

# Insights

## COVID-19 Vaccinations: Employer Incentives and Other New Guidance from the EEOC

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The EEOC recently updated its guidance on vaccine administration and included **guidance** on what employers can require or ask, what accommodations must be considered, and what incentives can be provided. As you update your organization's vaccine requirements, it is important to ensure your organization is complying with Equal Employment Opportunity ("EEO") laws including: the Americans With Disabilities Act ("ADA"), the Genetic Information Nondiscrimination Act ("GINA"), Title VII of the Civil Rights Act ("Title VII"), and the Age Discrimination in Employment Act ("ADEA").

### 1. Can employers require their employees to get vaccinated and require proof of their vaccination status?

The short answer is yes to both questions. Federal EEO laws do not prevent an employer from requiring all employees who are physically entering the workplace to be vaccinated for COVID-19. Further, employers are not prohibited by Federal EEO laws from requiring proof of vaccination status.

However, if an employer does require employees to get vaccinated and provide documentation regarding vaccination status, they must allow employees to request reasonable accommodations if they have a disability or religious reason for not receiving the vaccine. Any information collected regarding vaccine status should be kept in an employee's confidential medical file and maintained in accordance with the ADA. This means that vaccination status of employees should only be known by those individuals that "need-to-know" such as a Human Resources representative. This ADA confidentiality requirement applies regardless of whether the vaccination is administered by the employer, its agent, or an unrelated third party.

If an employer chooses to administer vaccinations to its employees, it must take additional precautions to comply with the ADA. Although the act of administering a vaccine is not a "medical examination" under the ADA, the pre-vaccination questions that are typically asked could elicit information about an employee's health or disability and thus could implicate the ADA. Therefore, an employer administering COVID-19 vaccines and asking pre-vaccination screening questions must do so only if they are "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 pre-vaccination questions and, therefore, cannot be vaccinated, poses a direct threat to the employee's own health or safety or to the health or safety of others in the workplace.

If, rather than requiring vaccinations, an employer offers to vaccinate its employees on a voluntary basis, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. But the employee's decision to answer the pre-vaccination questions must be voluntary. Employers should ensure they are not taking any adverse action against an employee who chooses to not participate in a voluntary employer-administered vaccination program, including harassing an employee for refusing to participate.

### 2. What accommodations must be considered if an employee requests them?

If an employee requests an accommodation in response to an employer's inquiry of vaccination status or requirement to be vaccinated, the employer must perform the appropriate analysis and determine if an accommodation is available and warranted. The only exception to this requirement is if providing an accommodation would pose an undue hardship on the operation of the employer's business. The EEOC has published specific **guidance** regarding the accommodation provisions of Title VII and the ADA and other EEO considerations. Employers should ensure they are engaging in the appropriate conversations and complying with these laws.

If an employer is requiring all employees to be vaccinated, it should confirm the qualification is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. If an employee cannot meet this qualification because of a disability, the employer cannot require compliance unless it finds the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace.

An employee may also have a religious objection to receiving the COVID-19 vaccination. Once on notice of an employee's sincerely held religious belief, practice, or observance that would prevent the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers could also receive religious objections from employees who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available and should consider those requests accordingly.

In summary, both employees that are not vaccinated due to a disability and those who have a religious objection may be entitled to accommodations. Examples of accommodations that an employer could offer include the following: requiring unvaccinated employees to wear masks, work at a distance from other employees, work a modified shift, receive periodic COVID-19 tests, be given the opportunity to work remotely, or as a last resort, be reassigned into another role.

### **3. What incentives can an employer provide to its employees to encourage vaccination?**

Even if employers choose not to require their employees to be vaccinated, they could provide incentives to encourage vaccinations. If an employer or its agent administers the vaccine, any incentive provided cannot be so substantial as to be considered coercive. Because vaccinations require employees to answer pre-vaccination screening questions that could constitute an ADA inquiry, a very large incentive could pressure employees to disclose protected medical information. However, there is no such limit on incentives under EEO laws if employers incentivize employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider.

Additionally, an employer (or its agent) may provide vaccinations to an employee's family members. But an employer may not offer an incentive to those family members or the associated employee in exchange for vaccinating the family members because doing so could lead to the employer's receipt of genetic information in violation of GINA. Title II of GINA prohibits employers from providing incentives in exchange for genetic information.

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The guidance provided by the EEOC is especially helpful in directing employers as to what they can and cannot require with regard to COVID-19 vaccines. Employers should consider creating vaccination policies to ensure their supervisors and employees understand and comply with the Federal EEO laws. Should you have any questions about the EEOC's latest guidance or need assistance creating vaccination policies, please contact **Elizabeth M. Roberson** or another member of our **Labor & Employment Law Practice**.

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