

Labor and Employment Alert

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The EEOC Releases Guidance on Employer COVID-19 Vaccination Programs

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Key Points

- The U.S. Equal Employment Opportunity Commission (EEOC) has expanded its COVID-19 guidance to discuss how federal equal employment opportunity laws—including the Americans with Disabilities Act (ADA), Title VII, and the Genetic Information Nondiscrimination Act (GINA)—apply to employers who want to provide or mandate COVID-19 vaccines for their employees.
- According to the guidance, vaccination itself is not a “medical examination” within the meaning of the ADA. However, to the extent that pre-screening questions are likely to elicit information about a disability, the employer must be able to demonstrate that the pre-screening is “job-related and consistent with business necessity.”
- The guidance addresses how an employer should respond to an employee who is unable to receive a COVID-19 vaccine because of a medical condition or religious objection.
- Finally, the guidance notes that GINA prohibits employers from asking pre-vaccination screening questions that solicit genetic information, such as family medical history.

On December 16, 2020, the EEOC updated its publication entitled “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)” to include guidance to employers who want to provide or mandate COVID-19 vaccines for their workforce.

Mandatory Vaccines and the Americans with Disabilities Act

Under the ADA, employers may only conduct medical examinations, or ask employees questions that are likely to elicit disability-related information, where the exams or questioning are “job-related and consistent with business necessity.” The EEOC’s updated guidance explains that a vaccination alone is not a medical examination within the meaning of the ADA. However, requiring that employees respond to pre-screening questions, such as those recommended by the CDC to screen for contraindications to vaccines, are medical inquiries within the meaning of the ADA,

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and therefore are impermissible unless job-related and supported by business necessity. To satisfy this standard, the EEOC explains that the employer must 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 the health or safety of the employee or others.

The EEOC's guidance suggests two alternatives that would avoid the need to justify pre-screening questions based on a direct threat. First, employers may implement strictly voluntary vaccine programs. Specifically, as long as the employer makes vaccines available to employees on a voluntary basis, and the employee's decision to answer the pre-screening questions is also voluntary, the ADA's restrictions on medical inquiries and exams are not implicated. Second, an employer can require that employees receive vaccines from their own health care provider (such as a pharmacy or the employee's doctor) without employer involvement. The guidance explains that requiring workers to offer proof that they have received a COVID-19 vaccine is not a disability-related inquiry because an employee who refuses to do so may have reasons for not being vaccinated that are entirely unrelated to a disability.

The EEOC's guidance also addresses the intersection between a mandatory vaccination program and the ADA's obligation to provide reasonable accommodations to employees with disabilities. The EEOC explains that, consistent with the ADA, an employer may mandate vaccines as a safety-based job qualification standard. However, when an employee claims to have a disability that prevents him or her from being vaccinated, the employer must engage in the interactive process and explore alternatives to the vaccine that could reasonably accommodate the employee, such as remote work. The guidance suggests [the Job Accommodation Network website](#) as a source of potential accommodations. An employer may only exclude unvaccinated employees from the workplace if they pose a "direct threat" due to a significant risk of substantial harm to the their own or others' health or safety. In assessing "direct threat," the EEOC's guidance states that employers should conduct an individualized assessment of four factors: (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. The guidance also explains that "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." Even when a direct threat justifies excluding unvaccinated employees from the worksite, the EEOC states that employer cannot automatically terminate the employee and must consider teleworking as a reasonable accommodation, as well as ensure compliance with paid or unpaid leave protections under federal, state and local laws.

Religious Objections and Title VII

Title VII protects employees from religious discrimination, which includes an obligation to accommodate an employee's sincerely held religious beliefs, practices or observances. Applying this standard, the EEOC's guidance explains that an employee may be entitled to a reasonable accommodation that includes excusing the employee from a mandatory vaccine requirement due to religious objections. The EEOC recommends that employers assume a request for religious accommodation is legitimate unless there is an objective basis for questioning either the religious nature or sincerity of a particular belief, practice or observance. An employer need not provide a religious accommodation if doing so would cause undue hardship to the

employer, which the guidance defines as “having more than a *de minimis* cost or burden on the employer.” In such a situation, the employer may exclude the employee from the workplace and may even terminate the employee if doing so would be consistent with all other applicable laws.

Title II of the Genetic Information Nondiscrimination Act

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances. The EEOC confirms that vaccination for COVID-19 itself does not implicate GINA, even if the vaccine uses mRNA technology. Yet an employer’s administration of the vaccine may implicate GINA if pre-vaccine screening questions elicit genetic information (for example, family medical history information). Such questions do not implicate GINA if asked by an independent healthcare provider. Therefore, an employer can avoid any risk of violating GINA by requiring proof of vaccination rather than administering the vaccine itself. The EEOC advises employers to warn employees not to provide genetic information as part of such proof.

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