

## Employees and Vaccinations: What Do Employers Need to Know and Consider?



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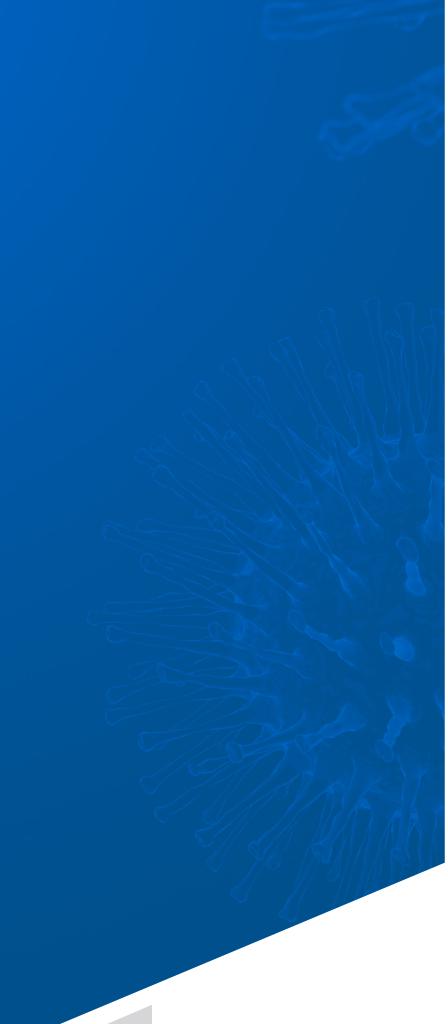
Infectious disease experts have a saying: Vaccines don't save lives, vaccinations do. As vaccinations are now widely available, and with the Biden Administration's goal of 70% of adults at least initially vaccinated by July 4 in reach, employers eager to get back to the way things were pre-pandemic may want to mandate vaccinations. Yet, it has been reported that a still sizeable number of Americans are hesitant to take the vaccine, and news of a small number of adverse reactions may give rise to more angst.

Still, employers have a duty under OSHA to keep their employees safe while at work, which includes protecting them from fellow employees, customers and others who have access to the workplace. If employers want to make vaccinations mandatory, can they force their employees hands (or, more accurately, their arms)? Short of mandating the shot(s), how can employers lawfully encourage employees to get the vaccine? How do they handle employees who refuse to be vaccinated?

### **EEOC GUIDANCE: A TIMELINE**

In 2009, during the H1N1 flu pandemic, the EEOC issued guidance entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." Beginning in March 2020, the EEOC began updating that guidance to address the burgeoning coronavirus pandemic. See *What You Should Know about COVID-19* and the ADA, the Rehabilitation Act, and other EEO Laws. On December 16, 2020, the EEOC added FAQs specifically addressing the issue of vaccinations in the workplace. On May 28, 2021, the EEOC updated its FAQs once again.

- The EEOC's current guidance makes the following critical points related to the EEO laws it administers:
- Vaccines are not medical examinations under the Americans with Disabilities Act (ADA).
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry under the ADA.
- Certain vaccination pre-screening questions might constitute a disability-related inquiry.
- Employers can make vaccination mandatory under the ADA (with exceptions), Title VII (with exceptions) and the Genetic Information Nondiscrimination Act (GINA).
- Employers can bar unvaccinated employees from physically entering the workplace (with exceptions).
- Employers can offer incentives to employees to get vaccinated (i.e., to provide proof of vaccination to the employer) – and a higher level of incentives if they don't administer the vaccine.
- Employers must comply with federal nondiscrimination laws when offering voluntary vaccinations to employees.

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- Employers should process any employee request for a reasonable accommodation through the regular ADA/religious accommodation interactive process, regardless of the individual's vaccination status.
  - Employee records related to vaccination are confidential medical records under the ADA.
  - Disclosing that an employee is receiving a reasonable accommodation is unlawful.

## MANDATING VACCINATION

### A Vaccination is Not a Medical Examination

Vaccinations are administered to protect everyone from something (in this case, COVID-19). Unlike a medical examination, such as a blood test, they do not seek personal information about a specific individual's health. Therefore, per the EEOC, vaccinations are not medical examinations and can be required to return to the workplace (with exceptions). This finding is important because the standard that must be met for requiring an employee to have a medical exam is significant.

### Proof of Vaccination is Not a Disability-Related Inquiry

The EEOC states that simply asking for proof of vaccination is not a disability-related inquiry that violates the ADA. Additionally, because such proof is not covered by the ADA, the EEOC states that employers may offer an incentive to employees to voluntarily provide documentation of their vaccination status.

However, while an employer can require proof, they should take care to avoid inadvertently receiving disability-related information while doing so. The EEOC suggests that an employer "may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA." Additionally, the recipient of the proof should not ask any supplemental, health-related questions, such as why an employee did not receive the vaccine, as those questions could elicit information about the employee's disability.

### Vaccinations Can Be Required Under the EEO Laws

As the EEOC states, the "ADA allows an employer to have a 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.' Such a safety-based qualification standard can include a vaccination requirement. As a result, employers can bar unvaccinated employees from physically entering the workplace. In response, a number of states have introduced legislation to prohibit mandatory vaccinations.

In its recent May update, the EEOC notes that such a requirement might lead to allegations of its disparate impact on certain groups, but confirms that mandates are permissible, with exceptions. The EEOC states, "Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement." Beyond the serious considerations of equity, such mandates may also violate the ADA unless employers engage in the "direct threat" analysis (see discussion below).

### Encouraging and Incentivizing Vaccination

In its May update, the EEOC reminds employers that they may encourage vaccinations without violating the ADA (or GINA, which prohibits discrimination on the basis of genetic information in the workplace).

To encourage vaccinations, the EEOC offers the following best practices:

- Providing employees and their family members with educational information, raising awareness about the benefits of vaccination
- Gathering and disseminating information on low-cost and no-cost transportation options to and from vaccination sites
- Offering time off for vaccination, and addressing common questions and concerns

The guidance also provides links to educational websites, as well as the CDC's toll-free telephone number that offers assistance in many languages: (800) 232-4636; TTY (888) 232-6348.

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But the most significant development from the May 28 FAQs is that the EEOC, for the first time, states that employers may provide incentives for employees to get vaccinated. The EEOC distinguishes between incentives for receiving a vaccine administered by a third party and incentives for receiving a vaccine administered by the employer (or its agent). Regarding the latter, the EEOC states, a "very large incentive" could make employees feel pressured to disclose private, protected medical information. What will constitute a "very large incentive" remains to be determined, with the EEOC only elaborating by stating, "[A]ny incentive (which includes both rewards and penalties) [must not be] so substantial as to be coercive." This language would certainly seem to indicate that the extra day or two of paid time off that many employers have offered would be permitted.

In addition, if an employer allows the employee to voluntarily get a vaccination from a third party (such as a local pharmacy, personal physician or the county health department), the EEOC says there is no limit on the size of the incentive. This is significant because employers now have flexibility in providing what could be substantial new or added incentives to employees who receive a vaccination from a third party.

#### **Issues Related to Vaccination Screening**

The EEOC warns that a pre-vaccination medical screening is likely to elicit information about a disability. For example, current CDC vaccination protocol includes asking questions about prior vaccinations, as well as contraindications including allergies, prior reactions to vaccines and underlying immune system problems. Therefore, employers who administer a vaccine themselves (or via a contractor) would have to show that the questions are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a "direct threat" to their own or others' health or safety. (See further discussion of "direct threat" below).

However, in this situation the EEOC provided several safe havens. First, it stated that if the vaccination program was voluntary, then the disability-related screening questions would also be considered voluntary and would not violate the ADA. The EEOC also stated that when an employee receives an employer-required vaccination "from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider," then the employer cannot be held liable for those same pre-vaccination questions. Therefore, employers who wish to mandate the vaccine should consider keeping the process of vaccination at arm's length.

#### **Storing Employee Vaccination Information**

While employers may require employees to show proof of vaccination, such records of being vaccinated (or not being vaccinated) are considered medical records under the ADA; therefore, like any other medical records, vaccination information should be kept confidential and stored separately from the employee's personnel file.

#### **ACCOMMODATING DISABILITIES**

##### **Exposure to COVID-19 as a Direct Threat to Safety and the Accommodation Process**

As the EEOC states, "if a particular employee cannot meet ... a safety-related qualification standard [such as a COVID-19 vaccination] because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a direct threat to the health or safety of the employee or others in the workplace." A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. The EEOC reminds employers that there must be an individualized assessment to make this determination. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. In its May update, the EEOC adds this instruction:

The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee.

**" WHILE EMPLOYERS MAY REQUIRE EMPLOYEES TO SHOW PROOF OF VACCINATION, SUCH RECORDS OF BEING VACCINATED (OR NOT BEING VACCINATED) ARE CONSIDERED MEDICAL RECORDS UNDER THE ADA; THEREFORE, LIKE ANY OTHER MEDICAL RECORDS, VACCINATION INFORMATION SHOULD BE KEPT CONFIDENTIAL AND STORED SEPERATELY FROM THE EMPLOYEE'S PERSONNEL FILE. "**



Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; 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.

This is a fact-intensive inquiry, and the EEOC's guidance adds factors that make the analysis more complex. Therefore, when determining whether a direct threat is present, employers must not simply look at fixed characteristics, such as their industry, but rather the fluid, dynamic environment around the employer. For example, if an employee cannot be vaccinated because of a disability, yet works with a population that is mostly vaccinated in a private office and must wear a mask when in common areas, there may not be a significant risk of substantial harm.

### **ACCOMMODATIONS**

If you have concluded that unvaccinated employees present a direct threat, there remains the issue of a reasonable accommodation. As HR professionals know, the ADA requires employers to make reasonable accommodations so that qualified individuals with disabilities can perform the essential functions of their jobs. The EEOC's May 28 update states: "As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis."

Such an accommodation could include, for example, modifying a workplace tardiness standard to allow an employee with a disability some flexibility in reporting time (absent an undue hardship). The same could be true with a mandatory vaccination policy. If an employee cannot be vaccinated due to disability (which could include pregnancy) or a sincerely held religious belief, the EEOC states that the employer cannot exclude the employee from the workplace, or take any other action, unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the risk. Remember that Title VII as amended by the Pregnancy Discrimination Act specifically requires that employers treat women affected by pregnancy, childbirth and related medical conditions the same as those employees who are similar in their ability or inability to work.

The EEOC uses a host of factors to determine whether undue hardship exists, including the "type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation." Ask yourself: Would requiring the employee to wear a mask work? Could that employee work at home until the United States reaches herd immunity? Are there other accommodations that might be effective (such as social distancing, working in an office with a door, etc.)?

In its May update, the EEOC also states that reasonable accommodations or modifications for the nonvaccinated who enter the workplace include a face mask, working at a social distance from coworkers or nonemployees, working a modified shift, getting periodic tests for COVID-19, being given the opportunity to telework or accepting a reassignment.

#### **Accommodating a Sincerely Held Religious Practice or Belief**

Additionally, under Title VII, the employer may have to provide a reasonable accommodation where an employee's sincerely held religious belief, practice or observance prevents the employee from being vaccinated if doing so does not impose more than a de minimis cost – a lower burden than the ADA, but one that requires employers to consider and analyze the request.

The EEOC counsels that the definition of religion is broad and that employers faced with such a request should "ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief." However, should an employer have an "objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance," the employer may require the employee to provide additional, supporting information.

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## OTHER CONSIDERATIONS

Employees who are disciplined or terminated for not being vaccinated may have rights beyond the ADA, Title VII and GINA. OSHA's position on mandating flu vaccines is that such requirements are permissible but employees who refuse vaccination because of a reasonable belief that they have a medical condition that creates a real danger of serious illness or death may have recourse under OSHA's whistleblower laws. Additionally, under the National Labor Relations Act, unionized workforces may have the right to negotiate any mandated vaccine as a term or condition of employment. Furthermore, compensation issues – for the vaccination as well as time off to be vaccinated – may arise (similar to the issue of compensating employees for waiting for a health screen before starting a shift).

Employers should also be mindful of state and local laws, such as paid sick leave, that may trigger financial obligations. Potential liability issues could arise if an employee has an allergic reaction to or becomes sick due to vaccination. Finally, while the federal government has said the COVID-19 vaccine will be free in 2020 and 2021, regardless of insurance, employers may want to provide free vaccinations should they be required in future years.

### Steps Employers Can Take Now

#### 1. Decide Whether to Mandate or Not

When deciding whether to mandate vaccination, take care to review the availability of the vaccine in your area.

#### 2. Decide Whether to Offer Any Incentives

The latest guidance provides employers with great leeway to offer incentives, particularly if the employer does not provide the vaccine.

#### 3. Draft a Vaccination Policy

Employers should draft a vaccination policy – whether mandatory or voluntary – so that employees clearly understand the company's vaccination protocol and its safety-related purpose. The policy should include language that the employer will reasonably accommodate employees who request an exemption on the basis of a disability or sincerely held religious belief, practice or observance. Reporting and recording procedures should also be set forth. Consequences for failing to adhere to the vaccination policy should be explained. Finally, the company should revisit any existing vaccine policy to ensure consistency.

#### 4. Anticipate Accommodations/ Train HR and Supervisors

Employers should anticipate accommodation requests and designate a person or department (such as HR) to whom accommodation requests should be referred. They should also train the managers and supervisors about the accommodation policy and process. The EEOC states that as a "best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy." The EEOC includes a link to guidance on recognizing such a request. Second, they must know to whom to refer the request for full consideration. Finally, the EEOC guidance reminds managers and supervisors that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation.

One issue certain to arise is whether working from home is a reasonable accommodation – particularly if the employee has done so over the past year. Indeed, the EEOC guidance states that remote work should be considered before termination.

*For more information or to discuss these issues further, please contact a member of [Gould & Ratner's Human Resources and Employment Practice](#) or visit our [Coronavirus/COVID-19 Resources](#) page.*

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