

## EEOC Issues Vaccination Guidance for Employers

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The federal agency responsible for enforcing workplace anti-discrimination laws, the Equal Employment Opportunity Commission (EEOC), has added a section on vaccinations to its [guidance addressing compliance during the COVID-19 pandemic](#). The section answers questions employers may have as they consider rolling out vaccine-related policies for their workplaces. Such policies may implicate legal obligations under the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act (Title VII). This Legal Update provides a summary of some of the major points, but we encourage CAAs to review the guidance themselves. Please also refer to [this FAQ produced by Troutman Pepper](#) for more information on these and other legal considerations related to vaccinations during the COVID-19 pandemic. For additional inquiries or specific questions, please contact CAPLAW directly.

### **Vaccination Pre-Screening and Follow-Up Questions**

The EEOC guidance clarifies that vaccinations administered to employees by their employer or a third-party provider contracted by their employer do not constitute medical examinations for the purposes of the ADA's provisions regarding disability-related inquiries. Under the ADA, employers [may not require](#) medical examinations or make disability-related inquiries of current employees unless they are job-related and consistent with business necessity. The EEOC defines a "medical examination" as "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health".

While vaccinations do not constitute medical examinations, pre-vaccination screening questions may constitute a prohibited disability-related inquiry, as such questions are likely to elicit information about an individual's disability. Pre-screening questions may also elicit information, such as family medical history, that is protected under Title II of the Genetic Information Nondiscrimination Act (GINA). GINA prohibits employers from acquiring or disclosing genetic information, but it does not apply to an employee's individual health care provider. Therefore, **employers administering vaccines to employees must ensure that all pre-screening questions are "job-related and consistent with business necessity"**. To satisfy this standard, employers must show 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 her or himself or others (direct threats are discussed in more detail below).

The EEOC also explains that asking or requiring employees to show proof of receiving a COVID-19 vaccine generally does not constitute a disability-related inquiry under the ADA, because that question is not likely to elicit information about an individual's disability. There are many non-disability related reasons why a person may not be vaccinated. However, follow-up questions such as asking why an individual was not vaccinated may constitute disability-related inquiries or elicit protected genetic information. Employers requiring proof of vaccination from their employees should consider affirmatively directing employees to not provide medical or genetic information as part of their proof. Model language asking employees not to disclose genetic information can be found in [29 CFR 1635.8\(b\)\(1\)\(i\)\(B\)](#), and may be modified to also discourage employees from providing disability-related information.

### **Vaccination Accommodations for Disability or Religious Belief**

The EEOC guidance reminds employers that under the ADA and Title VII of the Civil Rights Act they must provide reasonable accommodations to employees who cannot receive a vaccination due to a disability or due to a sincerely held religious belief, as long as doing so does not cause undue hardship. The EEOC explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, Employers should assume that an employee's request for an accommodation under Title VII is based in a sincerely held religious belief. However, if the employer has an objective basis for questioning the sincerity or religious basis of a particular belief or practice, the employer may request supporting information from the employee.

Reasonable accommodations for unvaccinated employees may include teleworking, providing PPE, altered work schedules, and other measures already commonly implemented by employers in response to the COVID-19 pandemic. The EEOC encourages employers and employees to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, [www.askjan.org](http://www.askjan.org). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

As to determining whether an accommodation poses an undue hardship, the EEOC refers to several COVID-19 specific factors an employer may consider. These factors include the prevalence of vaccinated employees in the workplace and the amount of contact with employees whose vaccination status is unknown. Employers may also rely on CDC recommendations to decide whether an effective accommodation exists that would not pose an undue hardship. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

The guidance also directs employers not to engage in unlawful disability-related inquiries (as discussed above) to determine the validity of an employee's disability or retaliate against the employee for requesting an accommodation.

### **Unvaccinated Employees as a Direct Threat**

In the guidance, the EEOC walks through the analysis that an employer would undergo to determine if an unvaccinated employee poses a direct threat for which mitigation via reasonable accommodation is impossible. While the ADA allows an employer to have a [health and safety standard](#) to mitigate direct threats in the workplace, if the standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee poses a significant risk of substantial harm to the health or safety of him/herself or others that cannot be eliminated or reduced by a reasonable accommodation. The guidance directs employers to conduct an individualized assessment in

determining if a direct threat exists and explains that a conclusion of its existence would include a determination that an unvaccinated individual would expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat, 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 this risk so the unvaccinated employee does not pose a direct threat.

### Takeaways

Employers must provide a reasonable accommodation to employees with a disability or those who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief. If the employer cannot provide a reasonable accommodation due to undue hardship or if a direct threat exists under the ADA because an employee is unvaccinated, the employer may exclude the employee from the workplace. An employee's exclusion from the workplace should not automatically result in termination, since the employee may have other rights or options, such as leave under the FMLA or the employer's policies.

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