



CRISIS PRACTICE

Coronavirus

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For more information,
contact:

Michael W. Johnston
+1 404 572 3581
mjohnston@kslaw.com

Amanda A. Sonneborn
+1 312 764 6940
asonneborn@kslaw.com

Edward Holzwanger
+1 202 626 8980
aholzwanger@kslaw.com

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

Chicago
110 N Wacker Drive
Chicago, Illinois 60606
Tel: +1 312 995 6333

Washington, D.C.
1700 Pennsylvania Avenue,
NW
Washington, D.C. 20006-
4707
Tel: +1 202 737 0500

COVID-19: The Do's and Don'ts of a Mandatory Vaccination Policy

As COVID-19 vaccines become more widely available and employers contemplate policies that will facilitate returning to the workplace, one important issue is whether employers can require employees to receive COVID-19 vaccinations. This client alert addresses the Equal Employment Opportunity Commission's ("EEOC") guidance on mandatory COVID-19 vaccination policies, which is applicable only to employers in the United States of America. As additional guidance is issued by the EEOC and other departments, King & Spalding's labor and employment attorneys stand ready and able to help employers implement vaccination policies.

On December 16, the EEOC updated its COVID-19 [guidance](#) to address mandatory COVID-19 vaccination policies. The EEOC affirms the general rule that employers can require COVID-19 vaccinations if certain exceptions are made. When considering a mandatory vaccination policy, employers must consider the requirements of the Americans with Disabilities Act ("ADA"), the Genetic Information Non-Discrimination Act ("GINA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). Employers should also weigh the benefits of requiring employees provide proof of vaccination as opposed to vaccinating employees themselves. Below are the key takeaways from the EEOC's updated guidance:

Generally, employers can require employees receive a COVID-19 vaccine as a condition of returning to work; however, employers must attempt to accommodate employees who, due to medical disabilities or sincerely-held religious beliefs, decline vaccination.

The EEOC affirmed that employers can require employees receive COVID-19 vaccinations. That said, employees with underlying disabilities or sincerely held religious beliefs preventing them from being vaccinated must be excused from an employer's mandatory vaccination policy.

The question is then whether these unvaccinated employees can be excluded from returning to work. An employee declining to receive the



vaccine for medical or religious reasons may be excluded from the workplace if the employee presents a direct threat due to a significant risk of substantial harm to health or safety that cannot be eliminated or reduced through reasonable accommodations. To determine if an employee presents a direct threat, the employer must make an individualized assessment of: 1) the duration of the risk presented by the unvaccinated employee; 2) the nature and severity of the potential harm presented by the unvaccinated employee's presence in the workplace; 3) the likelihood that harm will occur; and 4) how imminent that harm is to others in the workplace. If, through this assessment, it is determined the unvaccinated individual will expose others to the virus in the worksite, they pose a direct threat.

If the unvaccinated individual poses a direct threat, the employer must then assess whether there is a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk. Again, many employers may find that the sorts of accommodations that have been in place for the past several months, If no reasonable accommodation exists, then the employer may refuse to allow the employee in the workplace.

Excluding an employee from the workplace does not mean that the employer is automatically entitled to terminate the individual's employment. Rather, the employer will need to assess if other accommodations can permit the employee to continue working, such as remote work, and if the employee has other rights under other federal, state, or local EEO laws.

As employers conduct these assessments of significant risk and reasonable accommodation, they should keep in mind the guidance and practices that have underpinned the early return to work stages of the past summer and fall. It will be important to understand any Centers for Disease Control guidance about available vaccines, in particular whether health risks (including risk of transmission) may be attenuated when others within the workplace have received vaccines, as well as the availability of the same infection-mitigation efforts (namely mask wearing, social distancing, health screenings, and hygiene controls) and related accommodations (namely, remote work, schedule modification, and the like) that many business have successfully leveraged over the last several months.

The administration of a COVID-19 vaccination is not a "medical examination" for purposes of the ADA.

Before conducting a "medical examination" employers must be able to demonstrate the examination is job-related and consistent with business necessity. Because administering a vaccine does not gather information about an individual's health status, it is not a medical examination. Similarly, asking an employee for proof of vaccination is not a disability-related inquiry because the request is unlikely to prompt disclosure of information about a disability. If, however, an employee indicates he has not been vaccinated, the EEOC cautions employers not to ask why. Doing so could be a prohibited disability-related inquiry unless the employer can demonstrate the question was job related and consistent with business necessity.

Pre-vaccination medical screening questions may trigger ADA and GINA requirements, so employers should consider requiring proof of vaccination rather than administering vaccines.

The CDC encourages health care providers to ask pre-screening questions prior to a COVID-19 vaccination. Those questions are likely to elicit information about employee disabilities. As a result, the questions may constitute disability-related inquiries. That means the employer must show the screening questions are job-related and consistent with business necessity. If, however, an employee receives the vaccination from a third party that does not have a contract with the employer, even if vaccination is required by the employer, the ADA restrictions do not apply to the questions.

Pre-screening questions may also implicate GINA's restrictions if they elicit genetic information. GINA prohibits the use of genetic information in making employment decisions and generally prohibits employers from requesting, requiring, or purchasing genetic information about applicants or employees. It is currently unclear what pre-



vaccination questions will be asked or what potential genetic conditions they will elicit. If pre-vaccination questions do *not* seek genetic information (including family medical history), asking them will not implicate GINA. If, however, pre-vaccination questions include questions about genetic information, GINA's restrictions become relevant. By simply requiring proof of vaccination instead of administering the vaccine, employers can avoid having to ask employees these pre-vaccination questions.

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