



Vaccines & Employment Discrimination: The EEOC Provides Guidance

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Team](#)

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On December 16, 2020, the Equal Opportunity Employment Commission (EEOC) updated its technical guidance, titled “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#).” The updates include topics related to COVID-19 vaccination. Since the beginning of the pandemic, the EEOC has maintained this Q&A guidance discussing the interaction of COVID-19 workplace issues and existing discrimination laws. With COVID-19 vaccinations beginning across the country, and employers potentially mandating these vaccines or administering them to their employees, the EEOC’s most recent update addresses potential issues that may arise with discrimination laws and employee vaccinations:

Americans with Disabilities Act (ADA) and Vaccinations

- ***Is it a Medical Examination?*** Among other things, the ADA requires that employers comply with specific rules regarding medical examinations administered to employees and applicants. According to the EEOC, however, the administration of an FDA-approved COVID-19 vaccine by an employer (or by a third party at the employer’s direction) to an employee is not a medical examination subject to the ADA.
- ***Do Pre-Vaccination Questions Implicate the ADA?*** The CDC has [recommended](#) certain procedures before administering a vaccine, including asking questions related to the participant’s medical history. According to the EEOC, where an **employer** is administering the vaccine to an employee, these pre-vaccination medical questions will potentially elicit information regarding an employee’s disability. Therefore, if an **employer** requires an employee to receive the vaccination, administered by the employer, the

employer must show that these disability-related screening inquiries are “job-related and consistent with business necessity.” Voluntary vaccination programs in which employees voluntarily answer pre-screening questions do not implicate the ADA. Similarly, when an employee receives an employer-required vaccination from a **third-party** that does not have contact with the employer, the ADA restrictions on questions would not apply.

- ***Is Asking for Proof of Vaccination Subject to the ADA? No – but proceed with caution.*** Because there are many reasons an employee may not be vaccinated, both related and unrelated to an employee’s medical history, simply asking about an employee’s vaccination status is not a disability-related inquiry. The EEOC cautions, however, that additional inquiries, such as the reasons why an employee is not vaccinated, may elicit information regarding a disability, and should be “job-related and consistent with business necessity.”

Mandatory Vaccination, Title VII, and the ADA

- ***What if an Employee Cannot Receive a Mandatory Vaccination Because of a Disability?*** In response to this inquiry, the EEOC advises employers to examine whether an unvaccinated employee presents a “direct threat” to the workplace 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.” To avoid issues under the ADA, the employer should conduct an individualized inquiry for each such employee and only take adverse action against the employee where: (1) it is determined that the unvaccinated individual presents a direct threat because the employee will expose others to the virus at the worksite, and (2) there is no way to provide a reasonable accommodation that would eliminate or reduce the risk so that the employee would not pose a direct threat. Before taking adverse action, the employer should also first determine whether another EEO law applies, such as the FMLA

or Families First Coronavirus Response Act.

- **Objections Based on Sincerely Held Religious Beliefs.** Under Title VII of the Civil Rights Act, employers must provide reasonable accommodations for employees based on an employee's sincerely held religious belief, practice, or observance, unless it would pose an undue hardship on the employer. The same is true if an employee refuses an employer's mandatory vaccination policy based on a sincerely held religious belief. The EEOC indicates that employers should assume that a request for a religious accommodation is based on a sincerely held belief.

Genetic Information Nondiscrimination Act (GINA) and Vaccinations

- **Is GINA Implicated by Employer-Administered Vaccinations?** Under GINA, employers may not: (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances. According to the EEOC, however, administering or requiring proof of an employee vaccination does not implicate 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.
- **Do Pre-Vaccination Question Implicate GINA?** Because pre-vaccination medical screening questions may potentially elicit information about a participant's genetic information, such as questions related to family medical history, this screening likely implicates GINA. However, as the EEOC points out, it remains unclear what screening checklists and questions are to be provided with vaccinations. If these questions do include questions about genetic information, employers may want to avoid administering the vaccine themselves and, instead, simply request proof of vaccination.

Key Takeaways

It seems the EEOC has paved the way for employers to create mandatory vaccination programs provided employers continue to evaluate their duty to provide reasonable accommodations under both the ADA and Title VII. Employers should also remain cognizant of their duty to prevent retaliation against any employee who is unable or chooses to not be vaccinated. Employers are also cautioned to train supervisors and managers on recognizing accommodation requests and handling sensitive issues related to vaccination.

Frost Brown Todd will continue to monitor and update you on your EEO obligations with respect to vaccinations and all things COVID-19.

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