

EEOC Publishes Updated Guidance on Employer COVID-19 Policies

June 2, 2021

Key Points

- While the Equal Employment Opportunity Commission's (EEOC) May 28, 2021 guidance (the "EEOC Guidance") largely is consistent with its previous pronouncements regarding employer mandatory COVID-19 policies, including policies regarding vaccinations, the new EEOC Guidance adds some color that is helpful to most alternative asset managers.
- The EEOC confirms that employers seeking to institute mandatory vaccination policies likely can do so under federal equal employment laws, subject to certain limitations and requirements. As discussed below, however, doing so raises a number of legal and practical concerns which firms will want to consider.
- The federal, state and local legal issues surrounding employer COVID-19 policies remain nuanced and multifaceted; firms should obtain legal counsel in designing and implementing their policies.

EEOC Guidance

On Friday, May 28, 2021, the EEOC issued updated guidance regarding COVID-19 policies, including employer policies encouraging or requiring employees to become vaccinated in order to enter the workplace. While largely consistent with the agency's prior administrative interpretations of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act ("Title VII") with respect to COVID-19, the EEOC Guidance contains some additional texture that is helpful to firms seeking to require vaccinations for employees entering the office. Among the main takeaways are the following:

1. **Firms can ask employees whether they are vaccinated.** As the EEOC previously has made clear, firms are permitted to ask employees and applicants whether they are vaccinated and/or intend to get vaccinated. Such a question is not a "disability-related inquiry," as there are many reasons why an individual may or may not become vaccinated, and thus an individual's vaccination status does not reveal the existence of a disability. See EEOC Guidance, K.9. When inquiring about vaccination status, however, firms should avoid asking other questions that may solicit medical information, such as questions regarding *why* an employee did not

Contact Information

For further information regarding this alert, please contact:

Richard J. Rabin

Partner

rrabin@akingump.com

New York

+1 212.872.1086

Lauren Helen Leyden

Partner

lleyden@akingump.com

New York

+1 212.872.8172

Esther G. Lander

Partner

elande@akingump.com

Washington, D.C.

+1 202.887.4535

Anastasia Marie Kerdock

Senior Counsel

akerdock@akingump.com

New York

+1 212.872.7432

Rachel Klausner

Counsel

rklausner@akingump.com

New York

+1 212.872.1089

Grace Margaret O'Donnell

Associate

godonnell@akingump.com

New York

+1 212.872.1015

receive a vaccine. Further, the EEOC Guidance takes the somewhat inconsistent position that an employee's vaccination status is "confidential medical information" for purposes of the ADA. This means that upon receiving information regarding an employee's vaccination status, a firm should treat this information confidentially and keep it separate from other employee personnel information.

2. ***Firms generally can require employees to become vaccinated in order to enter the workplace under federal equal employment opportunity laws.*** A firm likely can institute a mandatory vaccination policy for employees entering the office, subject to its obligations under applicable antidiscrimination laws, such as the ADA, Title VII, and state and local analogs. Under these laws, a firm must consider a potential exception to a mandatory vaccination policy for employees who cannot become vaccinated due to a disability or sincerely held religious belief. The EEOC Guidance also notes the agency's limited jurisdiction, stating that other federal, state or local laws may limit an employer's ability to implement mandatory vaccine requirements, as discussed in Section 8, below.
3. ***Firms implementing vaccine policies should consider certain "best practices."*** Firms should consider certain best practices when implementing an employee vaccination policy. For example, firms announcing a mandatory policy should consider including a reminder about their reasonable accommodation policies under the ADA, Title VII, and applicable state and local laws. Firms also should designate a contact person(s) to address requests for a reasonable accommodation; ensure that firm employees are aware of this contact person(s); and ensure that managers and supervisors are sufficiently trained regarding the firm's policies to recognize an implicit request for a reasonable accommodation when they hear one.
4. ***Firms that implement mandatory vaccine policies must consider exceptions for employees with disabilities who request a reasonable accommodation.*** If an employee seeks an exception from a mandatory vaccination policy due to an alleged disability, a firm must engage in a two-step process: First, the firm must consider whether the unvaccinated employee's attendance in the office would pose a "direct threat" to other employees or office visitors. Second, if such a threat exists, the firm must consider whether a reasonable accommodation is available to allow the employee to continue performing his or her job without imposing an undue hardship on the firm. The foregoing analyses must be made on a case-by-case basis with respect to the particular employee, position and workspace at issue. Employees with pregnancy-related disabilities are entitled to reasonable accommodations to the same extent as non-pregnant workers.
 - ***Establishing a Direct Threat:*** In addressing whether an employee poses a direct threat, the relevant factors include (a) the duration of the risk posed by the unvaccinated employee; (b) the nature and severity of the potential harm he or she could cause; (c) the likelihood that the potential harm will indeed occur; and (d) the imminence of the potential harm. Firms can expect unvaccinated employees to argue, *inter alia*, that so long as they wear face coverings and socially distance while in the office, they will not pose a significant threat to fellow employees or office visitors—particularly those who already are vaccinated. In response, firms are likely to focus on the life-and-death nature of COVID-19 infections, the threats posed to others in the office and their families, and the imperfect protections that masking and social distancing offer. Indeed,

the EEOC Guidance lists several factors that may buttress a “direct threat” argument, particularly in the context of the typical fund manager workplace: (i) “whether the employee works alone or with others”; (ii) whether the employee “works inside or outside”; (iii) “the available ventilation” in the workplace; (iv) “the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees”; and (v) “the space available for social distancing.”^[1] Because many asset managers have relatively small offices, with open floorplans, with a limited number of individual offices, in a highly collaborative environment in which windows cannot be opened, such firms would appear better-positioned to establish a direct threat than many other types of employers, such as those whose employees work outdoors; on a large, well-ventilated shop floor; or in individual offices.

The threshold for establishing a direct threat nevertheless is a high one, and there are no guarantees that a firm will prevail in any resulting litigation. Further, to the extent firms have permitted unvaccinated/masked employees or visitors into their offices to date, such history could undercut an argument that such individuals pose a direct threat. But in light of the myriad considerations firms must balance in addressing COVID-19—including the risks of tort claims in the event an employee or visitor (or one of their family members) contracts COVID-19 via the workplace—firms may be willing to take their chances in establishing a direct-threat defense.

- ***Engaging in the Reasonable Accommodation Process:*** Assuming an unvaccinated employee poses a direct threat to the safety of the workplace, a firm must consider whether a reasonable accommodation would allow the employee to perform the essential functions of his or her job. Among the potential accommodations a firm may consider are “staggered shift[s], making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees),” requiring periodic negative COVID-19 tests, and/or “permitting telework if feasible.” See EEOC Guidance, K.2, K.5. Firms do not need to provide an employee with his or her “first choice” of reasonable accommodation, and can instead choose among potential accommodations. Further, accommodations are not required where they would impose an “undue hardship” — meaning “significant difficulty or expense”—upon the firm. See EEOC Guidance, K.6. Where no reasonable accommodation is available, an employer generally is permitted to terminate the unvaccinated employee’s employment. But see Section 8, below.

5. ***If an employee claims that he or she cannot become vaccinated due to a sincerely-held religious belief, firms must engage in a reasonable accommodation analysis.*** Under Title VII and various state and local anti-discrimination laws, firms also must provide a reasonable accommodation to employees whose sincerely held religious beliefs prevent them from getting vaccinated, unless offering such an accommodation would pose an “undue hardship” on the firm. Notably, however, the standard for establishing an undue hardship with respect to a religious belief is far less exacting than the ADA undue hardship test discussed above. Establishing such a hardship in the case of a religious belief requires showing only that an accommodation would have “more than minimal cost or burden” on the firm.

6. ***Firms can encourage employees to get vaccinated.*** Firms have wide latitude to encourage employees to become vaccinated. See EEOC Guidance, K.3. For example, firms can educate employees about the benefits of vaccinations, share applicable Centers for Disease Control and Prevention (CDC) and local health department guidance, and/or provide information about where employees can receive the vaccine. Firms also can voluntarily offer paid time off to employees to get the vaccine and/or to recover from its side effects. Indeed, some jurisdictions—including New York—require firms to provide employees with leave to obtain the vaccine.² If a firm or its agent administers the vaccine, incentives for becoming vaccinated cannot be so substantial that an employee would feel coerced into doing so.
7. ***Firms are permitted to require employees to test negative for COVID-19 before being present in the workplace.*** The EEOC Guidance does not alter the EEOC's previously-stated position on the permissibility of COVID-19 testing. Under the ADA, any mandatory medical test of an employee must be job-related and consistent with business necessity. The EEOC has indicated that COVID-19 testing is permissible because an employee with the virus will pose a direct threat to the health of others in the workplace. As such, COVID-19 testing administered by firms in a manner consistent with current CDC guidance generally will satisfy the requirements of the ADA. See EEOC Guidance, A.6.
8. ***Laws in some states may impact mandatory vaccine requirements.*** The EEOC notes that its jurisdiction is limited to federal anti-discrimination statutes, and that other laws may impact a firm's ability to impose a mandatory vaccine requirement. Indeed, states and localities across the country have promulgated a raft of legislation, executive orders, and ordinances with respect to COVID-19, and we currently are tracking various bills that would prohibit or limit the ability of firms to implement mandatory vaccine policies in certain states.³ Further, a recent lawsuit has challenged a company's mandatory vaccination policy, arguing that it violates Texas public policy. The suit relies heavily on federal law relating to the emergency use of medical products, and suggests that the vaccine is not sufficiently safe for an employer "mandate."⁴ Firms should remain cognizant of the pending bills and of litigation-based challenges to requiring employee vaccinations.

Finally, while not addressed in the EEOC Guidance, firms also should weigh practical and commercial considerations in designing COVID-19 policies. Employee views regarding vaccinations vary widely, and firms will need to consider not only their employees, but other potential office visitors, such as actual and potential investors, who all will have their own views on these subjects. In addition, firms must remain cognizant of the highly dynamic nature of the coronavirus—including changing societal infection rates, rising population vaccination rates, the potential emergence of new strains of the virus, the issuance of new CDC or other health guidance, the potential passage of new legislation, etc.—and be prepared to adjust their approach based on relevant developments. As always, we are available to help firms think through these important issues.

¹ The guidance also lists other factors, including "the number of partially or fully vaccinated individuals already in the workplace" and "whether other employees are wearing masks or undergoing routine screening testing." See EEOC Guidance, K.5.

² See N.Y. Lab. Law § 196-C.

³ See <https://www.akingump.com/en/experience/industries/national-security/covid-19-resource-center/50-state-survey-coronavirus-related-stay-at-home-orders.html>.

⁴ See *Bridges v. Southern Methodist Hosp.*, No. 21-06-07552 (Tex. Jud. Dist. 457 filed May 28, 2021); see also *Legaretta v. Macias et al.*, No. 2:21-cv-00179-MV-GBW (D.N.M. filed February 2, 2021) (asserting claims against Los Angeles public school district); *California Educators for Medical Freedom et al. v. The Los Angeles Unified School District et al.*, No. 21-cv-02388 (C.D. Cal. filed March 17, 2021) (asserting claims against officials of county detention center).

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