue hardship on the employer.

Finally, the EEOC guidance discusses that the COVID-19 vaccine is not likely to implicate GINA because the vaccine does not involve the use of genetic information to make decisions about employment status. Most of the promising versions of the COVID-19 vaccine are known as “mRNA vaccines” and do not interact with a person’s genetic information (stored in cellular DNA) in any way. However, to avoid implicating GINA, employers or their third-party vaccine administrators should avoid inquiring about family medical history as part of the vaccine prescreening process as such is protected under the statute.

While the EEOC’s guidance pertains to employees for school districts, similar issues exist for student vaccinations. That said, there is no vaccine currently approved (even under an EUA) for anyone under 16 years of age. Thus, the ability of school districts to require vaccinations for students is further constrained at this time.

Before starting a vaccination program, and for assistance navigating how employers can protect themselves from liability regarding the COVID-19 vaccine, contact your Robbins Schwartz Attorney.