

EEOC Guidance: Employer Mandated Vaccinations?

COVID19, EEOC, Employment Law / December 22, 2020 / Andrea Johnson

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued further guidance about the employment rules applicable during the COVID-19 pandemic—this time focusing on employer-mandated vaccinations. The latest guidance updates previous EEOC thought “***What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Law***”. In the new Section K. Vaccinations, the EEOC concludes that employers *may* mandate that employees be vaccinated as a job requirement, with the sole accommodations for either sincerely held religious reasons or physical (or mental) disabilities (meaning, for example, that the employee cannot take the vaccine due to an allergy or other issue). This conclusion is similar to what the EEOC did in 2009 in response to the H1N1 flue (*aka* “swine flu”) outbreak. The guidance is also in line with the EEOC’s previous announcement about COVID-19 – that an employee who has contracted COVID-19 meets the Americans with Disabilities “direct threat” definition. See the EEOC’s “***Pandemic Preparedness in the Workplace and the Americans with Disabilities Act***” guidance, finding, in part, that excluding from the workplace employees with COVID is not discriminatory due to the “significant risk of substantial harm” posed.

While there are strict rules concerning when and if an employer may seek to have an employee undergo a medical exam, the EEOC avoided that issue by concluding that a vaccination is not a medical exam. As the guidance states, “If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.” In other words, because the employer is not seeking data about the employee’s current health or possible physical/mental impairments, the vaccination is not a medical test and rules about “medical tests” do not apply. This conclusion differs from how the EEOC views vision tests, urine analysis or other diagnostic procedures. See, for example, the EEOC’s “***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA.***”

When an accommodation for religious reasons or a disability is raised, the employer has a legal obligation to accommodate the affected employee “reasonably.” The employer should engage in a confidential, “interactive” discussion with the employee to find an accommodation for the specific religious issue or disability raised that also allows the employee to keep working, if possible. This discussion may include (1) as to a religious objection, data about the religious belief in issue; or (2) as to a claimed disability, medical confirmation of the limitation on the employee. Examples of accommodations include continued mask wearing, remote work, unpaid leave, changes in office arrangements, or an adjustment to job duties. Accommodations may be refused, but only if they pose an “undue hardship” to the business.

The issue of “accommodation” can be difficult to navigate, with legitimate concerns about potential liability for mandating a vaccine, and even about the safety of the vaccine itself. Thus, rather than mandate vaccination as a condition of continued employment, some employers may instead choose to “encourage” employees to take the vaccine. These decisions may be based, in part, on the nature of the business, its interaction with the public, and the risks that may be posed by having unvaccinated employees working in that environment. The employer should also consider how its employees - and even the public - may react to any decision to require vaccination as a condition of employment. And, in a unionized environment, the employer should consult the existing collective bargaining agreement(s) before implementing

any policy as a condition of employment. However, not having a vaccination rule at all may affect whether the workplace is considered “safe” under the Occupational Safety and Health Act (“OSHA”). Finally, employers should be on the lookout for any different or additional requirements imposed by state or local laws.

KRCL offers counsel through the maze of laws and EEOC guidance addressing accommodations for “sincerely held” religious beliefs and physical and mental disabilities. Please contact either Ms. Johnson or anyone in the KRCL Employment Law group for assistance.

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Andrea Johnson

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