



Important COVID-19 Vaccine

Topics, Resources, and FAQs for Employers

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- **Consult with Employment & Labor Attorneys:** Employers who wish to implement a mandatory COVID-19 vaccination policy should seek the advice of a competent labor and employment attorney before attempting to implement it.¹
- **Many Employers Are Considering Requiring the COVID-19 Vaccine:** It is anticipated that many employers will require and/or strongly encourage their employees to receive the COVID-19 vaccination, with few exemptions. Employers must comply with state and federal laws relating to an employee's religion or disability in the context of vaccinations.²
- **Federal Guidance on Requiring the COVID-19 Vaccine:** On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) released its [updated guidance](#) discussing vaccine mandates in the workplace. **The guidance supports the conclusion that an employer may require vaccines in the workplace, so long as there are exceptions available to the mandate – disability exemptions under the ADA and religious exemptions under Title VII.**³
 - Employees may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability or a sincerely held religious belief,

¹ Katherine Davis, "What to Consider Before Implementing a Mandatory Vaccine Policy," Spencer Fane LLP, December 22, 2020, <https://www.spencerfane.com/publication/what-to-consider-before-implementing-a-mandatory-vaccine-policy/>

² "Vaccinations in the Workplace," *The National Law Review*, <https://www.natlawreview.com/article/vaccinations-workplace>

³ "Vaccinations in the Workplace," *The National Law Review*

practice, or observance. In each case, the employer must analyze whether it can provide a reasonable accommodation.⁴

- **Does it Make Sense to Require a COVID-19 Vaccine for My Workplace?:** Employers should carefully analyze whether it makes sense for them to implement a mandatory COVID-19 vaccination policy. Depending on the work environment, it may not make sense to implement one.⁵
 - If an employer is requiring vaccine, best practice is to do so based upon judgment that immunity from COVID-19 is job related and consistent with business necessity.⁶
 - Employers do not need to accommodate an employee's objections to a vaccination where doing so would impose an “undue hardship,” which might be hard to show if the employee can telework. **But employers with frontline workers— doctors, nurses, first responders, and potentially even retail workers—likely will have an easier time proving that a request not to be vaccinated constitutes an undue hardship.**⁷
 - Alternatively, employers may encourage employees to get vaccines.

Vaccine at Your Workplace – Requires a Qualification Standard

- A vaccine requirement is a qualification standard under the Americans with Disabilities Act (ADA).
- “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.’” 29 C.F.R. 1630.2(r)⁸
- A vaccination requirement has the effect of excluding some individuals with disabilities from the workplace, then the employer must show that the presence of unvaccinated employees in the workplace may pose a direct threat to themselves or others in the workplace.⁹ [See EEOC Q & A at K. 5.](#)

⁴ Nathaniel M. Glasser and Jennifer Barna, Epstein Becker Green, “Covid-19 Vaccines and Workplace Challenges,” *Bloomberg Law*, <https://www.ebglaw.com/content/uploads/2020/12/Barna-Glasser-Covid-19-Vaccines-Workplace-Challenges.pdf>

⁵ Katherine Davis, “What to Consider Before Implementing a Mandatory Vaccine Policy,”

⁶ “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

⁷ Nathaniel M. Glasser and Jennifer Barna, Epstein Becker Green, “Covid-19 Vaccines and Workplace Challenges,”

⁸ “29 CFR § 1630.2 - Definitions.,” Legal Information Institute, <https://www.law.cornell.edu/cfr/text/29/1630.2>

⁹ “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

- Employers who require that employees receive the vaccine should be prepared for employees who may indicate they are unable to receive the vaccine for disability-related reasons, and engage in the process of determining whether a reasonable accommodation is available for the employee that will reduce the risk to an acceptable level.¹⁰ [See EEOC Q & A at K. 5.](#)
- A similar process may be required for employees who request an exception to the vaccine requirement based upon a sincerely held religious belief or practice. [See EEOC Q & A at K. 5.](#)
- When implementing vaccine policies, employers should understand that questions relating to why an employee has not received a vaccine could result in the employee providing information about a disability. These questions, therefore, should only be asked if the employer is able to demonstrate that the inquiries are job related and consistent with business necessity.¹¹
- The EEOC suggests that if employers require employees to demonstrate receipt of a vaccine, the employer may also wish to warn the employee not to provide medical information in response.¹² [See EEOC Q & A at K. 3.](#)

A Vaccine is Not a Medical Examination

- A medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.”¹³
- Medical examination examples include “vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.”¹⁴
- If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.¹⁵

¹⁰ “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

¹¹ “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

¹² “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

¹³ “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” *U.S. Equal Employment Opportunity Commission*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

¹⁴ “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”

¹⁵ “The Latest COVID Challenges: Vaccinating the Workplace”, (Marti Cardi, Esq. & Helen R. Holden)

- [See EEOC Q & A at K.1.](#)

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

(Three Important Guidance Questions & Answers from EEOC below)

K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (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 purposes of the ADA? (12/16/20)

No. The vaccination itself is not a medical examination. As the Commission explained in [guidance on disability-related inquiries and medical examinations](#), a medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” Examples include “vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.” If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are “job-related and consistent with business necessity.” [See Question K.2.](#)

K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? (12/16/20)

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. [Read more.](#)

K.5. 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? (12/16/20)

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.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and 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—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies. *See also [Section J, EEO rights relating to pregnancy](#).*

Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability and considering the possible options for accommodation given the nature of the workforce and the employee’s position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and

employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in [Question K.7.](#), there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: www.osha.gov/SLTC/covid-19/.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).

Other Important Resources:

<https://askjan.org/topics/COVID-19.cfm>

<https://www.spencerfane.com/publication/what-to-consider-before-implementing-a-mandatory-vaccine-policy/>

<https://www.natlawreview.com/article/vaccinations-workplace>

<https://www.ebglaw.com/content/uploads/2020/12/Barna-Glasser-Covid-19-Vaccines-Workplace-Challenges.pdf>