

Mandatory COVID Vaccinations—A Guide for Employers

Now that effective vaccines against COVID-19 are available (although not yet widely), employers are wondering whether they should require employees to get vaccinated. The guidance from the Equal Employment Opportunity Commission (EEOC) indicates that generally employers can require employees to get the COVID vaccine as a condition of continued employment. However, employers who do so will need to consider making exceptions for employees who cannot get vaccinated because of a disability or religious belief.

Also, some states are considering providing employment protections for those who choose not to receive the vaccination, so keep an eye out for new laws passed in your state.

Other issues to consider include concerted activity, safety, and confidentiality.

In addition, we recommend employers consider if their circumstances might be better served by *encouraging* rather than requiring employees to vaccinate against COVID.

Keep in mind that guidance in this area is likely to change relatively quickly.

Disability

Under the Americans with Disabilities Act (ADA), employers are required to accommodate employees with disabilities so they can perform the essential functions of their job unless it would cause an undue hardship. Employers are not required to provide an accommodation if the employee would pose a direct threat to people at work.

A direct threat is defined as 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.” The EEOC says 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.”

Here are the steps to take if an employee says that they cannot get vaccinated because of their disability:

1. Determine whether allowing the employee to come to work rises to the level of direct threat, that is, a significant risk of substantial harm to someone’s health or safety, considering these four factors: (i) duration of the risk; (ii) nature and severity of the potential harm; (iii) likelihood that a particular harm will occur; and (iv) imminence of the potential harm.
2. If no direct threat exists, grant the employee an exception to the vaccination requirement. For example, if an employee always works remotely, they wouldn’t be a direct threat.
3. If having an unvaccinated employee at work does pose a direct threat, consider reasonable accommodations to reduce the threat to an acceptable level. The most common accommodations in this scenario would be allowing the employee to work from home or take a leave of absence. An accommodation does not have to be provided if it constitutes an undue hardship or the employee cannot perform the essential functions of their job. Both of these exceptions to providing an accommodation, however, are high standards to meet.
4. If having an unvaccinated employee at work poses a direct threat and no accommodation would sufficiently reduce that threat, then the employer is not required to exempt the employee from its vaccination requirement and may exclude them from the workplace. However, the employer may not necessarily terminate the employee. Instead, they should consider their policies and other laws or rights that may apply.

Religion

Under Title VII of the Civil Rights Act of 1964, employees are entitled to accommodations for their sincerely held religious practices and beliefs unless the accommodation would cause an undue hardship. The definition of undue hardship under Title VII is “having more than a *de minimis* cost or burden on the employer.” While still vague, this standard is lower than the standard of undue hardship under the ADA.

Religious practices and beliefs do not need to be traditional or mainstream to warrant protection under Title VII. In fact, the EEOC recommends that employers should “ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” If you have reason to doubt the validity of the employee’s purported religious belief, you could ask the employee to provide additional information to support their accommodation request. It is not recommended that you require any specific type or source of documentation. Further, if you are not satisfied with what they provide, the best course would be to consult with an attorney for a risk assessment of your options.

Pregnancy

Under the Pregnancy Discrimination Act, employers are required to treat employees who are affected by pregnancy, childbirth, or related medical conditions the same as other employees who are similar in their ability or inability to work. This means that if an employee cannot get vaccinated for a reason related to pregnancy, the employer would have to grant an accommodation if it does so for other employees who cannot get vaccinated for other reasons. Pregnancy-related conditions are likely to constitute disabilities under the ADA as well.

Safety

Requiring vaccinations implicates two safety considerations. First, there’s a possible argument that employers would actually need to require vaccinations under OSHA’s general duty clause, which requires employers to provide a safe workplace. This argument hasn’t been tested in court, so it may be a bit hypothetical at this point.

Second, although vaccines go through regulatory testing and review before they’re available to the public, adverse reactions do sometimes occur. This is true with the COVID vaccine as well. If an employee gets sick from a vaccine *the employer requires*, medical treatment or lost time may be compensable under the employer’s workers’ compensation policy; the employer should contact their workers’ compensation carrier to see if they should initiate a claim.

Separately from workers’ compensation, OSHA’s reporting and recording requirements could be triggered as well. If an employee is hospitalized or dies from getting a vaccine that the employer requires, then employers would be required to report it to OSHA. (OSHA’s reporting requirements apply to all employers, regardless of size or industry.)

In addition, employers that are subject to OSHA’s recordkeeping requirements (generally only those with 11 or more employees *and* in a high-risk industry) would need to record adverse reactions from the vaccine if they meet the recordable injury standards under OSHA. In general, an injury is recordable if it is (1) work related, (2) a new case, and (3) results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. It may be worth noting that the federal OSHA has said that it will not enforce the recordkeeping requirements for employer-mandated vaccines; however, employers should be aware

that OSHA-approved State Plans might. Fortunately for employers, recording an injury under OSHA does not have any direct consequence, so the risk-averse approach would be to record side effects from getting the vaccine if they meet the recordable injury criteria.

Protected Concerted Activity

Employees who are opposed to vaccinations for secular and non-medical reasons do not have any inherent employment protection. However, Section 7 of the National Labor Relations Act (NLRA) could come into play if two or more employees (not including supervisors) complain about or oppose a workplace vaccination policy.

Generally, Section 7 of the NLRA entitles non-supervisory employees to engage in concerted activity for their mutual aid and protection. In the scenario of vaccinations, this means that employers cannot interfere with employees' complaining about or opposing the vaccination policy or retaliate against them for doing so. This does not mean that they get to be exempt from the vaccination requirement, just that you cannot discipline them for *saying* that they want to be exempt for a non-disability and non-religious reason, including even if they say that they think vaccinations are part of some massive, unproven conspiracy.

Confidentiality

Any medical information an employer obtains through its vaccination program must be kept confidential under the ADA.

Employees are generally prohibited from asking employees about genetic information under the Genetic Information Nondiscrimination Act (GINA). According to the EEOC:

“GINA does not prohibit an individual employee’s own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.”

Here is a sample GINA warning employers can use:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

Frequently Asked Questions

Below are some frequently asked questions from employers regarding COVID-19 vaccination.

Can we require an employee to show proof that they have received the vaccine outside of work?

According to the Equal Employment Opportunity Commission (EEOC), yes. Simply requiring proof of vaccination by itself does not violate either the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA).

However, employers should be aware that the ADA limits their ability to make “disability-related inquiries,” and GINA generally prohibits employers from requesting employees’ genetic information. While neither of these laws prevents employers from asking for proof of vaccination, employers are wise to explicitly tell employees not to provide related medical or genetic information as part of the proof. For example, employees should be advised not to provide their full medical history or extraneous information about their medical visit when providing proof of vaccination. See above for a sample GINA blurb.

Can we ask or survey employees about whether they plan to get the COVID-19 vaccine?

Yes, you can likely ask employees this, but we recommend that you do so consistently with all employees and that you consider whether collecting this information is necessary.

Generally, the Americans with Disabilities Act (ADA) restricts employers’ ability to make disability-related inquiries or require medical examinations. However, the EEOC has stated that COVID-19 vaccinations are not medical exams and that requiring proof of off-site vaccination is not a disability-related inquiry. However, related medical inquiries, such as why an employee will not receive a vaccine, would be a disability-related inquiry.

Using this guidance as instructive, it is likely permissible to simply ask all employees whether they plan to receive the vaccine. However, to avoid potentially violating the ADA or other laws, such as the Genetic Information Nondiscrimination Act (GINA), we recommend that you do not ask any other questions and require only a “yes” or “no” response. Advise employees that no other explanation or reason should be provided. Additionally, as a best practice, consider making the survey anonymous to avoid any appearance of the survey results being used inappropriately, such as to make a termination decision.

Overall, it is always best for employers to have a legitimate business purpose when making this type of inquiry. For example, employers might consider such a survey if they plan to offer vaccines on site to estimate demand. In contrast, if you have an entirely remote workforce, it does not seem relevant whether your employees plan to get vaccinated or not.

Should we have a vaccine policy? Do you have a template?

A vaccine policy is optional, but many employers may wish to create one. At this point, we recommend working with an attorney to draft a vaccine policy if you want to require employees to vaccinate.

What are best practices if we plan to provide the vaccine at work?

If you do not have onsite medical resources that you can use, the best practice would be to contract with a professional medical service provider. We cannot recommend providers, but we recommend that you contact your health insurance carrier for assistance.

From a practical perspective, we recommend making COVID-19 vaccines available during times that

allow your employees to receive the vaccine during their workday, so that they will not have to come to work in their off-hours to receive the vaccine. If you are requiring employees to receive the vaccine, the best practice would be to pay employees for the time it takes to get vaccinated (including associated wait times). It is also wise to publicize the event and ensure that managers allow time for employees to receive the vaccine during their workday. Encourage leadership to participate in vaccination too, which may help inspire confidence and participation from other employees.

To maintain employees' privacy and comply with the ADA, we recommend that you provide a private space for each employee to receive the vaccination individually. Employees may share private medical information with vaccine providers or have medical questions; allowing privacy will help ensure confidentiality of that information.

Additionally, if you (or a contractor working on your behalf) provide vaccines, pre-vaccination screening questions are "disability-related inquiries" under the ADA and must be "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 get vaccinated will pose a direct threat to their own health or safety or the health and safety of others.

Any mandatory pre-screening questions must also comply with GINA and not seek employees' genetic information. GINA does not prohibit an employee's own healthcare provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. Genetic information includes, for example, family medical history. Employers may want to consider requiring employees to show proof of having received the vaccine outside of work instead of requiring vaccination at work.

If you require proof of vaccination, the best practice is to tell employees in writing not to provide genetic information as part of their vaccination proof. A sample GINA warning is available under the Confidentiality section above.

Finally, the ADA requires employers to keep all employee medical information confidential—including medical information obtained as part of the vaccination program.

Can I tell clients whether my employees are vaccinated?

While employers are allowed to ask employees about their vaccination status, employers should treat this information as confidential unless they have a legitimate business reason to disclose it. For example, employers whose employees are in-home caregivers for elderly clients can most likely confirm to their clients that their employees are vaccinated. The best practice would be to have employees voluntarily consent to the disclosure to avoid potential privacy issues under state law (if applicable). Employers may be prohibited from disclosing additional information, however, such as the fact that an employee didn't get vaccinated because of a disability.