Updates in Federal Agency COVID-19 Guidance for Employers: Where We Are in February 2021

February 16, 2021

Porzio Employment Law Monthly

Our October 2020 Employment Law Monthly article discussed our employment team's consensus on how the Equal Employment Opportunity Commission (EEOC) ultimately would interpret employer mandated vaccination policies against the backdrop of statutory protections and prohibitions under the Americans with Disabilities Act (ADA), and Title VII. On December 19, 2020 the EEOC updated its guidance affirming our prediction and offering additional guidance to assist employers in navigating the pandemic while staying on the right side of employment laws. On January 20, 2021, the Occupational Safety and Health Administration (OSHA) updated its guidance to inform employers how to identify the risk of exposure and transmission in the workplace and determine appropriate control measures to implement. This article provides a recap on where we stand on lawful pandemic-related employment practices in February 2021.

EEOC Updates

Now that there is a light at the end of the tunnel and many businesses are in the process of or anticipating a full reopening, employers are requesting legal guidance on how to bring their employees back to work and what policies and practices can or should be implemented.

Health Screenings

As part of an employer's Written Pandemic Preparedness Plan (see OSHA guidance below), employers should implement and maintain some form of health screening of employees who are entering the workplace. At a minimum this should include temperature checks and health and travel inquiries. Employees refusing to cooperate in health screenings may lawfully be excluded from the workplace. Knowing which employees have been vaccinated against COVID-19 may become part of the health screening process and requiring documentation from employees is permissible as discussed below.

Testing Employees for COVID-19

As COVID-19 viral and antibody testing kits are becoming more accessible, many employers are seeking to implement policies requiring employees to be tested before entering or returning to the workplace. Critical infrastructure employers are implementing in-house periodic or even daily testing of employees to reduce potential disruptions to their operations. In November 2020, the Centers for Disease Control and Prevention (CDC) issued guidance to employers to include COVID testing on non-symptomatic employees, particularly in geographic areas experiencing high transmission rates. Even where transmission rates are moderate, the CDC recommends periodic or daily testing of the workforce in the following settings:

1.

    1.

    2.

3. Employees working in close quarters;
4. Workplaces where continuity of operations is a high priority (such as critical infrastructure sectors);
5. Workplaces in remote areas where medical treatment may be delayed; and
6. Work settings where congregate sleeping or housing is provided. (such as firefighters, farming operations, fishing vessels, oil rigs).

The ADA limits an employer's ability to make disability-related inquiries and to conduct medical examinations or testing for all applicants and employees, including those who are not disabled. Such inquiries or examinations may only be conducted when the employer can demonstrate that the inquiry or examination is "job related and consistent with business necessity." The EEOC update advises that testing employees for COVID-19 does not run afoul of the ADA because an employee entering the workplace with an active (detectable) infection of COVID-19 would pose a "direct threat." A direct threat is defined as a significant risk of substantial harm to the health or safety of the individual or to others that cannot be eliminated or reduced by a reasonable accommodation.

The "direct threat" defense is a narrow exception to the general rule that employers may not take adverse action against an employee, including excluding them from the workplace, based on his or her disability. This defense is intended to shield employers who must take an employee's disability into account in their decision-making process in order to protect the individual or other employees from significant danger that cannot reasonably be mitigated. An employer's determination that an employee poses a direct threat cannot be based on fears, misconceptions, or stereotypes about the employee's disability. Instead, the employer must make (1) an individual assessment, (2) based on reasonable medical judgment, (3) relying on the most current medical knowledge and the best available objective evidence.

In deciding whether a direct threat exists, an employer should consider:

2.

7.
8.
9.

- The duration of the risk;
- The nature and severity of the potential harm;
- How likely it is that the potential harm will occur; and
- How imminent the potential harm is -- that is, the probability of infection transmission, which we know with COVID-19, is very high.

Generally, the above factors must be weighed against each other to decide whether a direct threat is present. For example, if an employee's disability could threaten the lives of many employees and others, the employee might pose a direct threat even if such an incident was not very likely. On the other hand, if it is very likely that an employee's disability will cause imminent harm, the severity of such an incident might not have to be as high to prove a direct threat. With the known likelihood of transmission of COVID-19, and the potentially lethal consequences of infection, proving the direct threat for employers will be a relatively easy burden to meet.

Employers will want to ensure they are using the right type of test. Because the CDC guidelines advise against using antibody testing (i.e., past infection) in making decisions about returning employees to work, the EEOC's position is that

antibody testing fails to meet the ADA's "job related and consistent with a business necessity" standard at this time. Testing employees for viral infection of COVID-19, however, is permissible as employees with an active infection pose an unequivocal and immediate direct threat to others. Under these circumstances, the ADA permits an employer to bar an employee from physical presence in the workplace if he or she refuses to be tested.

The EEOC reminds employers that records involving employee testing, illness, and medical treatments (including vaccinations), must be maintained as confidential and apart from their employees' personnel files.

Mandatory Employee Vaccination Policies

Employers lawfully may require employees to be inoculated with a vaccine approved or authorized by the Food and Drug Administration (FDA). The EEOC cautions, however, that employers contemplating inhouse vaccination programs must be aware that prescreening questions for the vaccine may illicit information regarding the individual's disability or genetic information which would violate employee-protections under the ADA and the Genetic Information Nondiscrimination Act (GINA). For this reason, it is better for employees to receive an employer-mandated vaccination from a third party that does not have a contract with the employer, since the ADA "job-related and consistent with business necessity" restrictions on vaccination screening questions would not apply.

Employers may request documentation from employees verifying they have been inoculated by a third-party since the EEOC advises that requesting proof of COVID-19 vaccination, in and of itself, is not a disability or medical related inquiry. If an employer requires employees to provide documentation verifying that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer should advise the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA or GINA. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of inoculation will be considered inadvertent and therefore not unlawful under EEO laws.

Employers still must attempt reasonably to accommodate an employee's disability or sincerely held religious belief upon request if the disability or religious belief prevents the employee from receiving the vaccination. Employers may not terminate an employee who cannot be vaccinated due to a medical contradiction related to his or her disability or a sincerely held religious belief, unless the employer can show that there are no reasonable accommodations available (such as remote work) and the unvaccinated employee would pose a direct threat as explained above.

Front-line supervisors and managers should be trained to recognize when an employee is making an accommodation request due to his or her disability or sincerely held religious belief and know to whom that request should be communicated for consideration. All supervisors and managers need to be reminded that it is unlawful to retaliate against an employee for requesting an accommodation from a mandatory vaccination policy or to disclose that an employee has been granted such an accommodation.

Pandemic Specific Anti-Discrimination Training

Employers should revisit their anti-discrimination training on EEO laws for supervisors and employees and consider an updated training module for pandemic-specific types of discrimination -- and there are surprisingly quite a few scenarios in which pandemic-discrimination may occur. For example, derogatory remarks about "China Flu," or individuals with national origins from various global locations where frightening variants of COVID-19 are reportedly originating (South America, South Africa, United Kingdom), and individuals belonging to populations currently eligible to receive COVID-19 vaccinations such as the elderly and disabled are all members of protected classes under EEO laws. Discrimination based upon an employee or coworker's membership in a protected class can lead to hostile work environment, and discrimination claims.

Although derogatory COVID-19 remarks made to Asian employees obviously are discriminatory, other seemingly innocuous comments to a coworker such as “you only got the vaccine because you are old,” or “don't sit next to me, I don't want to catch one of those deadly variant strains” also are potential grounds for discrimination claims.

Another example of discrimination of which the EEOC warns employers to be cognizant in training their supervisors and employees is disclosure of, or discrimination based on, the vaccinated status of employees as that also could implicate the employee's protected status including medical condition, disability or sincerely held religious belief.

All employees must be reminded that EEO laws make it unlawful to harass or otherwise discriminate against coworkers based on race, national origin, religion, age, disability, or genetic information -- any of which may be implicated in COVID-19 cases. Supervisors and managers need to be trained to watch for, stop, and report any COVID-19 related harassment or other discrimination.

Employers also should have an updated written and published policy that advises employees how to report COVID-19 related harassment or discrimination and states the employer will review immediately any allegations of harassment or discrimination and take appropriate action.

OSHA Updates

Under the General Duty clause of the Occupational Safety and Health Act, employers are obligated to provide a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. Recent OSHA guidance, which closely tracks that from the CDC, advises employers to implement a COVID-19 Written Pandemic Preparedness Plan that includes the following essential elements:

3.

10.

11.

12.

13. Conduct a Hazard Assessment;
14. Identify control measures to reduce transmission of the virus;
15. Implement absentee policies that permit and encourage potentially infected workers to stay home;
16. Effectively communicate COVID-19 related policies and procedures in a language workers understand (i.e., required effective communication with non-English speaking employees); and
17. Implement reporting procedure and protections from retaliation for workers who report workplace COVID-19 safety concerns.

Additionally, OSHA's updated guidance includes advice encouraging employers to make COVID-19 vaccinations available to employees, ensuring there is no discrimination against vaccinated employees from non-vaccinated workers, and recording and reporting COVID-19 infections and deaths. Employers can review our previous article regarding their obligations in recording and reporting COVID-19 cases in the workplace here. OSHA also reminds employers that employees wearing a face covering is in addition to and not a replacement for physical distancing in the workplace -- both safety practices should be required.

Take Away

Employers may require testing of their workforce and implement mandatory vaccination policies to prevent the transmission of COVID-19 infection, providing they consider requests for exemption from the policy if a reasonable accommodation exists. The pandemic has created new, uncharted areas in which discrimination claims can arise and employers need to update their policies to educate employees and affirmatively address unlawful conduct before it occurs.

The employment team at Porzio is highly informed on the latest federal and state guidance on pandemic employment practices and can assist employers in drafting and implementing compliant pandemic preparedness plans, screening procedures, vaccination policies, and anti-discrimination training for supervisors and employees tailored to meet the specific needs of their unique workforce.