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Client Alert: Updated Employer Guidance on COVID-19 Vaccination Mandates Issued by Both the EEOC and Safer Federal Workforce Task Force

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Recently, both the Equal Employment Opportunity Commission and the Safer Federal Workforce Task Force issued updated guidance for employers concerning COVID-19 vaccination mandates.

EEOC GUIDANCE UPDATES

The Equal Employment Opportunity Commission (“EEOC”) recently updated its [COVID-19 guidance](#), likely in anticipation of the Emergency Temporary Standard we all await from OSHA which will require employers of 100 or more employees to mandate vaccines (and more). We highlight here the key lessons for employers from this updated guidance.

Tread carefully when considering objections to mandated vaccines based on sincerely held religious beliefs

The EEOC has held previously that mandated vaccines are permissible as long as employers offer reasonable accommodations for sincerely held religious beliefs and disabilities. Most employers have some experience accommodating on the basis of disabilities, but religious objections were, to date, much less common. The following summarizes the EEOC’s recently offered insight into some of the key challenges employers have been facing with religious objections:

- Employees are not obligated to use any “magic words” in objecting on the basis of religion. They just need to notify the employer that there is a conflict between a religious belief and the vaccine mandate.
- An employer does not have to accept at “face value” an employee’s assertion of a religious objection. However, the EEOC does state that employers should assume that a request for religious accommodation is, in fact, based on a sincerely held religious belief. Still, if the employer has an objective basis for questioning either the religious nature or sincerity of the belief, the employer may make a limited inquiry and seek supporting information.
 - An employee who does not cooperate in this conversation does so at the risk of losing any claim that the employer improperly denied the accommodation request. Put another way, this conversation is a two-way street.
- The Federal Law protecting the right to religious accommodation (Title VII) does not protect personal, political, or social beliefs or personal preferences.
- Even assuming the religious belief is sincerely held, an employer need not provide the accommodation if it would be an “undue hardship” to do so. An employer can satisfy this standard more easily than it can in connection with

accommodating medical disabilities.

- In connection with religious objections, the courts historically have said that the employer just needs to show that the accommodation would require the employer to bear more than a minimal “cost.” “Costs” can be monetary or a burden on the business such as the spread of COVID-19. The manner in which this will be interpreted in the context of a pandemic has yet to unfold in the courts. But, employers likely will be in a defensible position as long as they can articulate the burden the non-vaccination will impose on the organization, its employees, or the population it serves.
- The consideration of religious objections must be an individualized assessment. As a result, just because an employer grants religious accommodations to some employees does not mean it must provide them to all. The employer should consider the job position and duties, nature of interaction with others, worksite, and any other relevant factors to determine whether having that particular unvaccinated person at work imposes an undue hardship.
- An employer need not grant the specific accommodation requested by the employee. If the employer can offer another accommodation that resolves the conflict (such as remote work), they may do so.

Treat pregnant employees the same as non-pregnant employees

The EEOC notes that the CDC recommends vaccines for employees who are pregnant, breastfeeding, trying to become pregnant, or planning to later become pregnant. In its update, the EEOC reminds employers that any such employees who seek an exemption from a vaccine mandate should be treated the same way a non-pregnant employee with an objection would be treated. This means that a pregnant employee may be entitled to accommodations such as telework, changes to scheduling, job modifications, and leaves of absence if such accommodations are provided for other, non-pregnant employees.

Employers may use incentives to encourage vaccination with some limitations

The EEOC informs us that when employers offer COVID-19 vaccinations that are administered through the employer or its agents, they may only provide incentives (inclusive of rewards and penalties) that are not “so substantial as to be coercive.” However, incentives to get vaccinated from health care providers that are not connected to the employer have no limitations.

It is ok to mandate, but keep an eye on the disparate impact on certain groups

The EEOC further notes in the recent guidance that employers must be prepared to respond to allegations that the vaccine requirement has a “disparate impact” on a group of employees because of a protected characteristic such as race, religion, sex, etc. Employers are advised to bear in mind that some groups may face barriers to COVID-19 vaccination, which means they could be negatively impacted by a vaccination requirement. The EEOC does not go further than this, so it is challenging to know the real usefulness or purpose of this addition to its guidance. However, it is worth noting that they raise it as an issue they are watching.

Don't forget to maintain the confidentiality of vaccine information

Employers are permitted to ask for information about and documentation of vaccine status. However, that information must be maintained confidentially, as would be the case with any medical information. As a practical matter, that means it should be kept separate from the personnel record and access to it should be on a limited, “need to know” basis.

SAFER FEDERAL WORKFORCE TASK FORCE GUIDANCE UPDATES

On September 9th, [President Biden issued an Order requiring federal contractors to mandate COVID-19 vaccinations](#) and provide other COVID-19 safeguards, as well as establishing the Safer Federal Workforce Task Force (“Task Force”) to issue guidance to federal contractors and subcontractors for compliance with the mandate.

The Task Force recently has updated its [guidance for covered contractors](#) concerning vaccination and safety protocols. The key takeaways are as follows:

- Covered contractors should establish a vaccination timeline for an employee whose request for an accommodation is denied.
- Under limited circumstances, a covered contractor *may* grant an employee an extension to the vaccination deadline due to a documented medical necessity that does not meet the legal definition of a “disability.” Such extensions should be granted only where the medical reason necessitates a delay in vaccination. The Task Force provides a [list of medical circumstances](#) that may warrant a delay in vaccination. The covered contractor should nonetheless establish a date by which the subject employee must be fully vaccinated, taking into account that employee’s particular medical evaluation.
 - Receipt of another type of vaccine, such as an influenza vaccine, does *not* warrant a delay of an employee’s receipt of the COVID-19 vaccine, as per CDC guidance.
 - The Task Force guidance does not directly address whether covered contractors should allow an employee to delay vaccination due to pregnancy or a related condition but indicates that a covered contractor should review such requests consistently with its process for reviewing other delay requests.
- Individuals are considered fully vaccinated two weeks after receiving their second dose of any combination of FDA approved/authorized or WHO emergency use listed COVID-19 vaccines.
- An employee who is a COVID-19 clinical trial participant may be considered fully vaccinated if documented to have received a full series of an active (non-placebo) COVID-19 candidate, for which efficacy has been confirmed, and the requisite two-week period has elapsed following the employee’s receipt of the final dose.

We continue to watch for more updates from the White House and Federal agencies and will update you immediately with any developments. In the meantime, please contact us with any questions.