

Covid-19 vaccinations and the Americans with Disabilities Act

Updated guidance for clients during the COVID-19 pandemic

In January, as COVID-19 vaccines were just beginning to become available, we provided guidance that discussed an employer's responsibilities regarding the Americans with Disabilities Act (ADA) and COVID-19 vaccinations. Among the issues previously detailed were how vaccine mandates implicate the ADA and the importance of conducting an interactive dialogue with employees who may have an impairment that prevents them from getting vaccinated.

Since, the rollout has proceeded more swiftly than anticipated. Specifically, as of June 8, 64% of all adults in the U.S. have received at least one shot, and, perhaps in response to this, many employers are beginning to (or are planning to) return employees to the workplace.

As employers consider this, they should do so thoughtfully and in conjunction with the latest Centers for Disease Control (CDC) recommendations and Equal Employment Opportunity Commission (EEOC) guidance. In late May, the EEOC issued an updated guidance focusing on COVID-19 vaccines. The guidance opinioned on, among other things, the legality of vaccine mandates, providing expanded considerations in potential "direct threat" situations and suggesting accommodations employers may consider if they mandate vaccination and an employee is unable to get one.

Below are recommendations from the EEOC guidance that employers should consider related to COVID-19 vaccination policies and requirements.

LEGALITY OF MANDATES

According to the EEOC, federal laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the ADA's reasonable accommodation provisions. However, the EEOC did not address whether employers can require remote workers to be vaccinated.

DIRECT THREAT CONSIDERATIONS

In January, we advised that an employer must consider several factors in determining whether an unvaccinated employee poses a direct threat (e.g., duration of the risk, likelihood of potential harm, etc.). The EEOC's newest guidance provides many additional direct threat factors an employer should consider in a COVID-19 scenario, including:

- Whether the employee works alone.
- Whether the employee works indoors or outdoors.
- The workplace's ventilation.

- The frequency and duration of direct interaction the employee will typically have with other employees and/or non-employees.
- The number of partially or fully vaccinated individuals already in the workplace.
- Whether other employees are wearing masks or undergoing routine screening testing.
- The space available for social distancing.

As a reminder, 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\(r\)](#). To determine this, an employer should conduct an individualized assessment of all the factors described above.

REASONABLE ACCOMMODATIONS

The most recent EEOC guidance reiterated that, in cases where an unvaccinated employee would pose a direct threat, employers must consider whether providing a reasonable accommodation would reduce or eliminate that threat. Additionally, the EEOC provided examples of accommodations an employer should consider, including:

- Requiring the employee to wear a mask.
- Allowing the employee to work a staggered shift.
- Making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees).
- Getting periodic COVID-19 tests.
- Permitting telework, if feasible, or reassigning the employee to a vacant position in a different workspace.

The EEOC cautioned against denying an accommodation request without “considering all the options”. It further advised that before declaring a request as an undue hardship an employer should consider the latest CDC recommendations.

POLICY AND SUPERVISORY TRAINING

From a policy perspective, the EEOC suggested that as a best practice an employer who rolls out a COVID-19 vaccination policy should notify all employees that the employer will consider requests for reasonable accommodation on an individualized basis.

In addition, the EEOC said that before instituting a mandatory vaccination policy, employers should provide managers, supervisors and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

INCENTIVES

Some employers are considering offering incentives to encourage employees to get vaccinated. This is allowed, provided that the incentive is not tied to the employee receiving the vaccine from the employer or someone with whom the employer contracted. Simply providing an incentive for an employee to voluntarily provide proof of

vaccination from a third party (e.g., a pharmacy or health clinic) does not constitute a disability-related inquiry and therefore does not implicate the ADA. However, if the incentive is tied to a vaccine provided by the employer or a contracted party, the ADA is implicated, and any incentive (which includes both rewards and penalties) must not be so substantial as to be coercive. The EEOC did not define “substantial”.

CONCLUSION

As employers plan for employees to return to the workplace, they 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.