

EEOC Addendum 2 to Employer

EEOC GUIDANCE: ANTI-DISCRIMINATION LAWS APPLY

Regarding current testing and vaccine mandates for teachers, school staff and any business or entity operating in your county, the Equal Employment Opportunity Commission (EEOC) issued updated pandemic guidance on December 16, 2020.¹ This guidance makes clear that *all* workplace anti-discrimination laws continue to apply during the time of COVID, including:

- the Americans with Disabilities Act (ADA),
- the Rehabilitation Act (including the requirement for reasonable accommodations and non-discrimination based on disability as well as strict rules about employer-mandated or employer-led medical examinations and inquiries),
- Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy),
- the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older),
- the Genetic Information Nondiscrimination Act, and
- other federal, state and local laws that may provide employees with additional protections.

As the National Law Review Journal reported in an article last month, the “EEOC guidance [...] includes a variety of cautionary instructions for employers, including, for example, potential restrictions on disability-related questions and recognized protections that must be afforded to employees seeking exemption from vaccination [or other] requirements due to medical conditions or sincerely held religious beliefs.”²

However, the EEOC guidance also provides information that is in direct conflict with the plain language of the EUA authorizing statute. The EEOC guidance suggests that employers *may* have the authority to mandate these EUA products on their employees. *That is absolutely false.* Again, both federal and state law are explicit: it is illegal to mandate any EUA products. Period.

Regardless, even employers considering adopting *voluntary* programs to distribute EUA products to employees must proceed very carefully. Sections A, D, G and K of the EEOC guidance lay out in some detail the procedures that all employers must follow with respect to setting up programs to distribute EUA products for use by employees.³

¹ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws; Technical Assistance Questions and Answers*, updated on December 16, 2021, available at: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² *EEOC Says Employers May Mandate COVID-19 Vaccinations – Subject to Limitations*, January 20, 2021, available at: <https://www.natlawreview.com/article/eeoc-says-employers-may-mandate-covid-19-vaccinations-subject-to-limitations>

³ *Id.*

First, for any program, employers would have to implement appropriate procedures to process disability and religious accommodation requests; this is an extensive process that, if mishandled, can easily expose employers to liability. Second, given that both the investigational vaccines and PCR tests are only available under EUA, requirements related to full disclosure, informed consent and accommodations associated with mandates for these not fully approved products can be even more onerous on employers than for fully approved products. Risks associated with EUA products are also generally much more significant than for fully approved products.

Nevertheless, some small but significant percentage of employers are rolling out or have already implemented illegal employee mandate programs. Many of these employers are already being sued. Beyond the legal liability exposure, employers who choose to mandate experimental, controversial and demonstrably risky products will face pushback in the court of public opinion and likely suffer losses due to impacts on employee and customer morale and commitment. Employer vaccine mandates in particular present a number of serious ethical, medical, economic and legal risks. Class action lawsuits brought by members of racial minorities are the most vulnerable to harm and the type of plaintiff class that employers likely do not want to defend against.

It is always permissible for employers to offer vaccines or other experimental products to employees on a voluntary basis, provided employees' decision to answer questions is entirely voluntary regarding pre-screening, disability, or intent to get a COVID test or shot. Any such questions must not violate HIPPA laws, as well. Voluntary programs are far safer and more cost-effective for employers and provide the means to address workplace safety and operational concerns without the significant risks associated with mandatory programs — particularly mandates of products only available under an EUA. Of particular importance, even voluntary programs must follow EUA law regarding providing “informed consent” to anyone deciding whether or not to use or receive an EUA product like the RT-PCR test or a COVID shot, including:

That the Secretary has authorized the emergency use of the product;...the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and ...OF THE OPTION TO ACCEPT OR REFUSE ADMINISTRATION OF THE PRODUCT [emphasis added,] of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks. [21 USC Sec 360bbb-3]⁴

Additional information and research above was provided courtesy of Children's Health Defense CA. <https://childrenshealthdefense.org/about-chapters/california-chapter/>

⁴ <https://codes.findlaw.com/us/title-21-food-and-drugs/21-usc-sect-360bbb-3.html>