

## **COVID-19 VACCINE EMPLOYMENT QUESTIONS**

### **Q: Can the vaccine be required as a condition of employment?**

**A:** In general, under federal law an employer can require vaccination as a condition of employment where it is job-related necessity (meaning the employee's ability to perform their job will be impaired or there is significant risk of substantial harm to the health or safety of the individual or others). Given the nature of the business, employees providing healthcare services often (but not always) fall into that category. That said, the EEOC has yet to provide guidance specifically as to COVID-19.

There are, however, exceptions for medical or religious concerns under federal law. When considering whether the employee would be required to have the vaccine as a condition of employment, the employer would need to consider (i) the employee's ability to safely perform the essential functions of the job, (ii) the imminence of the risk, (iii) the severity of the harm to the health or safety of the individual or others, and (iv) the availability of reasonable accommodations to reduce the risk absent undue hardship. Depending on these circumstances, an employer may be required to accommodate an employee with a medical or religious concern by providing alternative safety equipment or PPE, teleworking, or reassignment, among other alternatives.

Beyond federal considerations, the ability of an employer to require a vaccine can vary from state to state and could be impacted by local laws or regulations as well. Prior to implementing any mandatory vaccination program, employers should discuss the particulars of such plan with their employment attorney to be sure to comply with applicable requirements.

### **Q: Do union contracts impact employers' ability to create conditions of employment.**

**A:** Yes, where all or part of the workforce is unionized, federal law may obligate the employer to bargain with the appropriate union when implementing a mandatory vaccination program. Where applicable, employers should review the terms of their union agreements and discuss the issue with their employment attorney before establishing vaccination as a condition of employment.

### **Q: Can the condition of employment be added for existing employees?**

**A:** Yes, subject to the medical and religious concerns mentioned above, but employers will want to make sure they check local and state laws and any employment contracts that may be in place. Employers should discuss this with their employment attorney as issues may arise for employees that refuse the vaccination, even if a condition of employment.

**Q: Are there workers compensations issues with requiring a vaccine as a condition of employment?**

**A:** Yes, if a vaccination is listed as a condition of employment, and the employee has an adverse reaction due to the vaccine, there could be potential for a worker's compensation claim.

**Q: Can I provide incentives for employees who get the vaccine?**

**A:** Yes, if the employer maintains a voluntary vaccination program, to encourage employee participation the employer may provide incentives for employees to get the vaccine. However, if the employer requires vaccination as a mandatory requirement of employment, providing incentives is not advisable as it may create a disparate impact across certain protected characteristics such as age, disability, and religion, among other discrimination concerns.

**Q: Do I have to provide paid leave for employees with adverse reactions from the vaccine?**

**A:** While there is no current federal requirement for an employer to provide paid leave for an adverse reaction from the vaccine, an employer may be obligated to provide leave consistent with the Family and Medical Leave Act or ADA. Additionally, paid leave may be required under applicable state or local laws or the employer's own policies and therefore employers should consult with their employment attorney to the extent the need for leave arises.

**Q: Do I have to pay my employees for their time to get vaccinated?**

**A:** Where the employer maintains a vaccination program, the time an employee spends getting vaccinated is compensable regardless of whether the program is mandatory or voluntary. Additionally, the employer must cover the cost of the vaccination.

If an employer does not administer a vaccine program and does not mandate the vaccine as a condition of employment, the employer would not be required to pay for the employee's time.

Where the state or locality is requiring the vaccine, the employer would not be required to pay for the employee's time to get the vaccine, subject to the state or locality requiring that of employers.

**Q: For any COVID-19 vaccine that has been approved or authorized by the FDA, is the administration of a COVID-19 vaccine to an employee by an employer or by a third party with whom the employer contracts to administer a vaccine a "medical examination" for the purposes of ADA?**

**A:** No, the vaccination itself is not a medical examination.

**Q: If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks screening questions to ensure there is no medical reason that would prevent a person from receiving the vaccine, are these questions subject to the ADA standards for disability-related inquiries?**

**A:** Yes, pre-vaccination medical screening questions are likely to elicit information about a disability. If an employer requires the vaccination the employer must show that these disability-related screening inquiries 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 the health or safety of her or himself or others.

There are two circumstances in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement.

1) if an employer has offered a vaccination to employees on a voluntary basis, the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

2) 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, the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

**Q: Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?**

**A:** No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the 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.

**Q: If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?**

**A:** 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.” However, if a safety-based qualification 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 would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists:

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.

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. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace. If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker (see section K. Vaccinations of the EEOC’s [What you know about COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws.](#))

**Q: If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?**

**A:** Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

**Q: What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?**

**A:** If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

**Q: Is Title II of GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination?**

**A:** No. Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute.

**Q: Does asking an employee the pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA?**

**A:** Pre-vaccination medical screening questions are likely to elicit information about disability and may elicit information about genetic information, such as questions regarding the immune systems of family members. If the pre-vaccination questions do not include any questions about genetic information (including family medical history), then asking them does not implicate GINA. Speak to your employment attorney for more information, and review the [EEOC Guidance on COVID-19 Vaccinations](#).

#### **Additional Resources**

- [EEOC Guidance on COVID-19 Vaccinations](#)
- [Jackson Lewis Guidance on Mandating Vaccines](#)