

COVID-19 vaccinations and the Americans with Disabilities Act

Guidance for clients during the COVID-19 pandemic

The COVID-19 pandemic has created many challenges for employers — one of which is how to keep employees and non-employees safe. And, although COVID-19 vaccines became available in late 2020, administration of the vaccines has been slower than initially expected. As of February 14, 2021, the U.S. has administered fewer than 53 million doses, and it is expected that we are still months away from widespread access.

Despite the slower-than-expected vaccine rollout, some employers are considering requiring that their worksite employees get the vaccine. And the Equal Employment Opportunity Commission (EEOC) recently issued guidance that says employers may require COVID-19 vaccines to allow employees to return to — or continue working in — the workplace. But there are some things employers need to keep in mind.

IMPLICATION OF ADA

In the EEOC's guidance, they specified that simply requesting proof of receipt of the vaccine does not implicate the ADA.

However, follow-up questions, such as why an employee has not been vaccinated, may trigger employer obligations under the ADA since it may reveal information related to a disability. Similarly, pre-vaccination screening questions, which the U.S. Centers for Disease Control and Prevention (CDC) recommends.

If an employer, or a contracted third party (e.g., a pharmacy, on-site health clinic) administers the vaccine, the employer must show that these disability-related screening inquiries are “job-related and consistent with business necessity”. To do this, employer would need to demonstrate 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.”

DIRECT THREAT

The ADA defines a direct threat as the threat of a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” [29 C.F.R. 1630.2\(r\)](#). In order to determine this, an employer should conduct an individualized assessment of four factors in determining whether a direct threat exists:

- a) the duration of the risk;
- b) the nature and severity of the potential harm;
- c) the likelihood that the potential harm will occur; and

- d) the imminence of the potential harm.

A direct threat determination would include the presumption that an unvaccinated individual will expose others to the virus at the worksite.

INTERACTIVE DIALOGUE

In any case, an employee who can't receive an employer-required COVID-19 vaccine due to a disability would go through the interactive dialogue. The first step is to ask the employee to obtain medical documentation of their inability to be vaccinated and begin the interactive dialogue. Please note Sedgwick's recommendation is that a note from a health care provider saying that the employee can't receive the COVID-19 vaccination is enough. The documentation need not specify the barrier that prevents the vaccination.

For clients with Sedgwick's accommodation management service, Sedgwick will obtain and evaluate the medical documentation.

Once the documentation is received, an employer and employee should interactively dialogue to determine if there is a reasonable accommodation that would allow the employee to do their essential job functions without a vaccine. "Non-vaccine accommodations" should be considered in the same way as other accommodation options; specifically, reviewed in consideration of an employer's workplace and the essential functions of the employee's role. Accommodation options that may be considered include typical COVID protocols like masking and social distancing. If Sedgwick currently manages the interactive dialogue for your company, Sedgwick will also do so in this case.

If the employer and employee can't agree on any workplace accommodation, the employer should consider non-workplace accommodations such as the option to work remotely as an accommodation (as many have done during the pandemic) or leave under other laws or the employer's existing leave policy.

If, after a good faith interactive dialogue, an employer concludes that there is no reasonable accommodation that will allow an unvaccinated employee to do the essential functions of their job, the employer should conduct a direct threat analysis as described above. If an employer concludes that the unvaccinated employee does present a direct threat that cannot be mitigated, the employer may choose not to grant the accommodation and exclude the employee from the workplace. For clients with Sedgwick's accommodation management service, Sedgwick would close the case pursuant to the client's current step process.

However, the EEOC has cautioned that, in these situations, an employer should not automatically terminate the employee. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. And, in any case where an employer decides it cannot grant an accommodation, it is prudent to consult with legal counsel to discuss next steps.

CONCLUSION

The U.S. is still months away from the COVID-19 vaccine being widely available. And while employers may choose to require vaccinations for their employees, such a plan may implicate the ADA. Thus, employers should be careful and deliberate if they plan to roll out a vaccination requirement. If you have any questions about this, please reach out to your Sedgwick client services representative.