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New Guidance from the EEOC on Employer-Required COVID-19 Vaccination

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) updated its previously issued guidance addressing COVID-19 vaccinations. This updated guidance affirms the EEOC’s earlier stated position that Title VII of the Civil Rights Act (“Title VII”), the Americans with Disabilities Act (“ADA”), the Genetic Information Nondiscrimination Act (“GINA”) and the Pregnancy Discrimination Act do not preclude employers from requiring their employees to be vaccinated for COVID-19. The guidance, however, further confirms that employers who mandate vaccinations must accommodate employees who cannot be vaccinated due to a disability or a sincerely held religious belief unless providing accommodation would pose an undue hardship on the operation of the employer’s business or present a direct threat to the workplace.

According to the updated guidance, employers choosing to mandate vaccines must conduct an individualized assessment when an employee requests an exemption from the vaccine requirement as an accommodation. It further emphasizes that when evaluating whether an unvaccinated employee may pose a direct threat in the workplace, employers should consider the most up-to-date information available at the time the request is made, including the most current medical knowledge about COVID-19, as well as the level of viral spread in the community. The EEOC further advises that analysis of an accommodation request should include evaluating the number of employees in the workplace who are fully or partially vaccinated, as well as the extent of the employee’s contact with potentially unvaccinated individuals.

Although the EEOC’s updated guidance reaffirms an employer’s ability to mandate COVID-19 vaccines, it also clearly provides that “all the options” must be considered before an unvaccinated employee’s request for accommodation is denied and the employee is excluded from the workplace. The updated guidance gives several examples of reasonable accommodations that an employer should consider, which include allowing unvaccinated employees to wear masks or social distance, having them periodically get tested for COVID-19, providing a modified shift to allow for less contact with others, allowing telework and/or considering reassignment in a position where accommodation may be provided.

Through the updated guidance the EEOC also provides advice on how to address employees who are fully vaccinated, but nevertheless request an accommodation because of a disability that presents a heightened risk that severe illness or death might occur if the employee contracts COVID-19. Per the EEOC, employers should treat this accommodation request just like any other and act in accordance with the ADA, which typically includes engaging the employee in the interactive process and obtaining information from the employee's health care provider on how the employee can be accommodated due to the claimed disability.

The EEOC's updated guidance also restates what employers should do if they mandate the COVID-19 vaccine, but an employee chooses not to receive the vaccine due to the employee's pregnancy. The EEOC warns that an "employer must ensure that [a pregnant] employee is not being discriminated against compared to other employees similar in their ability or inability to work," which "means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work." In other words, if employees similar to a pregnant employee in terms of their ability or inability to work are provided job modifications due to not being vaccinated and a pregnant employee seeks these same job modifications due to not being vaccinated, the employer is required to provide the pregnant employee these same job modifications to be compliant with Title VII. While not specifically outlined in the EEOC guidance, employers receiving pregnancy related accommodation requests must ensure such requests are evaluated based on applicable local or state laws that may require accommodation to pregnant employees.

Although most of the EEOC's update simply affirms the EEOC's prior guidance with some additional details being provided on how to properly implement mandatory vaccine policies and address accommodation requests, it further provides additional information on how to request and store information provided by employees about their vaccine status, how to host vaccine clinics directly or indirectly through an agent and how to educate and offer incentives that encourage employees to get vaccinated voluntarily. The EEOC's full update can be accessed [here](#).

If you have questions about the EEOC's updated guidance or how your company can comply it, please contact your Kutak Rock attorney or a member of our [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

