Key Points

- EEOC Guidance confirms that employers may mandate employee COVID-19 vaccination programs, subject to certain exemptions.
- Employer COVID-19 mandatory vaccination programs should include religious and disability-related employee exemptions.
- The Emergency Use Authorization (EUA) process for the COVID-19 vaccine might be a factor to consider when deciding whether to encourage, rather than require, COVID-19 vaccination at this time.

INTRODUCTION

On Dec. 11, 2020, the Food and Drug Administration granted Emergency Use Authorization (EUA) for Pfizer’s COVID-19 vaccine. Yesterday, the FDA advisory panel voted (20 in favor, one abstention) to recommend the Moderna COVID-19 vaccine for EUA.

On Dec. 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Questions and Answers (Guidance) to specifically address employer COVID-19 vaccine programs. The new Guidance reiterates the medical/disability condition and sincerely-held religious belief exemptions that the EEOC recognizes for other vaccines, and provides a possible further exemption based upon the fact that the FDA authorized the COVID-19 vaccine use under its Emergency Use Authorization (EUA), and not yet granted full approval.

The Guidance specifically states, "The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities’ guidelines and suggestions." Thus, employers should keep apprised of any other federal and state laws that may implicate employee rights and to local health orders addressing vaccines and talk with counsel before proceeding with a mandatory or voluntary vaccination program.

THE NEW EEOC GUIDANCE
Illegal Medical Examinations and Disability-Related Questions

The EEOC Guidance confirms that *administering* a vaccine is not a medical examination and thus is not subject to laws restricting medical examinations. The Guidance further notes that the CDC recommends that "health care providers" ask certain questions before administering the vaccine to ensure there is no medical reason that would prevent the person from receiving the vaccine. According to the Guidance, these *"pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries,"* and any employer must show that such pre-screening questions are *"job-related and consistent with business necessity."* If the employer is implementing a *mandatory* vaccination program, this means that an employer would have to show that an employee who refuses to answer the question and does not receive a vaccine will present a direct threat to himself/herself or others.1 On the other hand, if the vaccination program is *voluntary,* the EEOC Guidance states that the employee's decision to answer pre-screening, disability-related questions *also must* be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d).

The Guidance also confirms that administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of the Genetic Information Nondiscrimination Act because it does not involve the use of genetic information. Again, employers should ensure that there are no pre-screening questions regarding genetic information, such as family medical history, as those inquiries may violate the Act.

Finally, the EEOC confirms that asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is *not* a disability-related inquiry. The EEOC warns, however, that any follow up questions might elicit disability-related information and, thus, employers need to be careful to make sure employees are not providing medical information.

Mandatory Vaccinations, Exemptions, and Accommodations

The EEOC continues to maintain that employees may have medical or religious-based reasons for not wanting to be vaccinated and that employers must attempt to accommodate those employees.

1.

Medical/Disability Related Exemption

The EEOC has long held that an employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him/her from taking the vaccine. For example, qualifying medical exemptions may include allergies to vaccine components or a history of Guillain-Barre syndrome. An employer can require some documentation, such as seeking a health care provider indication of a medical condition (not identified) that would be negatively impacted by the vaccination.

If an employee claims to have a disability-related objection to the vaccine, the Guidance provides that, before taking any adverse action, employers must show that an unvaccinated employee would pose 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." 29 C.F.R. 1630.2(r). In that regard, the Guidance provides that employers consider the following:

"Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: 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. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite."

If the direct threat cannot be reduced to an acceptable level, the employer can exclude the employee from the workplace, but not before the employer looks to alternatives (such as remote work, increased personal protective equipment, additional social distancing measures, or even modified work schedules to reduce potential contact) that could constitute a reasonable accommodation. The EEOC does acknowledge that there are situations where accommodation is not possible. Certainly, that conclusion is a discussion to have with counsel.

2.

**Sincerely Held Religious Practice Or Belief Exemption**

The EEOC Guidance continues to recognize the exemption for employees who have a "sincerely held" religious practice or belief that forbids them from getting vaccinated. The EEOC has been active in this area of religious-based exemptions regarding the flu vaccine, and we can expect the EEOC to continue to take on these cases.

The Guidance states that the employer could exclude an employee from the workplace based upon a religious objection but warns against automatic termination. As with the disability exemption, an employer should engage with the employee claiming a religious objection to determine whether they can be accommodated.

Whether a religious practice or belief is "sincerely held" is not a clear cut inquiry. The Guidance provides that "the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information." The Guidance does not define what information would constitute an "objective basis" for questioning an employee's religious belief.

**Impact of the Emergency Use Authorization (EUA) Nature of the Vaccine**

The EEOC Guidance specifically notes that the FDA cleared the new COVID-19 vaccine for use under its emergency use authority. The Guidance does not take a stance on whether employers may specifically mandate vaccination approved under the EUA other than to quote directly from the FDA website, which states:

"The FDA has an obligation to ensure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product."

Therefore, it appears, although the Guidance does not explicitly state, that the FDA's own proclamation regarding the EUA nature of the vaccine impacts an employer's ability to make the vaccine mandatory at
this time for employees who object to it based on this ground.

**Occupational Safety and Health Administration (OSHA) and Cal/OSHA**

In a Nov. 9, 2009, Interpretation Letter addressing flu shots, the U.S. Occupational Safety and Health Administration (OSHA) noted that "although OSHA does not specifically require employees to take the vaccines, an employer may do so." Cal/OSHA currently provides that workers can decline flu vaccinations in certain circumstances, but has not yet directly addressed the COVID-19 vaccine. See 8 CCR §5199, Appendix C1. Based upon the above, it is reasonable to assume that if employers maintain a program that mandates vaccinations subject to the guidelines that the EEOC suggests, the employer will not violate any obligation to maintain a safe working environment.

**The Local Arena**

Each employer should review the local county law in which they operate as states and localities may inevitably enact their own laws regarding vaccinations. Presumably, without a federal mandate, we will see the local health officers taking on a similar approach with a COVID-19 vaccine that may impact employer mandates.

**Workers’ Compensation**

Given past decisions regarding other vaccines, we can expect that California’s workers’ compensation law will apply to injuries or illnesses allegedly caused by COVID-19 vaccinations. See, e.g., *Roberts v. U.S.O. Camp Shows*, Inc. (1949) 91 Cal. App. 2d 884, 885 (The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable under the Workers’ Compensation Act.)

**Union Environments**

Employers who operate a unionized workforce must consider additional steps to take before implementing vaccination programs.

In *Virginia Mason Hospital v. Washington State Nurses Ass’n*, 511 F.3d 908, 911 (9th Cir. 2007), the employer hospital implemented a mandatory influenza immunization for all nurses and other employees. The union filed a grievance, and an arbitrator ordered that the hospital stop the mandatory immunization as it violated the collective bargaining agreement. The Ninth Circuit upheld the arbitrator’s decision "in light of the considerable deference for arbitral decisions and citing the clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment." *Id.* at 913, 917. Thus, any employers with unionized workforces should check with their labor counsel as to whether you must meet with the union before you implement the program.

Employers without unionized workforces still need to consider Section 7 of the National Labor Relations Act. Section 7 grants employee rights to engage in concerted activity regarding working conditions. Employees who join together to protest a COVID-19 vaccine program, or an employer’s failure to implement such a program, and who suffer some adverse employment action could allege retaliation and file unfair labor practice charges with the National Labor Relations Board.

**Conclusion**
The EEOC Guidance makes it clear that employers may mandate vaccines and not run afoul of Title VII and the ADA as long as the employer provides religious and medical exceptions. However, there are other considerations that an employer should keep in mind besides Title VII and the ADA. For example, the EUA nature of the vaccine may impact whether the employer wants to make the vaccine mandatory. Employers should consult with their counsel before implementing their staff vaccination programs to discuss and determine appropriate parameters.

The EEOC Guidance can be found here. Section K is the pertinent update on COVID-19 vaccines.

¹This part of the Guidance is confusing given the fact that the EEOC has already stated that COVID-19 presents a direct threat in the workplace. Presumably, the new Guidance means the “possibility” of having COVID-19 may not qualify as a “direct threat.”

²An Emergency Use Authorization (EUA) is a “mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic. Under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.” See https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained

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