

[Podcast]: Mandatory COVID-19 Vaccinations

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In this episode of The Proskauer Brief, partners Harris Mufson and [Evandro Gigante](#) discuss the U.S. Equal Employment Opportunity Commission's recent guidance for employers regarding mandatory COVID-19 vaccinations. On December 16th, 2020, the EEOC issued updated guidance for employers in light of the FDA's recent authorization of Pfizer's COVID-19 vaccine for emergency use. Widespread vaccinations have been largely perceived as critical in returning all employees to the workplace in a safe manner and allowing employers to resume normal business operations. Tune in as we discuss what many employers should consider regarding requiring employees to be vaccinated before returning to the office.

Harris Mufson: Welcome to The Proskauer Brief: Hot Topics in Labor and Employment Law. I'm Harris Mufson and on today's episode, I'm joined by my partner Evandro Gigante and we're going to discuss the U.S. Equal Employment Opportunity Commission's recent guidance for employers regarding mandatory COVID-19 vaccinations. On December 16th, 2020, the EEOC issued updated guidance for employers in light of the FDA's recent authorization of Pfizer's COVID-19 vaccine for emergency use. And generally speaking, widespread vaccinations have been largely perceived as critical and in returning all employees to the workplace in a safe manner and allowing employers to resume normal business operations. And in that regard, many employers have been thinking about whether or not they can lawfully require employees to be vaccinated before returning to the office.

The EEOC has now made clear that employers are in fact lawfully permitted to require employees to be vaccinated before returning to the office, subject to certain important limitations and exceptions that we'll talk about today. And the EEOC's guidance focuses really on three topics. One is accommodations for employees' disability related inquiries and medical examinations and also the Genetic Information Non-Discrimination Act. So just to touch briefly on accommodations, the updated guidance says that an employer must reasonably accommodate employees who are disabled including employees who have disabilities that could prevent them from receiving a COVID-19 vaccine. However, employers may deny a disability related accommodation where there's no available alternatives that would alleviate the direct threat posed by an unvaccinated employee. And the direct threat designation is one that poses a significant risk of substantial harm that cannot be eliminated or reduced by a reasonable accommodation. And so to meet that standard, the direct threat standard, the employer must consider current medical knowledge and objective evidence. As well as the duration of the risk, the nature and severity of the potential harm and the likelihood that the potential harm will occur and the imminence of the potential harm. Considering that risk, the EEOC notes that employers should also consider the number of employees in the workplace who have received the vaccine.

The other major accommodation that the EEOC says is required for purposes of employers who are going to mandate a vaccine are accommodations for religious beliefs. And the EEOC has made clear that employees with sincerely held religious beliefs that conflict with vaccinations may also be entitled to an accommodation. And similarly to medical accommodations, once an employer is on notice that an employee's sincerely held religious belief, practice or observance prevents them from receiving a vaccination, the employer must provide a reasonable accommodation unless doing so would pose an undue hardship on the employer. The undue hardship test under title seven, which applies to religious accommodations, is a lower burden than under the ADA which applies to disability related accommodations. But nonetheless, the EEOC's guidance makes clear that employers are required to explore whether these accommodations are available for both disabled employees and those with disabilities. The EEOC guidance also talks about disability-related inquiries and medical examination. So Evandro, why don't you talk a little bit about that issue and then also the EEOC's guidance related to GINA.

Evandro Gigante: Sure, thanks Harris. As you mentioned, the latest guidance addresses the implications for vaccination programs on disability-related inquiries and medical examinations. Big picture, the ADA restricts an employer's ability to conduct a medical exam or request medical information from their employees. And so the question becomes, "Well, does administering a vaccination program implicate that prohibition? Or does it fit within some exceptions?" So first off, just administering a vaccination, in and of itself, the guidance says does not constitute a disability inquiry or a medical examination. However, there are of course, many of you know from getting the flu shot, questions that tend to precede vaccination of an individual. Things like, "Do you have certain medical conditions that may make it difficult for you to receive or sustain any side effects associated with the vaccination?" And in that case, EEOC says those types of questions would be medical inquiries that need to be job-related and consistent with business necessity before they can be asked. So on that front, an employer would have to basically have a reasonable belief that an employee who doesn't answer those questions and therefore doesn't receive a vaccination, would pose a direct threat to the health and safety of themselves or to others. And that goes back to that direct threat analysis that Harris, you just described. Of course, an employer can avoid that inquiry altogether or at least avoid being assessed on the test, that I just described, if it makes the vaccine program voluntary.

In other words, it doesn't require that an employee gets it. So if an employee, by choice, opts for the vaccine, then they would also, by choice, opt to answer those questions. In addition to that, the EEOC guidance makes clear that merely asking an employee to provide proof that they've been vaccinated, does not amount to a disability related inquiry, which is good. But questions beyond that, for example, "Why didn't you get a vaccine?", right, could constitute that type of inquiry, if an answer to it could elicit medical information. The next topic that's covered by the guidance is whether the vaccination program would implicate, what's called GINA or the Genetic Information Non-Discrimination Act. It's not a law that we hear a lot about but it's a law that prohibits employers from discriminating against individuals based on their genetic information or even requesting that they disclose genetic information. Obviously that's things like genetic tests that were administered or the results of genetic tests administered to family members or even, and this is I think the issue that kind of raises a question, information about the manifestation of a disease or a disorder in a family member. So in other words, "What's your family history of X?" And so the guidance makes clear that even asking those types of pre-vaccination questions shouldn't implicate GINA, if they are limited in scope. But even still, and just to protect against any potential claims, employers should advise employees not to offer any genetic information in response to those questions. This way you avoid the risk of a GINA violation.

Harris Mufson: Let's just talk about, in the wake of all of this guidance, right? I think a lot of employers are going to be revved to adopt mandatory vaccination programs just because of all these major exceptions to mandating vaccines. Let's just talk about for a minute, if employers do want to move forward with a mandatory vaccination program with these carve outs for disabled employees and those with objections based on bona fide religious practices. Just spend a moment talking about practical considerations for such employers. And I think one is certainly considering the employee relations aspect of mandating vaccinations where employers may have employees who don't have a disability or a religious objection to receiving a vaccine. But nevertheless, have a concern about it. And I think employers need to think long and hard about how employees could react to receiving word that an employer is mandating that they receive a vaccine before coming back to the office. In their own workforce, they need to consider those issues with that understanding in mind. There are other practical considerations too, that employers need to be aware of. One is that the Pfizer vaccine and the Moderna vaccine come in doses. There's a booster shot that's required. So are employers going to permit employees to come back to the office before they receive the second shot or they have to wait till they receive both? How are employees going to provide proof of the vaccination to employers, ensuring that any medical information, including proof of a vaccination, is maintained in a confidential medical file? So all of these issues are really critical in thinking about prospectively and proactively before mandating vaccinations because there's a lot of blocking and tackling that goes into it. Evandro, I know you had some thoughts also about some other issues, including wage and hour concerns. And other liability concerns. And potential concerns about unionized employees. So why don't you talk about that for a moment

Evandro Gigante: Sure. Just to kind of round out wage and hour issues, if you're going to make the vaccine mandatory, then as an employer, you'll need to consider whether there's an obligation to pay employees for the time spent getting a vaccine. I think it's pretty clear, based on current FLSA regulations, that if that's done on work time, the answer to that is going to be yes. The real question is if it's done outside of work time. It depends whether there are state laws that could implicate the hours that you have to pay someone for. The answer to that is there definitely are, so you need to be attentive to that. It's a bit of an open question. Certainly at the federal level, the FLSA level. Liability concerns, am I liable if an employee gets, you know, ill, due to a side effect associated with the vaccine. Listen, that's a question. It's not one that's kind of necessarily, you know, got a clear answer either. There's certainly the possibility for workers compensation, although there's open question as whether workers comp would cover, sort of the vaccination, as opposed to day-to-day employment in the nature of someone's job. That's generally what workers comp is intended to cover. You'll think about things like, "Can I get a waiver from an employee, so that I don't get sued, if an employee gets sick as a result of the vaccine?" Well then, that kind of opens the door to whether waivers are valid or invalid in your particular state, as between an employer and employee. And there's a lot of uncertainty there too.

Some states like New York, generally prohibit waivers between employers and employees. Other states don't, so you'll need to think about that as well. Lastly, and well certainly, to the extent of an employee, an employer makes that voluntary on the employee with regard to a vaccine. I think that would lessen the risk of a potential liability issue. And lastly, it's just the union issue of the unionized employers to look at their collective bargaining agreements and take into account whether there's an obligation to bargain over a mandatory vaccine program with their unionized employees. That pretty much sums up, I think, the practical considerations, which are many. And of course, like Harris said, everyone knows your own workforce better and there could be a host of other issues that could arise, given your particular workplace that mitigates for, or against, a mandatory program.

Harris Mufson: So it's certainly a lot for employers to consider. And we know, anecdotally, that a number of employers are considering whether or not to implement a mandatory vaccination program and we obviously touched on many of those issues today and I think that more issues will arise in the future, as there's additional guidance that we receive from the EEOC and other agencies about this issue. And also, just the realities of vaccinations become more prevalent in everyday life and vaccines become more readily available. I think that may change the dynamic as well. So we'll wait and see how that plays out. Well, thank you very much Evandro, for all your insight and indeed all of our listeners for joining us on The Proskauer Brief today. Stay tuned for more insights on the latest hot topics in labor and employment law and be sure to follow us on Apple Podcasts, Spotify and Google Play.

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- **Evandro C. Gigante**
Partner