

Employment Law Update: Mandatory Employer Vaccination Policies and the ADA/NJLAD

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A New Jersey employer considering making COVID-19 vaccinations mandatory must consider compliance with federal and state laws prior to imposing such a requirement on its workforce. A prudent employer is one who reviews how the Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD) may come into play before embarking on a mandatory vaccination program of its employees. The [Equal Employment Opportunity Commission \(EEOC\)](#) has published a set of frequently asked questions and answers to help employers navigate the employment laws that may impact a mandatory employee vaccine requirement.

Pre-screening Inquiries

The EEOC does not consider the vaccination itself a medical examination, because the employer is not seeking information about employee health. This is good news for employers, since the EEOC's stringent guidelines for the administration of a medical examination to employees does not apply to COVID-19 vaccinations. However, although the vaccination itself is not a medical examination, pre-screening vaccination questions about employee health may violate the ADA's prohibition on inquiries about a disability. Therefore if an employer, or an entity contracted by the employer, administers the vaccination program, the employer's questions must be "job-related and consistent with business necessity." It may be difficult to question employees about their health within these restrictions.

To avoid questioning employees about their health, and possibly implicating the ADA (and the NJLAD which follows it), employers have choices. The employer can make it voluntary for an employee to answer pre-screening vaccination questions. The employer can then refuse to administer the vaccine. However, the employer must be careful not to retaliate against an employee who refuses to answer pre-screening questions. Second, an employer can require that employees get the required COVID-19 vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider. In that case, the employer does not have to be concerned that it may violate the legal prohibition on questions about an employee's health because it is not asking about the health of its employees.

Direct Threat

An employee may refuse to receive a COVID-19 vaccination because of a disability. In either case, the employer must determine whether an unvaccinated employee is a "direct threat" to the workplace. A "direct threat" is defined as 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." Employers should examine 4 criteria to determine whether a direct threat exists to their workforce from an employee who refuses to receive a COVID-19 vaccination:

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 the employer determines that an unvaccinated employee is a “direct threat” to its workforce because the individual may expose others to the coronavirus, the employer must accommodate the employee unless there is no way to eliminate or reduce the direct threat. Only if the employer cannot reduce the direct threat to an “acceptable level” may the employer exclude the employee from the workplace.

However, this does not mean that the employer can terminate the worker. The employer must provide an accommodation unless the accommodation is an “undue hardship” on the employer. The employer must explore ways to accommodate the employee’s absence from the workplace through an interactive dialogue with the employee. Possible accommodations may include telework or leave. An employer may terminate an employee only if the employee is a direct threat to the employer’s workforce, and the employer cannot accommodate the employee without suffering an “undue hardship.”

TAKEAWAY: Disabled employees who refuse to receive the COVID-19 vaccine must be treated carefully to avoid violating the ADA/NJLAD.

If you are an employer and need help navigating the COVID-19 pandemic and the law, or any other employment laws, contact [Stephanie Gironda](#) or any member of the Wilentz [Employment Law](#) Team.

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