

EMPLOYER REQUIRED VACCINATION POLICIES

BY MICHAEL SCHAUER

Employer Vaccination Policies

As the availability of vaccines increases in the United States, we wanted to provide a brief overview of existing guidance on employer required vaccination policies. The Equal Employment Opportunity Commission (“EEOC”) issued guidance on policies requiring employee vaccination in December. This guidance implies, but never definitively states, that an employer’s policy requiring employees to be vaccinated is legal.

The EEOC’s guidance references the Americans with Disabilities Act (“ADA”) as a legal basis to support a mandatory vaccination policy. The ADA allows employers to implement qualification standards so that an employee does not pose a direct threat to the health or safety of individuals in the workplace. This standard generally tracks the logic behind workplace safety, that it is the obligation of the employer to provide a safe workplace.

While employers may set employment qualification standards (i.e. require vaccinations for COVID-19), certain exceptions apply. The EEOC discussed two exceptions at length: a) individuals with a qualifying disability under the ADA and b) individuals with a sincerely held religious belief.

ADA Exception

The ADA’s protection of individuals with a qualifying disability extends to mandatory vaccination policies. If a mandatory vaccination policy would screen out prospective employees or result in the termination of individuals with a disability protected under the ADA, the employer must show that an unvaccinated employee constitutes a “direct threat”.

In analyzing whether a direct threat exists, the EEOC identifies four factors to consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm due to a significant risk of substantial harm to the health. The analysis must be done on a case-by-case basis and any conclusion

that a direct threat exists must include a determination that an unvaccinated individual is likely to expose others to COVID-19 at the worksite.

If an employer concludes a direct threat exists, the employer may not terminate the employee without first determining what (if any) reasonable accommodations would eliminate or reduce the risk so that the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, an employer can exclude an employee from physically entering the workplace. Excluding an employee is not the same as terminating an employee. Excluding an employee could result in an employee working remotely and employers should evaluate each case independently. No bright line rule exists.

Religious Exception

In addition to the ADA exception, employers may be required to accommodate sincerely held religious beliefs or practices. Ordinarily, employers should assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. However, if an employer has an objective basis for questioning the religious nature or sincerity of a religious belief, an employer can request additional information.

Key Takeaways

Employers may require vaccination by employees. Employers that choose to require employee vaccination need to be aware of the exceptions that the EEOC discussed and train supervisors to recognize requests for accommodation. Once a request for accommodation is made, employers should engage in a cooperative process to find a solution.

*If you have any questions, please contact the
SSSB Business Law Group at (216) 696-4200.*