

Can Employers Require Employees to Get a COVID-19 Vaccine?

Today, the Equal Employment Opportunity Commission (EEOC) issued guidance addressing a question that is top of mind for employers: can they require employees to get the COVID-19 vaccination? This is a nuanced and multifaceted question that touches on various federal employment laws.

Here is a summary of the new guidance:

Can an employer administer the COVID-19 vaccination without violating the Americans with Disabilities Act (ADA)?

Yes. Administering the vaccination is not itself a medical examination under the ADA. Indeed, the employer is not seeking information regarding an individual employee's impairments or current health status, and therefore administration does not meet the EEOC's definition of a medical examination.

If employers require an employee to receive the COVID-19 vaccination from the employer (or from a contracted third party) and ask screening questions as part of the vaccination process, are those questions subject to the ADA standards for disability-related inquiries?

Yes. Pre-screening vaccination questions are likely to elicit information about a disability. These questions, therefore, are "disability-related" inquiries under the ADA if asked by the employer or a group contracted to administer the vaccine on the employer's behalf. This means the employer must show that the disability-related pre-vaccination screening inquiries are "job-related and consistent with business necessity." In other words, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the pre-screening questions (and therefore does not receive a vaccination) will pose a direct threat to the health or safety of herself, himself, or others.

To avoid that conundrum, an employer can either: 1) offer the vaccine on a voluntary basis, so long as the employer does not retaliate against, intimidate, or threaten an employee who refuses to answer pre-screening questions; or 2) accept a vaccination administered by a third party that does not have a contract with the employer (e.g., a pharmacy).

Of course, an employer must keep any employee medical information obtained in the course of a vaccination program confidential.

Can an employer ask an employee for proof of a COVID-19 vaccination?

Yes. Asking an employee for proof of vaccination is not a disability-related inquiry because simply requesting proof is not likely to elicit information about any possible employee disabilities. That said, employers must be careful when

asking any subsequent questions, such as asking why an employee did not receive the vaccination. Those types of questions become a slippery slope and might elicit information about a disability, which again must meet the standard of being “job-related and consistent with business necessity.”

What if an employee indicates that he or she is unable to receive the COVID-19 vaccination because of a disability?

If an employer's vaccination requirements screen out or tend to screen out individuals with a disability, the employer must show that the unvaccinated employee would pose a direct threat to the person's own safety or the safety of others and cannot be eliminated or reduced by a reasonable accommodation (without undue hardship).

If there is a direct threat that cannot be reduced or eliminated, the employer can prevent the unvaccinated employee from entering the workplace—but this does not necessarily mean termination. The employer must be mindful to consider accommodations, such as working remotely or telecommuting. In other words, the employer must continue to engage in the interactive process, just like it would in any other situation regarding an employee's disability.

If an employer requires the COVID-19 vaccine, how should it treat employees who refuse vaccination because of religious practices or beliefs?

Once an employer is put on notice that his or her religious beliefs, practices, or observances prevent him or her from getting vaccinated, the employer must provide a reasonable accommodation for those beliefs, practices, or observances, unless doing so would be an “undue hardship” (e.g., more than a minimal burden on the operation of the business). If there is no reasonable accommodation possible, then the employer could exclude the employee from the workplace; but again, that does not mean termination. The employer should still explore telecommuting or remote work options. And because the law assumes that religious beliefs, practices, or observances are legitimate, an employer must be very careful to only question the religious nature or sincerity when it has an objective basis for doing so.

Does the Genetic Information Nondiscrimination Act (GINA) (which prevents discrimination based on employee genetic information) prevent employers from requiring employees to have proof that they were vaccinated?

No. An employer who administers the COVID-19 vaccination to employees or requires employees to provide proof that they received the vaccination does not involve the use of genetic information to make employment decisions. Much like the ADA, if the administration of the vaccine requires pre-screening questions that ask about genetic information, which includes family medical history, then GINA may be violated.

Does asking an employee pre-vaccination screening questions before administering the COVID-19 vaccine violate GINA?

Possibly. Pre-vaccination medical screening questions are likely to elicit information about a disability and may also elicit information about genetic information, such as immune system information of family members. It is currently unclear what screening questions will be asked during the vaccination process. If pre-vaccination questions do not include any questions regarding genetic information or family history, then asking them does not violate GINA. If pre-

vaccination questions include asking questions regarding genetic information, then employers may want to ask employees for proof of vaccination rather than administering it themselves. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof.

Where to Start

As a practical matter, employers should consider shying away from administering vaccination programs and instead require employees to provide proof of vaccination by a third party (that does not have a contract with the employer). And then, when an employee is unable to provide vaccination proof, employers should be careful if they inquire the reason why. Finally, employers must be vigilant in remaining creative and flexible in determining potential reasonable accommodations, including telecommuting and remote work options, when presented with disability- or religious-based objections to the COVID-19 vaccine, lest they risk running afoul of antidiscrimination statutes.

As the COVID-19 vaccine becomes more generally available, the debate surrounding it assuredly will continue to evolve. While this article summarizes the EEOC's recent guidance, there certainly will be additional issues to consider, such as employee fear, potential anti-vaccination feelings, staggered availability depending on the employee population, and potential risk and side effects. Stay tuned for additional guidance as we continue to monitor this important and evolving issue.

Please contact [Justin Furrow](#) or your relationship attorney if you have questions or need additional information.

Visit our COVID-19 Insight Center for our latest legislative and legal updates, articles, and resources.

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