

Employers May Require Covid Vaccinations of Their Employees

Employers may require that employees be vaccinated against Covid as a condition of employment, unless the employee has a recognized disability under the ADA, or in the instance of a sincerely held religious belief. This is according to recent [EEOC Guidance](#) which is set forth more fully at the bottom of this article.

Employees who request exemptions from mandatory vaccination policies due to a disability may still be subject to an employer's [qualified safety standards](#) and may still not be allowed to attend work although the EEOC guidance falls short of saying they can be terminated.

Employers may ask employees to show proof of vaccination without running afoul of the ADA. Employers should warn employees not to provide medical information as part of their proof, however.

With regard to religious exemptions, the EEOC stated that once an employer is on notice of an employee's sincerely held religious belief, the employer must provide a reasonable accommodation for the employee's belief unless it would pose an undue hardship under Title VII.

Undue hardship is anything that poses "more than a de minimis cost or burden" to the employer. Title VII permits the physical exclusion of employees seeking religious exemptions for vaccination if an accommodation cannot be made.

Employers reluctant to mandate employee vaccination should consider offering employees incentives for vaccination rather than punishments for failure to get vaccinated.

Offering to cover the cost of employee vaccinations or offering employees time off to get vaccinated are good ways to encourage vaccination without requiring it.

At present, the vaccine is not yet widely available. We believe, however, that requiring or strongly encouraging employee vaccinations is a best practice that all employers should adopt. Work-place vaccination policies promote safer work environments and offer employees some assurances as to their own well-being. Moreover, such a policy may help employers defend against any Covid lawsuits no matter how remote such a lawsuit might be. Frequently held questions that we think are relevant are set forth in more detail below, albeit, in abridged format:

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. . .

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."

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.

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.

K.6. 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 sincerely held religious practice or belief? (12/16/20)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the

employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined “undue hardship” under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

K.7. What happens 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? (12/16/20)

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker.

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