

Equal Employment Opportunity Commission Issues Updated Guidance on COVID-19 Vaccination Policies

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With vaccination rates for COVID-19 increasing, and more places of employment removing restrictions, the Equal Employment Opportunity Commission (EEOC) recently [issued guidance](#) regarding COVID-19 vaccination policies in the workplace.

The EEOC has advised that federal laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, as long as employers comply with the reasonable accommodation provisions of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 and other equal employment opportunity laws and requirements. The [EEOC notes that other laws](#), such as state and local laws, may place additional restrictions on employers.

Reasonable Accommodations Under the ADA and Title VII

In evaluating the merits of a mandatory vaccination policy, employers should keep in mind that an employee may request a reasonable accommodation from such a requirement based on a protected medical reason or bona fide religious belief. Typically, an employer may not deny an employee's request for a reasonable accommodation unless it would impose an undue hardship on the employer. Factors to consider when making the determination of undue hardship include the proportion of employees in the workplace who are vaccinated against COVID-19 and the amount of contact the employee will likely have with others whose vaccination status is unknown. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship under the ADA.

When an employer receives a request for an accommodation, it must participate in the interactive process with the employee. Some example of a reasonable accommodation may be to require the unvaccinated employee to wear a face mask in the workplace, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, telework, and/or be reassigned to an alternate position.

Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring the COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard 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.

There are several factors which must be considered to determine whether the employee would pose a “direct threat.” An employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job by considering: (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 EEOC makes clear that the direct threat assessment should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19 and the type of work environment. Such medical knowledge may include: the level of community spread at the time of the assessment, information from the CDC, and information from the employee’s health care provider, with the employee’s consent. When evaluating the work environment, employers should consider: whether the employee works alone or with others or works inside or outside; the ventilation of the workspace; 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; and the space available for social distancing.

Pre-Vaccination Screening Questions

ADA restrictions apply to pre-vaccination screening questions if an employer requires an employee receive the COVID-19 vaccine from the employer or its agent. The pre-screening questions must be “job related and consistent with business necessity.” To meet this standard, an employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee’s own health or safety or to the health and safety of others in the workplace.

Confidentiality of Vaccination Information

Pursuant to the ADA, employers must take affirmative steps to maintain the confidentiality of all information obtained during enforcement of a mandatory vaccination program, including medical information gathered during the pre-screening process and proof that an employee was vaccinated.

Incentive Programs

Employers are permitted to provide incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party. There are limitations on the types of incentives that may be provided and there are risks associated with providing such incentives. More specifically, the incentive program may not be too substantial as to be deemed coercive to impose undue pressure on an employee to obtain the COVID-19 vaccine or to disclose protected medical information through the pre-screening process.

Employers are *not* permitted to offer any incentives to an employee in exchange for the employee’s family member to receive the COVID-19 vaccine from the employer or its agent.

Providing such an incentive would violate the Genetic Information Nondiscrimination Act (GINA) because the pre-vaccination screening questions would illicit medical questions about the family member and lead to the employer's receipt of genetic information in the form of family medical history of the employee.

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The CDC and the EEOC continue to issue new guidance. Employers should continue to monitor the guidelines and consult with legal counsel with questions.