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## EEOC ISSUES GUIDANCE SPECIFIC TO COVID-19 VACCINE

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On December 16, 2020, the EEOC updated its COVID-19 Question and Answer page to address employment related questions specific to the COVID-19 vaccine. [We have previously written about the EEOC's guidance on the flu vaccine and how that guidance would be likely to transfer over to a COVID-19 vaccine](#), and that has proven to be the case. The two big takeaways from the EEOC's guidance are this: (1) Employers should let third parties administer the vaccine; (2) the EEOC doesn't have any idea when COVID-19 poses an un-accommodatable direct threat.

**Employers should use a third party to administer the vaccine, whether through direct contract with a single provider or by requiring proof of vaccination.** In the guidance, the EEOC affirmed that the administration of a vaccine is not a medical examination for purposes of the ADA, although screening questions prior to administering the vaccine could qualify as medical examinations or disability-related inquiries. This would mean that if employers administered the vaccine themselves, would have to prove by objective evidence that if the employee failed to receive the vaccine because he failed to answer questions, he would pose a *direct threat* to the health or safety of himself or others, which is a high standard to meet. Similarly, to the extent that screening questions may elicit genetic and family medical history information, using a third party would shield employers from inadvertently violating GINA in the vaccine administration process. Additionally, employers that administer the vaccine on a truly voluntary basis are also not subject to the *direct threat* standard.

If an employer instructs employees to provide proof of vaccination and an employee refuses or states he is unable to do so, an employer's follow up questions as to why the employee has not been vaccinated are likely to be disability-related inquiries, according to the EEOC. (However, real life experience tells us that most employees are going to refuse with at least a rationale, if not a manifesto, which may lead to questions of reasonable accommodation, discussed next).

While not specifically mentioned in the EEOC guidance, to protect themselves from other sources of liability, employers should be sure that they specify that they only require and accept FDA-approved vaccines; that any third party they contract with employs the appropriately qualified personnel, facilities (e.g., refrigeration), and safety and privacy precautions.

**If employers determine that an unvaccinated employee poses a direct threat, they should document well the reasons for that decision as well as their full compliance with the interactive reasonable accommodation process.** We'll give credit where it's due: the EEOC made was transparent that employers would fare pretty well in implementing a vaccine program where the employer didn't directly administer the vaccine. Unfortunately, the EEOC reverted to foggy opacity in describing the direct threat assessment and reasonable accommodation process. For direct threat, the EEOC listed the elements of what constituted a direct threat, without running through a single example. While we understand the hesitancy to engage in hypothetical scenarios that might not be precisely replicated, the failure to provide even a few guideposts from even extreme scenarios doesn't constitute "guidance" in our book. We feel—and fear—that the recitation of elements and standards without real world application is intended to be employer-deferential, at least while the EEOC is majority Republican (through at least July 2022), but that this interpretation will flip without the necessity of changing or contradicting a word of yesterday's guidance when President Biden gets to nominate the swing Democratic Commissioner.

The only practical tip from this section of the EEOC's guidance was that if employers determine a direct threat exists if an unvaccinated employee is in the workplace (regardless of available PPE), the employer should always consider if the work can be performed off-site as an accommodation, and should also ensure that the employee is offered leave that may be required under any employer policy, the FMLA, or any coronavirus specific leave program in existence.

Employers should remember that the direct threat assessment and reasonable accommodation processes should be individualized. For the direct threat test, the four elements are: the duration of the risk, the nature and severity of the harm, the likelihood that the harm will occur, and the imminence of the harm. Workplaces that have successfully prevented COVID-19 spread through PPE requirements and physical spacing may have trouble meeting the likelihood element, unless the individual refusing the vaccine is also refusing to follow those rules. Remember that the qualifying harm here is harm to the health and safety of the individual or others, not the company's bottom line. For accommodations, in addition to telework and exhausting available leaves, employers should consider physically quarantined spaces or transfers to open positions for which the employee is qualified if their unvaccinated status does not impose a direct threat in those other areas or positions.

**Legal protections only come into play when employees have a disability or sincere religious belief that prevents them from receiving the vaccine.** Finally, an employer only has to meet the direct threat burden if the employee has an ADA-qualifying disability that prevents him from being vaccinated. An employer has a right to substantiate the underlying disability and its relationship to the vaccine and may exercise that right through a carefully drafted physician's questionnaire. An employee only has a right to an accommodation, again, if the employee has a disability causing the inability to vaccinate or if the employee has a sincere religious belief or practice that

prohibits taking the vaccine. Generalized fears, Facebook memes, and conspiracy theories about Bill Gates won't satisfy these standards. However, an employee can have a sincere religious belief/interpretation even if it's not supported by an organized religion. Trained and qualified HR personnel working together with legal counsel can help employers sort through those requests and demands that aren't entitled to legal protections and those that are.

You may review the full EEOC guidance [here](#) or go directly to the vaccine questions [here](#).

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Appendix: A trusted reader raised a concern and question as to whether this synopsis advocated for employers across-the-board to adopt a vaccine requirement. It does not. We believe that decision should rest with ownership and management, after thoughtful consideration of their individual work environment; experiences with this virus and, if applicable, prior public health events; and the advice of health and legal experts.

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