

Bond

Employer Mandated Vaccination: EEOC Guidance Update



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Agenda

- History of Employer Vaccination Requirements
- EEOC Guidance
- Practical Suggestions



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Historical Context

- Historically, mandatory flu policies existed in the healthcare context and courts in New York have generally upheld such policies, so long as they provide medical and religious exemptions.
- In Kiel v. The Regents of the University of California, et al., a California superior court denied plaintiffs' request for a preliminary injunction to enjoin the enforcement of a policy mandating students, faculty and staff receive a flu vaccine as a condition to access University property during the 2020-2021 flu season.



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Can Employers Mandate the COVID-19 Vaccine?

- EEOC Guidance
 - Implies that vaccination may be required if exemptions allowed
- Historical Context
 - Generally permitted in medical settings



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Can Employers Mandate the COVID-19 Vaccine?

- Emergency Use Authorization (“EUA”)
 - [Emergency Use Authorization for Vaccines Explained](#)
 - Mechanism to allow use of vaccine that is not fully approved by FDA
 - FDA must ensure that recipients of the vaccine under an EUA are informed that they have the option to accept or refuse the vaccine
- Guidance from New York State?



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EEOC Guidance – ADA

- **Americans with Disabilities Act (ADA)**
 - Restricts employer ability to require medical examinations and make disability related inquires
 - Admission of vaccine not a “medical examination”
 - BUT, Pre-screening questions may elicit protected information
 - Only may be asked where “job-related and consistent with business necessity”
- **Exceptions**
 - Vaccine offered on voluntary basis
 - Vaccine received from third party with whom employer has no contract (proof of vaccination requirement)



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EEOC Guidance – GINA

- **Genetic Information Nondiscrimination Act (GINA)**
 - Protects against disclosure or acquisition of “genetic information”
 - Admission of vaccine not problematic
 - BUT, Pre-screening questions may elicit protected information
 - Depends on screening checklists
 - Potentially an issue if questions ask information about immune systems of family members
- **Recommendation that employers request proof of vaccination rather than administer the vaccine**



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EEOC Guidance – ADA and Title VII Issues

- ADA Accommodation Issues
 - Employer must show that unvaccinated employee would pose a “direct threat”
 - Individualized assessment of four factors: (a) duration of the risk, (b) nature and severity of the potential harm, (c) likelihood that the harm will occur, and (d) the imminence of the harm
 - Reasonable Accommodation
 - No exclusion from workplace unless there is “no way” to provide a reasonable accommodation absent “undue hardship”
 - Termination vs. Exclusion from Workplace



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EEOC Guidance – ADA and Title VII Issues

- Religious Accommodation Issues
 - What is a religious belief?
 - Reasonable Accommodation?
 - Undue Hardship?
 - More than a *de minimus* cost or burden to the employer



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Vaccination - Options

- No Action
- Encourage/Incentivize Vaccination (Voluntary)
 - Administer on-site
- Mandate Proof of Vaccine (if permitted)
- Mandate Vaccination Administered by Employer or Employer Contractor (if permitted)



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A few tips....

- If permitted to require vaccination, ensure there is a legitimate basis to mandate.
- Allow exemptions for medical (including pregnancy) and religious reasons.
- Have a clear process for requesting exemptions
- Review exemption requests on a case-by-case basis, review them carefully (preferably with the help of outside counsel), and engage each employee in the interactive process.
- Document. Document. Document.
- Provide training.
- For employees who refuse to get vaccinated, be sure you understand why before taking disciplinary action (i.e., is it for medical or religious reasons).



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