

Vaccination Exemption Guidelines

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I'm getting more and more questions about exemptions from COVID vaccination/booster mandates. I thought I'd offer reminders about the legal analysis in these situations. As you know, the exemptions are for disability-related reasons and religion-based reasons. Here goes, I tried to cut the legalese.

Disability

Under the ADA, employers may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring vaccination. If an employee can't meet such a safety-related standard due to a disability, an employer may not require that employee to comply unless it can show that the person would pose a "direct threat" to the health or safety of others at work. The federal regulations define a direct threat 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." This determination consists of two steps: (1) is there is a direct threat and, if so, (2) assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who's unvaccinated due to a disability poses a "direct threat" in the workplace, an employer first must assess the employee's present ability to safely perform the job's essential functions. Consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the harm will occur; and (4) the imminence of the harm. I advise my clients that the determination that an employee poses a direct threat should be based on the most current medical knowledge about COVID-19. Whether there's a direct threat also depends on the work environment, such as whether the employee works alone or with others and where; the available ventilation; the frequency and duration of direct interaction the employee typically will have with others; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If a person with a disability who isn't vaccinated would pose a direct threat to self or others, an employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate the threat. If there is undue hardship – expense, changing jobs, displacing other personnel, etc. – then the vaccination exemption might not be reasonable.

Religion

Once an employee presents evidence of a sincerely held religious belief, practice, or observance that prevents them from vaccinating, an employer must provide a reasonable accommodation unless it would pose an undue hardship. Courts define "undue hardship" (in this religious context) as more than minimal cost or burden on the employer. Considerations relevant to undue hardship may include, among other things, the proportion of vaccinated employees and the extent of employee contact

with non-employees with unknown vaccination status.

Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under equal employment opportunity laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee. Just take all of the individualized circumstances into account each time. No two situations are the same, and you don't want to be sued.