



## The EEOC breaks its silence on the COVID-19 vaccine

### Employment Alert

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In 2009, in response to the H1N1 virus, the Equal Employment Opportunity Commission (EEOC), issued its Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance document, in which it briefly addressed the issue of vaccines in the workplace. Although condoning employer mandated vaccines – provided religious and medical exemptions are accommodated – the EEOC noted that, generally speaking, employers should “simply encourag[e] employees to get the influenza vaccine rather than requiring them to take it.” (emphasis provided).

This year, coronavirus disease 2019 (COVID-19) has changed the world as we know it. In its March 2020 guidance, the EEOC clarified that because COVID-19 meets the “direct threat” standard under the Americans with Disabilities Act (ADA), employers are permitted to take employment actions that they otherwise could not lawfully take, such as (i) asking employees health-related questions and (ii) restricting those with COVID-19 symptoms from entering the workplace. Importantly, the guidance did not address the issue of COVID-19 vaccinations, as there was no vaccine available at that time.

On December 16, 2020, with one vaccine approved for emergency use authorization by the FDA and the first inoculations beginning across the country, the EEOC updated its Technical Assistance Questions and Answers in What You Should

Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws to address COVID-19 vaccinations and to make clear that employers may elect to implement mandatory vaccination policies. In this alert, we address some of the most important questions answered by the EEOC's guidance, while also highlighting some remaining issues employers will need to navigate.

## Are vaccines a “medical examination” for purposes of the ADA?

The EEOC answered in no uncertain terms: no, vaccines are not a “medical examination” for purposes of the ADA. It explained, “[i]f 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.”

That said, the agency noted that pre-screening questions for a COVID-19 vaccination – specifically those the Centers for Disease Control and Prevention (CDC) recommends asking to ensure that there is no medical reason that would prevent an individual from receiving the inoculation – *are* medical examinations because they are likely to elicit information about a disability.

That is, although the vaccines themselves are not medical examinations, employers should view mandatory vaccination programs as involving a “medical examination,” given that the employer (or the vendor with which the employer contracts to provide the vaccine) would need to ask such medical pre-screening questions before supplying the vaccine.

This is significant because under the ADA an employer may not administer a medical examination, and thus may not ask such pre-screening questions, unless the inquiries are “job-related and consistent with business necessity.” To satisfy this standard, the EEOC explains that “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 receive a vaccination, will pose a direct threat to the health or safety of herself or himself or others.”

## Can an employer avoid treating a vaccination program, specifically its pre-screening questions, as a “medical examination”?

Yes, and the EEOC describes two ways in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement.

First, the employer could make the vaccine program voluntary. This, in turn, would make answering any such pre-screening questions voluntary (and thus not eliciting information about a disability in such a way that implicates the ADA).

Second, the employer could require employees to receive the vaccination from a third party with which the employer is not contracting (eg, a pharmacy or other health care provider) before returning to work. The EEOC explained that requiring an employee to show proof of receipt of a COVID-19 vaccination from a third party would not be a medical examination because the failure to provide such proof may be the result of non-disability related reasons. That said, subsequent questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be considered a medical examination.

To avoid this scenario, the EEOC recommends that 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”; however, the Commission does not provide further guidance on how to respond if/when an employee refuses to provide such proof. In such a situation, further questioning would likely bring the employer back into the realm of disability-related inquiries – placing them squarely within the ADA's ambit.

## If required, how should an employer respond to an employee who indicates that he or she is unable to receive the COVID-19 vaccination due to a disability, which is protected under the ADA?

The EEOC explains that before excluding such an individual from the workplace, it must assess whether such an employee poses 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.” Although the EEOC has already found that

COVID-19 does pose a direct threat in its March 2020 guidance, it nonetheless instructs employers to “conduct an individualized assessment” regarding the existence of a direct threat, namely (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; (iv) and the imminence of the potential harm.

Following such assessment, the Commission explained, “[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.” In such case, an employer cannot take any action (including excluding such individual from the workplace or terminating employment) until determining 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.”

Furthermore, even if the direct threat cannot be mitigated to an acceptable level, the EEOC cautions that before terminating an employee, the employer must determine if any other rights apply under EEO laws or other applicable federal, state or local authorities. Per the EEOC, this step is analogous to the one employers take when otherwise excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms, explaining, “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.”

Lastly, the EEOC provides recommendations regarding the accommodation process, advising that managers and supervisors should know how to recognize and escalate accommodation requests. Thereafter, the employer and employee who needs an accommodation “should engage in a flexible, interactive process” to determine if there is an accommodation that would not constitute an undue hardship. In addition to collecting substantiating documentation of the employee’s disability and considering the nature of the employee’s role, such interactive process should also take into account “[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact [the employee may have] with others, whose vaccination status could be unknown.”

Importantly, the EEOC acknowledges, “there may be situations where an accommodation is not possible” and in such case it would be “lawful” to exclude the employee from the workplace. Still, the Commission cautions, “[t]his does not mean the employer may automatically terminate the worker,” instead again advising that in such situation the employer must “determine if any other rights apply under the EEO laws or other federal, state, and local authorities.”

## If required, how should an employer respond to an employee who indicates that he or she is unable to receive the COVID-19 vaccination due to his or her sincerely held religious practice or belief, which is protected under Title VII of the Civil Rights Act of 1964?

This analysis and process is similar to that for disability exemptions. The EEOC notes that once an employer is on notice that an employee’s sincerely held religious practice or belief restricts him or her from receiving the vaccination, the employer must reasonably accommodate the employee, unless doing so would cause an undue hardship. The agency cautions that employers “should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief,” but still notes that if an employer has an objective basis for questioning either the religious nature or sincerity of the requested exemption, it would be “justified in requesting additional supporting information.”

As with disability accommodations, the EEOC acknowledges that there may be situations where an employer cannot accommodate an employee’s sincerely held religious practice or belief and therefore may exclude the employee from the workplace. However, again, the agency cautions against summarily terminating the employee, and instead recommends determining what, if any, other rights may be available to the employee.

## What, if any, is the interplay between Title II of the Genetic Information Nondiscrimination Act (GINA) and the COVID-19 vaccination?

As an initial matter, the EEOC notes that even though certain COVID-19 vaccines use mRNA technology, that such vaccines, per the CDC, “do not interact with our DNA in any way” and “mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept.” Accordingly, a COVID-19 vaccine program mandated by an employer would not violate GINA’s prohibition on using, acquiring, or disclosing genetic information.

Further, the EEOC explained that while administering the COVID-19 vaccination or requiring employees to show proof of vaccination does not alone implicate GINA, pre-screening questions that ask about genetic information (including family members' medical histories) may violate the law.

The EEOC acknowledges that at this time “[i]t is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations” but that if such questionnaires do include questions about genetic information, then employers may want to request proof of vaccination rather than administering the vaccine themselves (or via a contractor). In such case, however, the EEOC recommends that employers may want to “warn the employee not to provide genetic information” as part of the proof of vaccination and that as long as such warning is supplied, any genetic information the employer receives will be considered inadvertent and not unlawful under GINA.

## Should employers institute mandatory vaccine programs?

Despite providing a significant amount of information concerning how employers can institute mandatory vaccine programs, the EEOC provides no guidance on whether employers in fact should require employees to get vaccinated.

Ultimately whether or not any specific employer should require its employees to get vaccinated is a highly fact-intensive inquiry involving many factors, such as the employer's type of business, the risk profiles of the employer's employees and customers/clients, and any applicable federal, state and local law.

Further, beyond the ADA, Title VII and GINA, whether employees should be required to be vaccinated against COVID-19 implicates many other legal considerations, including employee rights under the National Labor Relations Act, safety obligations under the Occupational Safety and Health Act and similar state laws, and workers compensation claims and other insurance-related issues, to name a few. Before making any decisions regarding requiring or encouraging vaccines among employees, employers are urged to coordinate with counsel to navigate the various issues implicated by such programs.

If you have any questions regarding this development, please contact the authors or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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