

Tips on making reasonable accommodations for employee vaccine mandates

by **Jodi R. Bohr**
Tiffany & Bosco, P.A.

You must provide a reasonable accommodation to employees who can't take the COVID-19 vaccine because of a disability or a sincerely held religious belief, according to the Americans with Disabilities Act (ADA) and Title VII. While the process is similar to other employee accommodation requests, the Arizona attorney general recently issued an opinion offering additional guidance to employers mandating vaccinations, stating: "In most cases this will require employers to accommodate . . . employees by using the same measures [they used] for approximately the last [17] months of the pandemic (e.g., masking, spacing, increased sanitation measures, teleworking, etc.)." Many companies employed the measures with the understanding they would be temporary. What steps must you take to accommodate an employee under the circumstances?

Accommodations for disability-related reasons

Unless you can show an unvaccinated employee poses a "direct threat" to others' health or safety in the workplace, you must consider alternatives to a COVID-19 vaccine mandate that allows the individual to perform the essential job functions. "[The] fact that most businesses have operated for months during the . . . pandemic without requiring employees to obtain a . . . vaccine will make the showing exceedingly difficult," the opinion says. It ignores the facts that:

A vaccine has only just been fully approved by the Food and Drug Administration (FDA); and

Employees could have been a "direct threat" without a vaccine, but the shots weren't an option for many months.

Since a showing of a direct threat isn't likely, an employee is entitled to a reasonable accommodation unless it doesn't allow the individual to complete the essential functions. To prove the proposed solution wouldn't help, you must demonstrate either (1) no reasonable accommodation is currently available to cure the performance

deficiency or (2) it will pose an "undue hardship" on your organization.

While the ADA doesn't provide an exhaustive list, some available accommodations to consider include "job restructuring, part-time or modified work schedules, re-assignment to a vacant position, [and] acquisition or modification of equipment or devices." In addition, you may look at the accommodations many of you have used throughout the pandemic, such as teleworking, masking, social distancing, enhanced sanitation measures, or periodic testing.

Religious accommodations

Under Title VII, you must engage in an interactive dialogue with an employee seeking a religious accommodation. You may not rely on a job applicant's religious practice as a factor in your employment decisions. And you must judge the sincerity of an employee's religious beliefs based on the individual's words or actions at the time of the request for an accommodation from the COVID-19 vaccine mandate and not on previous words or conduct.

As with the ADA, your inquiry into the sincerity of an employee's religious belief must be narrowly tailored and no more intrusive than necessary. In contrast with the ADA, however, a religious accommodation that "results in more than a *de minimus* cost to the employer" is "an accommodation [that] causes undue hardship."

Takeaways for employer

If you're considering a COVID-19 vaccine mandate for your employees, be prepared to receive accommodation requests. You'll need to highlight the essential functions for each position and determine what (if any) reasonable accommodations are available to employees who aren't willing or able to get vaccinated.

While the Arizona attorney general has indicated accommodations offered at the beginning of the COVID-19 outbreak should be considered reasonable now, that isn't always the case. Temporary accommodations made at the

start of the pandemic may create an undue hardship on your organization when made permanent.

Many employers are uncertain about how to maneuver through the interactive dialogue with employees. Contact experienced counsel to assist and prevent a wave of disability or religious discrimination claims.

[Jodi R. Bohr](#) is a shareholder with [Tiffany & Bosco, P.A.](#). She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jrb@tblaw.com or 602-255-6082.