

## **EEOC GUIDANCE: EMPLOYERS MAY MANDATE EMPLOYEE COVID-19 VACCINATION (WITH SOME CAVEATS)**

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On December 16, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) published new guidance addressing the effect of federal employment discrimination laws on employer-mandated vaccination for COVID-19. The guidance was issued the same week as distribution of the COVID-19 vaccine began in the U.S.

### **FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS AND PRIOR VACCINATION GUIDANCE**

The EEOC is charged with enforcing various federal employment discrimination laws. Its jurisdiction includes actions under Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits discrimination in employment based on race, color, religion, national origin, or sex; the Americans with Disabilities Act (“ADA”), which prohibits discrimination in employment on the basis of a disability; and the Genetic Information Nondiscrimination Act of 2008 (“GINA”), which prohibits discrimination in employment on the basis of genetic information.

Notably, both Title VII and the ADA include accommodation requirements. Title VII requires an employer to provide a reasonable accommodation for an employee’s sincerely held religious beliefs unless doing so would pose an undue hardship to the employer. Similarly, the ADA requires an employer to provide a reasonable accommodation for a qualified individual with a disability except when such an accommodation would cause the employer an undue hardship. Additionally, the ADA limits an employer’s ability to require an employee’s medical examination or make disability-related inquiries of an employee. An employer may only require current employees to undergo a medical examination or respond to disability-related inquiries when doing so is job-related and consistent with business necessity.

For years, some healthcare employers have mandated that employees receive an annual influenza vaccination. This requirement has been held to be consistent with applicable federal laws unless an employee has a sincerely held religious belief objecting to the vaccination or a medical disability that prevents safe vaccination. In such cases, employers have been required to provide a reasonable accommodation unless the employer can demonstrate undue hardship will result. Typical accommodations for religiously or medically exempted employees have included the requirement to wear a mask or personal protective equipment, or a temporary assignment away from job tasks that posed a higher likelihood of flu exposure. As trials of prospective COVID-19 vaccines proceeded, healthcare employers began to speculate whether the EEOC’s position on mandatory vaccinations would change.

## THE EEOC'S COVID-19 VACCINATION GUIDANCE REGARDING MANDATORY VACCINATION

The EEOC's new COVID-19 vaccination guidance closely mirrors its precedent relating to influenza vaccines. However, the new guidance provides a useful and current framework for employers to apply when considering COVID-19 vaccination issues.

The EEOC's guidelines are set forth on an updated technical assistance [webpage](#) it has maintained throughout the pandemic entitled "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws."

The guidance first states that an employer can generally mandate that its workforce be vaccinated for COVID-19 without running afoul of federal equal employment laws. However, employers must be aware of some important caveats to that general rule to the extent any employees wish to decline vaccination due to a disability or their religious beliefs.

### Mandatory Vaccination and Disabilities

Once an employee communicates and documents their inability to receive a COVID-19 vaccination due to a disability, the employer should assess whether the unvaccinated employee will pose a "direct threat" as that term is defined by federal regulations. Specifically, the individualized direct threat assessment requires a review of whether the unvaccinated employee will create a significant risk of substantial harm to the health or safety of himself or others that cannot be eliminated or reduced by reasonable accommodation. When conducting its analysis, the employer should consider: (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.

If the employer concludes that the unvaccinated employee may pose a direct threat, the employer then must determine whether there is an accommodation that could eliminate or reduce the direct threat to an acceptable level. An employer is not required to provide any accommodation that constitutes an undue hardship, which is defined as incurring a "significant difficulty or expense" in light of the cost, employer size and resources, the type of operation and the impact of the accommodation. Each step in the employer's analysis should be well documented.

The EEOC advises that the accommodation review process should be flexible and interactive with the purpose of identifying accommodation options. The process should also include documentation substantiating the disability (if the employer does not already have this information) and types of possible accommodations. The guidance further provides that the employer should consider the number of other employees who have already been vaccinated and the unvaccinated employee's potential contact with other individuals who also have not yet received the COVID-19 vaccine when determining whether a proposed accommodation will constitute an undue hardship.

If an accommodation is available that does not constitute an undue hardship and that sufficiently reduces risks so that the unvaccinated employee is no longer a direct threat, then such accommodation should be provided. The measures implemented by the employer prior to the approval of the COVID-19 vaccines will be relevant to this analysis.

If the direct threat posed by the presence of an unvaccinated employee cannot be acceptably reduced, the employee can be excluded from the workplace. The employer should then further consider other accommodations, such as allowing the employee to work remotely or granting the employee leave. Even if leave or remote work or similar accommodations for

employees excluded from the worksite are not possible, the EEOC warns that the employer may incur liability if the individual's employment is terminated. We recommend consulting with your legal advisor before taking such action.

### Mandatory Vaccinations and Religious Objections

Once an employer is on notice that an employee's sincerely held religious belief, practice or observance precludes them from receiving a COVID-19 vaccination, the employer must provide reasonable accommodation for the belief, practice, or observance. A slightly different and lower standard applies to requests for religious accommodation. No accommodation due to a religious objection to vaccination is required if it will create more than an *de minimis* cost or burden for the employer. An employer may require the employee to demonstrate the basis for his/her sincerely held belief, practice, or observance that allegedly prohibits the COVID-19 vaccination.

If no reasonable accommodation is possible, the employee may be excluded from the workplace. The EEOC similarly cautions with religious objections that legal risk may be incurred if the individual's employment is terminated. All potentially applicable federal, state, or local laws always should be considered before discipline is imposed.

### OTHER EMPLOYEE PROTECTIONS RELATING TO COVID-19 VACCINATION

In addition to setting forth the process for reviewing and assessing employee objections to mandatory COVID-19 vaccination, the new guidance also addresses other employee protections that may be available under the ADA or GINA. As previously noted, the ADA only permits an employer to direct a "medical examination" or "disability-related inquiry" to a current employee if doing so is "job-related and consistent with business necessity."

The new guidance notes that while the administration of a COVID-19 vaccine is not a medical examination under the ADA, the screening questions preceding the injection likely constitute a "disability-related inquiry." To comply with applicable requirements therefore, the guidance suggests that the employer must have a reasonable belief that the employee poses a "direct threat" to himself or others in the workplace if he or she is not vaccinated due to the failure to answer the screening questions. No showing of a direct threat is necessary if an employee voluntarily agrees to be vaccinated or if the employee is vaccinated by a third party not engaged by the employer. The EEOC's guidance helpfully clarifies that an employer requirement of proof of vaccination is not a disability-related inquiry.

Additionally, the EEOC cautions against prescreening questions that include inquiries about genetic testing or the employee/employee's family which likely implicate GINA. To the extent such questions are needed to safely administer the COVID-19 vaccine, the EEOC recommends that the employer encourage the employee to be vaccinated outside of work and provide proof of vaccination. This alternative approach does not violate GINA. The EEOC further recommends warning the employee not to include any genetic information in the proof of vaccination submitted. The guidance includes a source for model warning language to be provided to the employee.

### ACTIONS FOR EMPLOYERS

Employers throughout the U.S. are wrestling with the question of whether they will mandate COVID-19 vaccination for their workforce. Although the EEOC has signaled that mandatory vaccination remains permissible under federal employment law subject to longstanding medical and religious exemptions, many employers plan to offer but not mandate the vaccine for now.

Employers that choose to require COVID-19 inoculation should be mindful of the EEOC's guidance and be prepared to evaluate requests for accommodation from employees with disabilities or religious objections. Employers should review and update any vaccine policies to ensure they address the accommodation process. Additionally, employers should carefully document each step of their analysis when considering accommodation requests.

If you have questions or need assistance regarding compliance with the EEOC's COVID-19 vaccination guidance and other employment laws, please contact a member of Hancock Daniel's [Labor & Employment](#) team. Additional information about Hancock, Daniel & Johnson, P.C. is available on the firm's website, <https://hancockdaniel.com>.

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