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New EEOC Guidance Related to COVID-19 Vaccination

The U.S. Equal Employment Opportunity Commission (“EEOC”) recently posted updated and expanded [technical assistance](#) for employers with respect to their legal obligations under the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act (“Title VII”) concerning COVID-19 vaccines. As discussed in our previous [client alert](#), President Biden recently announced all federal contractors must be vaccinated; private employers with 100 employees or more must mandate vaccination or offer weekly testing; and healthcare facilities receiving federal funding must also mandate vaccination.

The EEOC’s updated guidance reminds employers that requesting confirmation of vaccination status is not a disability-related inquiry under the ADA, and the ADA’s rules about making such inquiries do not apply. However, it also explains that documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential and separate from the employee’s personnel file. Additionally, employers do not violate Title II of the Genetic Information Nondiscrimination Act (“GINA”) by requesting vaccine records from a healthcare provider who is not affiliated with the employer.

The EEOC clarifies that employers are free to offer incentives for employee vaccination, but if the vaccine is administered by the employer and not a third party, the incentive must not be substantial enough to be considered coercive. Similarly, employers may offer incentives to employees to encourage their family members to get vaccinated or provide proof of vaccination if the healthcare provider administering the vaccine is not the employer or its agent.

If, however, the employer or its agent administers the vaccination, the employer may not provide incentives for the employee’s family member to get vaccinated. Employers may offer an employee’s family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance, including not requiring the employee’s family members be vaccinated, not penalizing employees if their family members decide not to get vaccinated, and ensuring the family members’ medical information is kept confidential and used only for the purpose of providing the vaccination.

The Undue Burden Standard

The EEOC's updated guidance clarifies that employees do not need to use "magic words" to signal that they are requesting a religious accommodation, and the employer must provide the accommodation unless it would be an "undue burden" to accommodate the request. As for vetting employee religious accommodation requests, employers should assume employee requests are based on sincerely held religious beliefs unless the employer has an objective basis for questioning the nature or sincerity of the employee's belief. With this objective basis, an employer may require a "limited factual inquiry" with employees who refuse to cooperate, risking denial of their accommodation request.

The EEOC notes that individual religious beliefs may change over time and, therefore, an employee's newly adopted or inconsistently observed practice may nevertheless be sincerely held. Objections to vaccination based on social, political or personal preferences—or on non-religious concerns about possible side effects—do not qualify as religious beliefs under Title VII.

The EEOC's updated guidance also lists various factors employers may consider when assessing the credibility of an employee's stated religious beliefs, including:

- Whether the employee has acted in a manner inconsistent with the professed belief;
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for non-religious reasons;
- Whether the timing of the request renders it suspect; and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The EEOC further advised in its updated guidance that, under Title VII, an employer may show "undue hardship" where the requested accommodation "impair[s] workplace safety, diminish[es] efficiency in other jobs, or cause[s] coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work."

Establishing undue hardship is fact-specific and employers may not rely on speculative information when faced with an employee's religious objection to getting vaccinated. In evaluating how much cost or disruption an employee's proposed accommodation would involve, employers may consider if the employee works indoors or outdoors, if the employee has contact with other employees or third parties, and how many employees are seeking accommodation.

Religious Accommodations

The guidance also notes that receipt of multiple employee requests for religious accommodation may be considered when determining if accommodation of a religious belief might be an undue burden. In making this balanced determination, employers may consider “the type of workplace, the nature of the employee’s duties, the number of employees who are fully vaccinated, how many employees and nonemployees physically enter the workplace, and the number of employees who will in fact need a particular accommodation.”

Although a mere assumption that many more employees may seek a religious accommodation to the vaccination requirement in the future is not evidence of undue hardship, the employer may take into account the cumulative cost or burden of granting accommodations to other employees. The EEOC also recognizes that circumstances change, so employers may revoke religious accommodations if an employee is no longer using the accommodation for religious purposes or if the accommodation later becomes an undue burden.

Employees are not entitled to the religious accommodation of their choice, but according to the EEOC, it may be possible in many circumstances to accommodate employees based on their religious beliefs without imposing an undue hardship, and employers should consider remote work and reassignments as possible accommodations.

If you have questions about your organization’s management of COVID-19, including how to handle employee requests for religious accommodation from a vaccination requirement, please contact your Kutak Rock attorney or a member of the firm’s [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

