



WHAT YOU NEED TO KNOW ABOUT MANDATING VACCINES WHEN K-12s REOPEN

Due to the COVID-19 Pandemic, vaccines are being approved for emergency use authorization (EUA) by the FDA and people are lining up for inoculations throughout the country. Vaccines authorized under the EUA make a vaccine available for public health emergencies. This means that the vaccine is available outside of a research study but is not yet approved. However, the vaccine may be used as long as people benefit from it. On December 11, 2020, the U.S. Food and Drug Administration issued the first emergency use authorization (EUA) for a vaccine for the prevention of Coronavirus disease 2019.

As K-12s start to reopen across the country, and in particular for the State of California, Governor Gavin Newsom has taken the position that K-12s can begin to reopen even if all teachers are not vaccinated against COVID-19 but only if proper safety measures and supports are in place. Such measures include social distancing, engineering controls and the wearing of face coverings.

The question that naturally presents itself is whether or not school districts can make vaccination a mandatory condition of returning to the campus and if so, how do districts handle objections by its employees? While very little legal guidance is provided in this area, the Equal Employment Opportunity Commission has issued its position statement as to the legality of mandatory COVID-19 vaccinations as a condition of employment. Although the EEOC has never specifically stated that employers may require the COVID-19 vaccine, it has provided a position statement as to its legality if the vaccine is mandated. The issues presented by a vaccine requirement are as follows:

1. Is the vaccine considered a medical exam under the Americans with Disabilities Act?
2. May the employer, if it supplies the vaccine, make pre-screening inquiries that are disability-related?
3. May the employer ask or require an employee to show proof that he/she was vaccinated and is such proof a “disability-related inquiry” under the Americans with Disabilities Act?

1. Vaccines and Medical Examinations:

The EEOC position is that vaccines do not constitute a medical exam. As such, if the employer administers the COVID-19 vaccine, or through a third party contracted by the employer, the administration is not considered a “medical examination” under the Americans with Disabilities Act. The EEOC has taken the position that a medical exam is a procedure or test administered by a health care professional or in a medical setting that seeks information about the person’s physical or mental impairments or health. If the vaccine is given by the employer to protect against COVID-19, the employer is not seeking information about the person’s impairment or health status.

2. Pre-Screening Questions for the Vaccine if the Employer Administers the Vaccine or through a Third Party:

The EEOC has taken the position that asking questions of employees before the vaccine is administered as a screening device is likely to elicit information about the employee’s disability and as such, pre-screening questions are disability-related inquiries. The EEOC states that employers may not make these types of inquiries. However, if, on an individual basis, the employer has a reasonable belief that the employee fails to answer the pre-screening questions and also declines receiving a vaccine, the employer will have to analyze whether the employee will present a direct threat to the health or safety of the employee or others. Keep in mind there are two exceptions under the EEOC to this requirement: (1) if the vaccine is offered to employees on a *voluntary* basis and the employee answers these pre-screening, disability-related questions on a voluntary basis; and (2) if the employee is vaccinated from a third party vendor that does not have a contract with the employer.

3. Can Employers Require Employees to Show Proof of Vaccination?:

The EEOC has taken the position that demanding proof of the vaccination does not elicit information about an employee’s disability and requiring proof of vaccination does not violate the ADA. As such, the employer may require the employee to obtain the vaccine from an independent vendor and show proof of the vaccination. However, the EEOC cautions that asking why the person did not receive a vaccine may elicit information about a disability. In order to ask such questions, the inquiry must be “job related and consistent with business necessity.”

The Take Away:

In sum, the EEOC's position has established two ways in which an employer can ask disability-related screening questions without needing to show that the questions are "job-related and consistent with business necessity." The first way, if the employer wants to offer vaccines, is to make the vaccine administration voluntary. If the employer offers the vaccine on a voluntary basis, the employees' answering of any pre-screening questions are also voluntary and according to the EEOC, the answers will not elicit information about a disability and would not violate the ADA.

The second way is the employer can require the employee to receive the vaccination from a third party that does not have a contract with the employer (for example, going to one of the vaccination sites such as Dodger Stadium, LACOE, etc.). The EEOC has stated that asking for proof of vaccination from a third party is not a medical exam. Simply asking for proof of receipt of the vaccine is not likely to elicit information about the employee's disability. Employers should be aware that subsequent employer questions such as asking the employee *why* he/she did not receive a vaccination may elicit information about the employee's disability. Answers to those questions would be considered a medical examination and such questions must be "job related and consistent with business necessity."

CAN THE EMPLOYER MANDATE A COVID-19 VACCINE BEFORE RETURNING TO WORK?

As with the legality of the administration of vaccines, there is not an abundance of legal guidance as to whether or not employers may mandate the vaccine as a condition to returning to work. Nonetheless, the EEOC has provided its position as to the steps that the employers may take if the employee objects to the vaccine due to a disability, which is protected under the ADA. Before taking any adverse employment action against the employee for his/her refusal to take the vaccine, the employer should establish the following:

Show that the employee poses a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

The EEOC has already stated that the COVID-19 virus poses a direct threat to others but employers must conduct an individualized assessment regarding the existence of a direct threat. For example, the employer should consider the following:

a. **The duration of the risk.**

- b. The nature and severity of the potential harm.
- c. The likelihood that the potential harm will occur; and
- d. The eminence of the potential harm.

In general, requiring a vaccine is a safety based qualification standard. If this standard screens out individuals with disabilities, the employer must show that the unvaccinated employee poses a direct threat to the health and safety of others. You must conduct the individualized assessment as outlined in the four factors above to determine whether or not a direct threat exists. Employers are not allowed to assume that every employee who is at risk for becoming infected with COVID-19 poses a direct threat to the workplace. As such, if the employer forms a conclusion that an unvaccinated person that catches the virus poses a direct threat, the employer can determine that the unvaccinated employee will expose others to the virus at the work site. Keep in mind, however, that not every individual that is unvaccinated would pose a direct threat to the workplace. For example, employees that are regularly required to work remotely may not pose a direct threat to the health and safety of other workers in the workplace.

The reasonable accommodation process.

Once the employer determines that the employee's disability prevents the individual from receiving the vaccine, and the presence of the employee poses a direct threat to the workplace if the employee returned to the work site, the employer must start the interactive process and determine how the employer could eliminate or reduce the risk such that the unvaccinated employee does not pose a direct threat of harm to others. In going through this process, the employer and the employee should have an interactive discussion as to how the employer may provide a reasonable accommodation without an undue hardship. In going through this process, the parties should consider how much contact the unvaccinated employee would have with those who have already received the vaccine, and the amount of contact with individuals whose vaccine status is unknown. If, during the interactive process, the direct threat cannot be reduced or eliminated, the employer may exclude the employee from the workplace *but it does not necessarily mean that the employer may terminate the employee.*

Before considering termination as the last resort, the employer must consider the requirements of other federal and state anti-discrimination laws. For example, should the employer consider FMLA/CFRA leave? Can the employee adequately perform the job remotely? Is the employee eligible for leave under any Federal, State or Employer-provided leaves? It is advisable to consult with counsel in this regard.

HOW DO EMPLOYERS HANDLE PREGNANT EMPLOYEES AND THE VACCINE REQUIREMENT?

It is important to remember that pregnancy-related medical conditions may be disabilities under both the Americans with Disabilities Act and the California Pregnancy Disability Leave Law. Employers may have pregnant employees who refuse to get vaccinated due to a pregnancy-related medical condition.

Under the Pregnancy Disability Leave Law and the ADA, the pregnant employee is entitled to some form of reasonable accommodation, including a leave of absence. Employers are cautioned against discrimination against women affected by pregnancy, child birth, and related medical conditions. Such female employees must be treated the same as other employees who are similarly situated in either their ability or inability to perform their jobs.

HOW DO EMPLOYERS RESPOND TO EMPLOYEES THAT HAVE RELIGIOUS OBJECTIONS?

Employees have the right to practice their sincerely held religious beliefs, practices or observances unless doing so would impose an undue hardship on the employer. The EEOC has taken the position that this standard continues to apply to employees who refuse to take the COVID-19 vaccine due to the employee's sincerely held religious beliefs, practices or observances.

The EEOC has also emphasized that employers should assume that any employee that makes a request for religious accommodation is a sincere request unless the employer has objective facts to question the employee's sincerity of a particular belief, practice, or observance. If such is the case, the employer may request additional supporting information to substantiate the request for reasonable accommodation. Please be mindful that the undue hardship standard must be satisfied before denying an accommodation. It is advisable to consult with legal counsel.

In sum, if the employee cannot get vaccinated for COVID-19 due to a disability or a sincerely held religious belief, practice, or observance, *and* the employer cannot provide a reasonable accommodation, it is lawful for the employer to exclude the employee from the workplace. This does not mean that the employer may terminate the employee. Employers will still need to analyze whether any other rights are implicated under federal, state, and local laws.