

Employment Discrimination Claims Related to Vaccination Refusal – Disability

By: Tanya A. Salgado and James P. Anelli

Labor and Employment Alert

12.21.20

The FDA's emergency use authorization of the Pfizer-BioNTech COVID-19 vaccine and the Moderna COVID-19 vaccine is raising hope across the nation of a return to some semblance of normalcy in the months to come. In light of these promising developments, many employers are considering whether to implement mandatory or voluntary vaccination policies in the workplace once the vaccines become widely available. Before implementing such policies, employers should be aware of the legal requirements of the federal and local discrimination laws. The Equal Employment Opportunity Commission (EEOC) has recently provided much-needed guidance on this issue. In addition to the EEOC guidance, valuable lessons can be gleaned from cases involving employers that have implemented mandatory flu vaccination policies. These mandatory flu vaccination policies have led to claims from employees who object to vaccination for a variety of reasons, including disability or religious concerns. This article will address objections to vaccination based on medical reasons.

Disability Accommodation

In addition to claims based on religious discrimination, mandatory vaccination policies have also triggered a number of disability discrimination claims from individuals who object to vaccination due to medical reasons. In some cases, the objection is based on allergies to certain components of the vaccine; in other cases, there may be mental health concerns related to fear of needles or related phobias. Reports of individuals experiencing anaphylactic reactions after taking the Pfizer-BioNTech COVID-19 vaccine have raised concerns about the possibility of allergic reactions to the vaccine. In the United Kingdom, those who have a history of anaphylaxis to medicine or food are warned not to get the vaccine. In the United States, the Centers for Disease Control and Prevention (CDC) recommends that people with a history of severe allergic reactions to vaccines should consult with their physician as to whether to get the COVID-19 vaccine or not.

Legal Framework

The Americans with Disabilities Act (ADA) protects applicants and employees from employment discrimination based on disability. The ADA limits employers' ability to make disability-related inquiries and to conduct medical examinations for all applicants and employees, including those who are not disabled. Such inquiries or examinations may only be conducted when the employer can demonstrate that the inquiry or examination is job-related and consistent with business necessity. The ADA also prohibits covered employers from excluding individuals with disabilities from the workplace for health and safety reasons unless they pose a "direct threat." A direct threat is defined under the ADA regulations as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation." The ADA also requires employers to maintain employee medical information on a confidential basis.

The EEOC has recently updated its technical assistance questions and answers (EEOC Technical Assistance), What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws. The updated Technical Assistance, issued on December 16, 2020, addresses various issues related to the ADA and employer vaccination policies in the context of the COVID-19 pandemic.

Employer-Provided Vaccination Programs

The EEOC Technical Assistance provides detailed information regarding vaccination programs administered directly by employers or on their behalf under a contract. We interpret this section of the guidance to address the current situation where hospitals, nursing homes and assisted living facilities are providing vaccinations directly to their staff or under a contract on their behalf. At this time, it would not be feasible for other employers that are not healthcare providers to administer the vaccine directly to their workforce. Perhaps at some point in the future, private employers may be in a position to do so. The EEOC guidance addresses certain issues arising out of such programs. However, employers that are not medical providers are not currently in a position to administer vaccines directly to their staff.

The EEOC states that the administration of a COVID-19 vaccine to an employee does not constitute a "medical examination" for purposes of the ADA. However, pre-screening vaccination questions are inquiries likely to elicit information about a disability, and therefore, may implicate the ADA's provision on disability-related inquiries. Per the EEOC, if the employer administers the vaccine pursuant to a mandatory vaccination policy, the employer must show that any pre-screening questions it asks employees are "job-related and consistent with business necessity." To meet this standard, the 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. In the case of a voluntary vaccination program, the employer may ask the screening questions without needing to satisfy the "job-related and consistent with business necessity" requirement, provided that the employee's decision to answer the pre-screening questions is voluntary. Employers may not retaliate against employees for refusing to answer any pre-screening questions in the context of a voluntary vaccination program.

If any employee receives an employer-required vaccination from a third party that does not have a contract with the employer, the ADA "job-related and consistent with business necessity" restrictions on vaccination screening questions would not apply.

Per the EEOC, pre-vaccination questions that include questions about genetic information, including family medical history, would implicate the Genetic Information Nondiscrimination Act, or GINA. Therefore, if the pre-vaccination questions include questions about genetic information, then employers should request proof of vaccination instead of administering the vaccine themselves.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

Employer Requests for Proof of Receipt of COVID-19 Vaccine

Rather than providing vaccines themselves, many employers are considering whether to require employees to show proof of receipt of a COVID-19 vaccination once it becomes widely available. The EEOC states that requesting proof of COVID-19 vaccination, in and of itself, is not a disability-related inquiry. However, follow-up questions by an employer inquiring as to why the employee did not receive the vaccine may elicit information about a disability and therefore are subject to the ADA's restrictions on disability-related inquiries. Any employer questions that may elicit information about a disability would be subject to the ADA standard that they are "job-related and consistent with business necessity."

Employers should be aware that medical providers will require a HIPAA authorization from the employee before they will supply a copy of a vaccination record directly to the employer. As an alternative, employers may request that the employee supply the vaccination record, rather than requiring that the healthcare provider supply the vaccination record directly.

Mandatory Vaccinations and Disability Based Refusals for Vaccination

Employers that choose to institute a mandatory vaccination program should be prepared to address employee requests for exemption based on disability-related issues. The EEOC's Technical Assistance provides a framework for analyzing such requests.

The ADA permits employers to have safety-based qualification standards, including vaccination requirements. However, if a safety-based qualification standard screens out an individual with a disability, the employer must show that an unvaccinated employee would pose a "direct threat" due to a "significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

There are four factors to be considered in determining whether a direct threat exists:

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.

If an employer determines that an unvaccinated individual will expose others to the virus at the worksite and thus pose a "direct threat," the employer must next determine whether there is a reasonable accommodation, absent undue hardship, that would eliminate or reduce this risk. The EEOC suggests remote working as a possible accommodation if the employee cannot be accommodated onsite. The EEOC further notes that managers and supervisors should be trained to recognize accommodation requests and be prepared to engage in a flexible, interactive process to identify accommodation options. Consideration should be given to the nature of the workplace and the employee's position. In determining whether a proposed accommodation would constitute an "undue hardship," consideration may be given to the "prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown." The EEOC also recommends that employers consider CDC recommendations and applicable Occupational Safety and Health Administration (OSHA) standards and guidance.

ADA Claims Based on Mandatory Vaccination Policies

Employers should be aware of the types of medical issues that could give rise to ADA claims for refusal to be vaccinated due to disability. Mental health issues such as anxiety about vaccination may lead to claims. In the case of *Ruggiero v. Mount Nittany Medical Center*, 736 Fed. Appx. 35 (3d Cir. 2018), the plaintiff was terminated from her employment as a registered nurse for her failure to receive the TDAP vaccine as required by hospital policy. Prior to her termination, she had submitted a doctor's note stating that she had severe anxiety regarding the injection, based on reading about some side effects from the vaccine. The plaintiff suggested that she wear a mask instead of receiving the vaccine, as a reasonable accommodation. The hospital denied the exemption request and terminated her employment. The plaintiff sued the hospital, alleging that it violated the ADA by failing to reasonably accommodate her, discriminated against her because of disability and retaliated against her for requesting an accommodation. The court held that she had alleged sufficient facts in the complaint to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

History of Allergic Reactions

Some employees may object to COVID-19 vaccinations based on concerns regarding a history of allergic reactions. The viability of such claims may depend on whether the employee is able to demonstrate that they are disabled under the ADA.^[1] Nevertheless, employers should be prepared to review vaccination exemption requests from employees with a history of allergies, particularly

anaphylaxis, where appropriately supported by medical documentation from the employee's medical provider.

Fear of Needles

Lawsuits related to vaccinations are not limited to those who refuse to be vaccinated. In some cases, former employees have filed lawsuits based on their refusal to administer vaccinations. In the case of *Stevens v. Rite Aid Corporation*, 851 F. 3d 224 (2nd Cir. 2017), the plaintiff was a pharmacist who had a fear of needles. His employer had instituted a new policy that required all pharmacists to administer immunization injections. The new job description for pharmacists included a reference to immunizations in the list of "essential duties and responsibilities" of the job. The plaintiff obtained a note from his physician, stating that he is "needle phobic and cannot administer immunization by injection." He claimed that he became lightheaded, pale and felt faint around needles, and subsequently requested a reasonable accommodation. His employer inquired as to whether there were any accommodations that would enable him to perform injections. Plaintiff's physician responded that he could not safely administer an injection, since he would likely faint. Rite Aid terminated the plaintiff's employment. The case proceeded to a jury trial, with the jury finding for the plaintiff. On appeal, the court reversed the district court's denial of judgment as a matter of law. The court held that immunizations injections were an essential job requirement for pharmacists and that there was no evidence that a reasonable accommodation existed that would have allowed him to perform that job duty.

Pregnancy

According to the CDC, the safety of COVID-19 vaccines for people who are pregnant is not yet known due to limited data. The CDC recommends that pregnant individuals discuss whether to receive the vaccine with their healthcare provider. Employers will need to consider exemptions for employees who do not wish to be vaccinated due to safety issues associated with pregnancy. Pregnant employees are protected under the federal Pregnancy Discrimination Act (PDA) and may also be covered under the ADA and/or local discrimination laws. The PDA is an amendment to Title VII of the Civil Rights Act of 1964 (Title VII) that requires covered employers to treat women affected by pregnancy, childbirth or related medical conditions in the same manner as other applicants or employees who are similar in their ability or inability to work. While the PDA does not have a reasonable accommodation requirement, it does prohibit discrimination based on pregnancy. Per the EEOC, pregnant employees may be entitled to job modifications, including telework, to the extent provided for other employees who are similar in their ability to work. The ADA does not deem pregnancy alone to be a disabling condition. However, many pregnancy-related conditions are considered disabilities that are subject to the reasonable accommodation requirement. Further, a growing number of states and localities have enacted laws that require employers to provide reasonable workplace accommodations for pregnant employees.

Teenagers

The Pfizer COVID-19 vaccine is authorized for people who are 16 years old and older, notwithstanding limited data for the 16 and 17 year old age group. Employers that employ minors and are considering a mandatory vaccination policy should take into account that minors may be subject to a requirement of obtaining consent by a parent or legal guardian before they can be vaccinated. Exemptions from a mandatory vaccination policy for minors who are unable to obtain the consent of their parent or guardian should be considered.

Takeaways and Tips:

- Carefully document the reason for the mandatory vaccination policy, keeping in mind the legal standard of "job related and consistent with business necessity."

- Any mandatory vaccination policy should include a process for disability accommodation and religious exemptions that is carefully crafted to comply with the ADA and Title VII.
- Requests for exemption should be supported by appropriate documentation. In the case of disability exemptions, this should include a physician certification. All information obtained in connection with exemption requests should be maintained on a confidential, need-to-know basis.
- Be prepared to address differences in treatment between employees who are granted an exemption from a mandatory vaccination policy and those who are not. Carefully document the reasons for granting exemptions. Ensure that any differences in treatment are well-founded, non-discriminatory and can hold up under scrutiny.
- Consider establishing a vaccine exemption review committee to decide exemption requests. Ideally, exemption requests will be de-identified to remove the employee's name, identifying information and any non-relevant information including protected characteristics. Legal counsel should be consulted in most cases.

White and Williams's Labor and Employment Group is closely monitoring the COVID-19 vaccine rollout in anticipation of the general deployment of the vaccine across all industries (not just healthcare). You can read our first post related to what the vaccine means, [Incoming Relief: The COVID-19 Vaccine Rollout](#), and our second post on religious discrimination claims, [Employment Discrimination Claims Related to Vaccination Refusal – Religious Beliefs](#).

If you have any questions please contact Tanya A. Salgado (salgadot@whiteandwilliams.com; 215.864.6368), Jim Anelli (anellij@whiteandwilliams.com; 201.368.7224) or any other member of the Labor and Employment Practice Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

[1] See *Hustvet v. Allina Health System*, 910 F.3d 399 (8th Cir. 2018)(plaintiff failed to demonstrate that her allergies were a disability) and *Norman v. NYU Langone Health System*, 2020 U.S. Dist. LEXIS 180990 (S.D.N.Y. 2020)(plaintiff alleged she had a history of allergies and request exemption from mandatory vaccination policy; court ruled that plaintiff failed to demonstrate that she had a disability)

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

