



News & Types: Client Advisories

Can Companies Require the COVID Vaccination? - Yes, With Exceptions

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Practices: Employment, Labor & Benefits

EXECUTIVE SUMMARY

On December 16, 2020, the Equal Employment Opportunity Commission answered the question everyone has been asking. Yes, is the answer. Companies can require its employees to take the COVID-19 vaccination. However, there are some important exceptions. Companies need to understand the limits of their and their employees' rights and obligations.

Companies can require its employees to take the COVID-19 vaccination, but companies must comply with some exceptions. The Equal Employment Opportunity Commission ("EEOC") issued its Technical Assistance Questions and Answers on December 16, 2020. The EEOC is the federal agency tasked with enforcing the provisions of the Americans With Disabilities Act ("ADA") as well as other anti-discrimination laws and, therefore, its guidance is central to understanding and implementing companies' and employees' rights and obligations. In general, we recommend that companies require proof from employees that they were vaccinated by a pharmacy or health care provider, allow exceptions for disabilities and sincerely held religious beliefs, and, before terminating employees, determine whether the company may provide accommodations that are reasonable and not an undue burden.

Companies may require employees to get vaccinated by a pharmacy or a third-party health care provider. The pharmacy or health care provider should not have a contract with the company. The company may require employees to show proof that they received the vaccinations, but the company should not ask the employees to provide medical information with the proof. Asking for medical information implicates the ADA. If the employee is unable to show the proof, the company may ask follow-up questions, such as why the employee did not get the vaccination. However, the follow-up questions must be job related and consistent with business necessity.

Therefore, the company may not want to – or need to – ask follow-up questions. Instead, the company could exclude the employee from the workplace or terminate the employee's employment. However, companies may not take these actions automatically. Instead, if employees state that they did not receive the vaccination, the company must show that they will pose a significant risk of substantial harm to the health or safety of the employee or others.

This is the direct threat analysis. To show a direct threat, the company must analyze each employee's situation individually and determine the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. In addition, the company must determine if there is an accommodation that is reasonable and not an undue burden. For example, working remotely or taking a leave of absence are reasonable accommodations that would reduce the direct threat of harm to the other employees. During this analysis, the company and employee must engage in the interactive dialogue. Only if the company determines that the employee is a direct threat and there is no reasonable accommodation may the company exclude the employee from the workplace and terminate the employee.

In addition to analyzing the employee's refusal under the ADA, employees may refuse to be vaccinated because of their sincerely held religious practices or beliefs. When employees object, the company may not automatically terminate the employees. Instead, the company must provide an accommodation that is reasonable and not an undue hardship. An undue hardship is more than a de minimis cost or burden on the company. If a company has an objective basis for questioning the employee's religious beliefs, the company may ask for proof.

Therefore, we recommend a written policy regarding vaccinations. The policy should state whether the vaccination is mandatory or voluntary. If mandatory, the policy could require proof of the vaccination. In addition, the policy should provide that the company will protect the employee's rights under the Americans With Disabilities Act and Title VII of the Civil Rights Act for employee's sincerely held religious beliefs, practices and observances. Finally, the policy should state that termination may result, if the employee's continued employment poses a direct threat to the employee or others in the workplace and there is no accommodation that is reasonable and not an undue burden.