

EEOC Updates Vaccine Guidance: Accommodation, Confidentiality, Employer Incentives, and More

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its [guidance](#) on employer vaccination policies in the form of additional Q&As. Some of the Q&As relating to mandatory vaccination policies, accommodation, and confidentiality supplement and clarify EEOC guidance that was originally issued on these topics on December 16, 2020. Other Q&As are new as of May 28, 2021, including those relating to employer-provided incentives for receiving a COVID-19 vaccine.

The Guidance addresses COVID vaccine issues raised under the Americans with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), and Title VII (including the Pregnancy Discrimination Act). The EEOC expressly states that it is “beyond the EEOC’s jurisdiction” to discuss the legal implications of Emergency Use Authorization (EUA) by the FDA, and whether or how that may affect employer-mandated vaccine policies. The EEOC directs readers to the [FDA’s EUA page](#) for more information about the legal implications of the FDA’s EUA for vaccines.

Key provisions of the Guidance are summarized below. All reference to vaccines or vaccinations in this publication refer to the COVID-19 vaccine.

Mandatory Vaccination Policies

As originally announced by the EEOC on December 16, 2020, the updated Guidance reiterates that employers can require all employees who physically enter the workplace to be vaccinated for COVID-19, subject to reasonable accommodation for disability including disability resulting from pregnancy-related conditions, or sincerely-held religious beliefs. However, the new Guidance notes that “because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others,” employers with mandatory vaccine policies may need to address allegations that the policy has a disparate impact on certain employees based on race, religion, gender, age, or other protected characteristic.

Moreover, because pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be “job related and consistent with business necessity.” Thus, an employer must have a reasonable belief that an employee who does not answer the questions (and thus cannot be vaccinated) will pose a direct threat to the employee’s own health or

safety or to the health and safety of others in the workplace. The Guidance notes that employers with mandatory vaccine policies may face employee challenges to pre-vaccination inquiries, and should be prepared to justify them under the ADA.

Reasonable Accommodation

Employers can require employees in the workplace to be vaccinated for COVID-19, subject to reasonable accommodation for disability, pregnancy-related conditions, and sincerely-held religious beliefs. As a “best practice,” employers with mandatory vaccine policies should notify employees that requests for reasonable accommodation will be considered on an individualized basis, and should train management personnel responsible for communicating with employees about the vaccination requirement on how to recognize when an employee is [requesting an accommodation](#) from the vaccination mandate and to whom to refer the employee for full consideration of an accommodation.

Exemption from a Vaccine Mandate Based on a Disability:

The ADA permits an employer to require all employees to meet a job-related, necessary qualification standard such as a safety standard requiring employees in the workplace to be vaccinated for COVID-19. If an employee cannot meet this standard due to a disability, compliance can only be required if the unvaccinated employee would pose a “direct threat” to the health or safety of the employee or others in the workplace, meaning a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation.

Determination that an employee poses a direct threat should be based on “reasonable medical judgment that relies on the most current medical knowledge about COVID-19” that may include, for example, the then-current level of community spread, and when assessing the following factors: (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. The CDC guidance and the employee’s health care provider (with employee consent) may provide information relevant to the direct threat assessment. The employee’s work environment also is relevant, including:

- whether the employee works alone or with others,
- works inside or outside,
- ventilation,
- the frequency and duration of direct interaction with co-workers and non-employees,
- number of partially or fully vaccinated individuals already in the workplace,
- whether other employees are wearing masks,
- whether other employees are undergoing routine COVID testing, and
- ability to social distance.

If the employer determines that an employee who is not vaccinated due to disability, pregnancy, or religion does pose a direct threat, it must then determine if reasonable accommodation would

eliminate or remove the direct threat. The Guidance provides possible examples of reasonable accommodations to include:

- permitting the unvaccinated employee to wear a face mask in the workplace,
- work at a social distance from coworkers or non-employees,
- work a staggered or modified shift,
- improving ventilation,
- limiting contact with co-workers and non-employees,
- participate in periodic testing for COVID-19,
- telework, and/or
- accept reassignment.

Employers should first evaluate if accommodation would allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat. If not, the employer must then consider if telework is an option and, “as a last resort,” whether reassignment is possible. Employers may rely on [CDC recommendations](#) when deciding whether an effective accommodation is available that would not pose an undue hardship.

Exemption from a Vaccine Mandate Based on Religious Beliefs:

An employee may request, based on a sincerely-held religious belief, to remain unvaccinated, receive only a specific brand of the COVID-19 vaccine, or wait for an alternative version of the vaccine to become available. Employers should process these requests in the same manner as other accommodation requests. “Religion” is defined broadly under Title VII. According to the Guidance, employers should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance, “unless the employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance,” in which case the employer could request additional supporting information.

“Undue hardship” under Title VII means “more than minimal cost or burden on the employer.” It is a less stringent standard than the disability-related undue hardship standard under the ADA, with relevant factors that include the proportionate number of employees in the workplace who already are partially or fully vaccinated, and the extent of employee contact with non-employees. The Guidance suggests that before taking adverse action against an unvaccinated employee who cannot be accommodated, employers determine if obligations may arise under other laws.

Exemption from a Vaccine Mandate Based on Pregnancy:

Employees who are pregnant may request “job adjustments or ... exemptions from a COVID-19 vaccination requirement” under Title VII. If so, the employer must comply with the anti-discrimination requirement of Title VII and the Pregnancy Discrimination Act. This means that a pregnant employee

may be entitled to job modifications, such as telework, modified or staggered work schedules or assignments, and/or leave, to the extent such modifications are provided for other employees who are similar in their ability or inability to work. The Guidance states that management and human resources personnel should be trained on handling these requests.

Accommodation Requests from Fully Vaccinated Employees:

The Guidance notes the possibility that even a fully vaccinated employee may request reasonable accommodation based on a disability-related concern that he or she is at risk of severe illness from COVID-19. Employers should address these requests as they would any other accommodation request, by engaging in the interactive process in accordance with ADA requirements. That process would typically include, in this case, seeking information from the employee's health care provider (with employee consent) explaining why an accommodation is needed. For example, the Guidance notes that employees who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer the same measure of protection.

Voluntary Vaccination Policies

Employers that offer optional/voluntary vaccinations to employees must do so on a non-discriminatory basis. For instance, employers that offer voluntary vaccinations only to certain employees based on national origin or other protected basis would not be permissible.

Unlike employers with mandatory vaccine policies, employers that offer to optional/voluntary vaccinations to employees need not show that pre-vaccination screening questions are job-related and consistent with business necessity, so long as the employee's decision to answer the questions must be voluntary. However, employers must keep any medical information obtained from any voluntary vaccination programs, including pre-screening questions, confidential.

Because there are "many reasons... besides having a disability" that an employee may not provide proof of COVID-19 vaccination, asking employees whether they have obtained a COVID-19 vaccine from a third party, such as a pharmacy, personal health care provider, or public clinic, is not a disability-related inquiry. However, as noted below, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

Confidentiality of Vaccine Information

Employee documentation or confirmation of COVID-19 vaccination is confidential medical information under the ADA, and while the ADA does not prohibit employers from requiring proof of vaccination, as with other medical information, such information must be kept confidential and stored separately from the employee's personnel files under the ADA.

The ADA's confidentiality requirements also apply to screening questions asked immediately prior to administering the vaccine that elicit medical information, if the vaccine is administered by the employer or its agent.

The ADA also prohibits employers from disclosing that an employee is receiving a reasonable accommodation, which would include employees receiving an accommodation relating to COVID-19 vaccination.

GINA

The Genetic Information Non-Discrimination Act (GINA) prohibits employers from discriminating based on employees' genetic information, and from requesting, requiring, purchasing, or disclosing genetic information of employees. "Genetic information" includes information about a disease or disorder in a family member ("family medical history") as well as information from genetic tests of the individual employee or a family member. In the EEOC's December 16, 2020 guidance, the EEOC noted a potential GINA violation for employer-administered vaccinations given that the employer would need to obtain employees' answers to pre-screening medical questions, which might reveal genetic information, depending on what questions were asked.

There is some good news for employers, however: GINA does not appear to be of any ongoing concern with respect to employee vaccination issues at this time based on the pre-screening questionnaires currently in use. According to the Guidance, the CDC-approved pre-screening medical questionnaires that have been put into use for the three currently-available COVID-19 vaccines do not seek family history or other type of genetic information of the employee, and therefore employers may obtain employee responses to the pre-screening questionnaire without implicating GINA. It also is not a violation of GINA for an employer to require employees to be vaccinated, or to provide confirmation of vaccination. However, see below regarding potential GINA implications arising from employer-provided incentives for family member vaccinations.

Employer Vaccine Incentives

Employers may encourage employees and their family members to be vaccinated if they wish, and may do the following when doing so:

- provide employees and their family members with information to educate them about COVID-19 vaccines
- raise awareness about the benefits of vaccination
- address common questions and concerns
- under certain circumstances offer incentives to employees who receive COVID-19 vaccines

The Guidance provides numerous links to sources that can be made available to employees seeking information about vaccinations.

With respect to the fourth option, employers may offer incentives for employees to *voluntarily* provide confirmation of vaccination, so long as no genetic information is acquired while administering the vaccines or obtaining confirmation. However, *where the vaccine is provided by the employer or its agent*, the incentive cannot be "so substantial as to be coercive" because, according to the EEOC, "a very large incentive could make employees feel pressured to disclose protected medical information." This restriction against "coercive" incentives only applies to vaccinations offered by the employer or its agent; it does not apply if to incentives for vaccinations received "on their own from a third-party provider that is not their employer or an agent of their employer."

While vaccine incentives for *employees* are permissible as described above, vaccine incentives for employees' *family members* could violate GINA, if the vaccine is provided by the employer or its

agent. According to the Guidance, providing an incentive to an employee for a family member to be vaccinated by the employer would require the family member to answer pre-vaccination medical screening questions about the family member. This could result in employer receipt of the employee's family medical history, *which is "genetic information" under GINA*. GINA's implementing regulations prohibit employers from providing incentives in exchange for genetic information. Employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if steps are taken to comply with GINA.

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National Law Review, Volume XI, Number 152

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