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FAQ: EEOC Issues Guidance for Employers Regarding COVID-19 Vaccinations

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued [guidance](#) regarding COVID-19 vaccinations in the workplace and how they may implicate the Americans with Disabilities Act (ADA) and other federal laws. In short, the ADA and related federal laws generally do not prohibit employers from requiring vaccines for their employees so long as the employer provides reasonable accommodations for disabilities and sincerely held religious beliefs. However, other laws may prohibit terminating the employment of an employee who refuses to get vaccinated.

Davis & Gilbert Labor & Employment attorneys [Gregg Brochin](#) and [Sabrina Worthy](#) summarize key questions and answers from the new EEOC guidance regarding COVID-19 vaccinations in the workplace. If you have additional questions, please contact any of the authors or the D&G attorney with whom you have regular contact.

EEOC Guidance

1. Q. If an employer requires that its employees be vaccinated and an employee informs the employer that s/he is unable to receive a COVID-19 vaccination due to a disability, can the employer automatically exclude the employee from the workplace?

A: No. The ADA generally requires that employers provide reasonable accommodations to employees with a disability, unless doing so would cause an undue hardship to the employer. The ADA does allow an employer to require vaccination without accommodating a disability, but only if the employer can 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.”

Employers who require vaccination and are unwilling to accommodate an employee with a disability should conduct an individualized assessment of four factors to determine whether a direct threat exists:

1. The duration of the risk;
2. The nature and severity of the potential harm;

What Employers Can Do Right Now

Employers should continue to monitor CDC and state and local health department announcements and guidelines regarding COVID-19 and the workplace. Employers that are considering implementing a mandatory COVID-19 vaccination policy are advised to consult legal counsel.

3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

If an employer determines that an employee who cannot be vaccinated due to a disability poses a direct threat at the workplace, the employer still may not exclude the employee from the workplace or take another adverse action unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk, such as allowing the employee to work remotely.

If a direct threat cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean that the employer may automatically terminate the worker. Employers must determine if any other rights apply under federal, state and local laws.

2. Q: If an employer requires employees to be vaccinated and an employee informs the employer that s/he is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief, can the employer automatically exclude the employee from the workplace?

A: No. Employers must provide a reasonable accommodation for an employee's sincerely held religious belief, practice or observance, unless doing so would pose an undue hardship. Courts have defined "undue hardship" under federal law as having more than a *de minimis* cost or burden on the employer. If an employee requests a religious accommodation, and an employer has an objective basis to question the nature or sincerity of a particular belief, practice or observance, the employer would be justified in requesting additional information.

3. Q: If an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief, what options are available?

A: In such case, it would be lawful for the employer to exclude the employee from the workplace, but the employer may not automatically terminate the worker. Employers must determine if any other rights apply under federal, state and local laws.



4. Q: Is the administration of a COVID-19 vaccine by an employer or a vaccination vendor it hires considered a “medical examination” under the ADA?

A: No. The ADA imposes certain requirements on employers in conducting “medical examinations,” but a vaccine administered to an employee for protection against contracting COVID-19 is not a medical examination because the employer is not seeking information about an employee’s impairments or current health status.

5. Q: Will pre-screening vaccination questions asked by an employer or a vaccine vendor it hires implicate the ADA or the Genetic Information Nondiscrimination Act (GINA)?

A: Maybe. Pre-screening vaccination questions that elicit information about an employee’s disability implicate the ADA’s provision on disability-related inquiries. Moreover, questions that ask about genetic information, such as family members’ medical histories, may violate GINA.

With respect to the ADA, employers must show that the pre-screening questions are “job-related and consistent with business necessity.” To meet this standard, an employer needs to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions does not receive a vaccination will pose a direct threat to the health or safety of her or himself or others.

However, satisfying the “job-related and consistent with business necessity” element is not required if:

1. Vaccinations are offered on a voluntary basis and the pre-screening, disability-related questions are also voluntary (if an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate or threaten the employee for refusing to answer); or
2. Employees receive any required vaccination from a third party that does not have a contract with the employer (e.g., a pharmacy or health care provider).

6. Q: If employers ask or require an employee to show proof of receipt of a COVID-19 vaccination, is this a disability-related inquiry?

A: No. However, asking an employee why s/he did not receive a vaccination may elicit information about a disability and would be subject to the ADA standard of “job-related and consistent with business necessity.” If an employer requires its employees to provide proof of receipt of a COVID-19 vaccination from a third party, the employer may want to inform employees not to provide any medical information when submitting the proof to avoid implicating the ADA.



Other Legal Considerations

Employment in the U.S. is generally at-will, but there are limitations. In addition to disability and religious accommodation requirements, many states prohibit termination in violation of public policy. At present, certain COVID-19 vaccines have been approved through the Emergency Use Authorizations (EUA) process. Under the EUA rules, after being informed of the known and potential benefits and risks of a vaccine, and the extent to which such benefits and risks are unknown, a potential recipient has the option to accept or refuse the vaccine. Because of this legal right, it is possible that terminating an employee who refuses to get an EUA-approved vaccine could be interpreted as terminating an employee for exercising a legal right, which may be a termination in violation of public policy.

Moreover, with the EUA for COVID-19 vaccines only being recently issued, states and localities have not yet weighed in on this issue. Employers will also need to consider state and local law, which may ultimately require vaccination for certain employees in certain industries, or may prohibit employers from requiring vaccines.

For More Information

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Please contact the attorneys listed below or the D&G attorney with whom you have regular contact.

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