

Employment Law Update: The Vaccine Is Here—Now What?

12/22/20

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) published guidance concerning the administration of vaccines and pre-screening questions with respect to compliance with the Americans with Disabilities Act (ADA), Title VII, and the Genetic Information Nondiscrimination Act (GINA). See Section K at the EEOC website: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

In summary, the EEOC has said that all employers may require mandatory vaccines for their employees provided that employers: (i) allow employees to receive the vaccine from a third party that does not have a contract with the employer, and (ii) follow the accommodation requirements under the ADA and Title VII.

The administration of a COVID-19 vaccine to an employee by an employer is not considered a “medical examination” for purposes of the ADA since the employer is not seeking information about the employee’s disability or health status.

Because pre-screening vaccination questions may elicit information about a disability or health condition, an employer must demonstrate that pre-screening questions are “job-related and consistent with business necessity,” as required under the ADA. The EEOC identified two scenarios in which an employer can ask such pre-screening questions without having to demonstrate such questions are job-related and consistent with business necessity:

1. an employer has offered a vaccination to an employee on a voluntary basis and, therefore, the employee’s decision to answer pre-screening, disability-related questions is also voluntary (as required by the ADA) and without consequence; or
2. a third party (i.e., a pharmacy or health care provider) administering the vaccine does not have a contract with the employer.

When administering the vaccine themselves, employers should ensure that they do not seek information regarding an employee’s genetic information, which may violate the Genetic Information Nondiscrimination Act.

In and of itself, requiring an employee to provide proof of a COVID-19 vaccination is not a disability-related inquiry. However, follow-up questions by employers asking why an individual did not receive a vaccination may elicit protected medical information and would be subject to the standard of “job-related and consistent with business necessity.”

If an employee indicates that the employee cannot fulfill a mandatory vaccination requirement because of a disability-related issue or sincerely held religious belief, observance, or practice, an employer must conduct an individualized assessment of the following four factors in determining whether an unvaccinated employee poses a direct threat and a significant risk of substantial harm to the health and safety of the workplace:

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 a determination is made that an unvaccinated employee will expose others to the virus at the worksite, then the unvaccinated employee would be considered a direct threat.

If an employer institutes a mandatory vaccination requirement and an employee cannot obtain a vaccination for COVID-19 because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible (i.e., remote work), it would be lawful for the employer to exclude the employee from the workplace. However, an employer may not automatically terminate an employee who is unable to be vaccinated due to a disability or a religious belief and poses a direct threat to the workplace without determining whether any other rights apply under the EEOC laws or other federal, state, and local authorities.

If you are an employer with a question about this legal alert, please contact [Tracy Armstrong](#) or another member of the [Employment Law Team](#).

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