Restaurant Guidance: Legal Issues to Consider Regarding COVID-19 Mandatory Vaccine Policies*

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As a best practice, restaurants should encourage all employees to get the COVID-19 vaccine when it becomes available. This document only addresses legal questions raised if a restaurant wishes to go a step further and mandate the COVID-19 vaccine as a condition of employment. As a general answer, restaurants, based on existing case law, can require employees to be vaccinated against COVID-19. However, as in the past, restaurants still must allow for disability accommodations under the Americans with Disabilities Act and religious accommodations under Title VII of the Civil Rights Act. Please note that most of the prior cases dealt with individuals in the health care field, which more often would require vaccinations as a pre-requisite to employment. The Restaurant Law Center will have a free webinar on this topic with legal experts on February 11, 2021. You can register for this webinar here and a recording will appear here afterwards. Finally, on December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance on mandatory vaccinations and our answers below are based in large part on their recommendations found here.

Q: If a restaurant requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?

A: The Americans with Disabilities Act (ADA) allows a restaurant to have an employment qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a vaccination requirement screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to 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." For example, regarding COVID-19, the EEOC and agencies opined that restaurants could deny service indoors to someone who refuses to wear a mask regardless of whether the refusal was for health or religious reasons.

Employers should still conduct and document an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. In a typical restaurant setting this should be easy to document. Once an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the restaurant, the employer can exclude the employee from physically entering the restaurant, unless there is a way to provide a reasonable accommodation without undue hardship to the restaurant. Some workers might be able to perform their duties remotely. However, a restaurant might, for example, not be able to accommodate a waiter's request for a similar accommodation. Regardless, before terminating an employee because you cannot provide a reasonable accommodation, make sure they are not eligible for other benefits, such as leave under the Families First Coronavirus Response Act or other state/local benefits.

Q: How should a restaurant handle a request for an accommodation from an employee that is unable to receive a COVID-19 vaccination because of a disability?

A: Managers and supervisors responsible for communicating with employees about compliance with the restaurant's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship, i.e., significant difficulty or expense. Please note that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the restaurant of employees who already have received a COVID-19 vaccination should be a consideration. However, in the restaurant environment, the amount of contact with others, whose vaccination status would be unknown, should also impact the undue hardship consideration. There will be situations where an accommodation is not possible, but you need to be consistent in making or denying accommodations. When deciding, the facts about specific job duties are very relevant.

Q: If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?

A: Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

Q: What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?

A: If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

Q: Can an employer require employees to provide proof that they have received a COVID-19 vaccination without violating Title II of the Genetic Information Nondiscrimination Act (GINA)?

A: Yes. Requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. However, restaurants should still refrain from asking additional employment pre-screening questions related to genetic information, such as family members' medical histories, which might violate GINA.

Q: Does asking an employee pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA?

A: Pre-vaccination medical screening questions are likely to elicit information about disability and may elicit information about genetic information, such as questions regarding the immune systems of family members. We recommend for restaurants that want to ensure that employees have been vaccinated to request proof of vaccination instead of administering the vaccine themselves. GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information.

If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. If this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. Here is some model language that a restaurant can used for this warning:

> "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for proof that you have received a COVID-19 vaccination. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

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