

KD Alert: EEOC Issues Guidance on Employers' Right to Require COVID-19 Vaccinations

By: Arif Virji, San Francisco and Sonoma Managing Partner

On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance regarding COVID-19 vaccinations for employees. In doing so, the EEOC answered a key question on the minds of most employers: With certain exceptions and caveats, employers can require that employees receive the COVID-19 vaccine as a condition of returning to, or remaining in, the workplace. Here are the key points:

- **A Vaccination Is Not a Medical Examination**

The EEOC guidance confirms that administration of the vaccination itself is not a “medical examination” within the meaning of the Americans with Disabilities Act (ADA) (which would be prohibited or limited by the ADA) because the employer is not seeking information about the employee’s current health status.

- **Pre-screening Vaccination Questions May Constitute a Medical Examination**

According to the US Centers for Disease Control and Prevention (CDC), health care providers must ask pre-vaccination screening questions to confirm there is no medical reason preventing a person from receiving the vaccination. These questions may count as a “medical examination” under the ADA because they could seek information about an employee’s disability. An employer (or a third-party with which the employer has contracted to provide vaccinations) may ask such questions only where they are “job-related and consistent with business necessity,” which means that “an employer would need to have a reasonable belief, based on objective evidence, that an employee, who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.”

There are two exceptions to this requirement: (1) where the vaccination program (including the decision to answer pre-screening questions) is voluntary and the employee elects not to answer those questions, the employer may refuse to administer the vaccine (but there should be no retaliation for refusing to answer the questions); and (2) when the employer requires its employees to obtain vaccinations from third party medical providers in the community (such as a pharmacy) but does not directly contract with that provider, the ADA’s “job-related and consistent with business necessity” restriction would not apply to the third party healthcare provider’s pre-screening questions.

- **An Employer May Ask Employees For Proof of Vaccination**

Asking employees to show proof they received a COVID-19 vaccination is permitted because it likely will not elicit disability related information. However, the question must be limited to proof of vaccination; asking employees why they did not receive a vaccination may qualify as a medical/disability inquiry under the ADA and therefore would be allowed only when such an inquiry is “job-related and consistent with business necessity.”

- **Employers Must Attempt to Accommodate Employees’ Disability or Religious Concerns**

Employers must try to accommodate employees who refuse the vaccination due to medical disabilities or sincerely-held religious beliefs. If there is no reasonable accommodation that would reduce or eliminate the health and safety concerns without undue hardship to the employer, the employer can exclude the employee from the workplace, but only if the employer determines, based on objective

evidence, that the unvaccinated employee presents a direct threat to the health and safety of persons in the workplace. However, an employer may not automatically terminate an unvaccinated employee from the workplace due to the direct threat presented by his or her presence in the workplace; the employer must first assess whether other accommodations, such as remote work, are available.

- **GINA Does Not Apply**

The Genetic Information Non-Discrimination Act (GINA) is not triggered by employers requiring the vaccine or proof of vaccination because the employer is not acquiring or using an employee's genetic information to make employment decisions.

The EEOC is the first agency to provide guidance on the implementation of COVID-19 vaccinations for employees. However, the vaccination roll out has only just begun and the results of early vaccination campaigns will likely lead to revised guidance. It is also possible that state and local governmental agencies may take a different approach from the guidance provided by the EEOC. Stay tuned as we provide regular updates on this critical issue for employers.