

## Top 7 Things You Need To Know As EEOC Says Employers May Mandate COVID-19 Vaccines

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Employers now have clarification that they will be able mandate the COVID-19 vaccine among their workers in certain circumstances without running afoul of key federal anti-discrimination laws, according to updated guidance issued Wednesday by the Equal Employment Opportunity Commission. While there are numerous issues to consider before mandating that your employees get vaccinated, this guidance is the first official pronouncement on the subject from the employment law watchdog agency and provides an outline of various hurdles to overcome. Here are the top seven takeaways for employers from this critical development.

### **1. The EEOC indicates that employers can require their workers to get a COVID-19 vaccine in certain circumstances, even under the Emergency Use Authorization.**

The agency's updated FAQs do not unequivocally state that "*employers can require the vaccine.*" However, the Equal Employment Opportunity Commission (EEOC) repeatedly answers questions discussing what actions employers can take in response to various circumstances *after* an employer has mandated the vaccine. This approach plainly suggests there must be circumstances where employers are legally permitted to require vaccine immunization of their workers without violating the Americans with Disabilities Act (ADA), Title VII, and other federal anti-discrimination laws. According to the EEOC, this is true even though the COVID-19 vaccine is only authorized under the FDA's Emergency Use Authorization (EUA), rather than approved under the full and comprehensive FDA vaccine

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licensure process, known as a Biologics License Application or “BLA.”

To be clear, the only scenario described by the EEOC as a permissible basis to mandate vaccination under the ADA is when a worker poses a “direct threat” to themselves or others by their physical presence in the workplace without being immunized. This means mandating vaccines is only permitted if workers would pose “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Therefore, if an employee is capable of fully performing their current job duties remotely without the potential spread of the virus to co-workers or work-related third parties, it does not appear that you can require that they get vaccinated.

### **2. Employers that require the COVID-19 vaccine must consider reasonable accommodations for employees with disabilities.**

Notably, simply because your company chooses to mandate vaccine usage for those workers who may pose a direct threat to themselves or others does not mean you have complete freedom to require the vaccine for all such workers. If an individual cannot be vaccinated because of a disability, you need to determine whether you can provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the safety risk. You cannot automatically exclude them from the workplace or take any other negative action against them.

First and foremost, the EEOC recommends that those managers responsible for communicating with your employees about compliance with your vaccination requirement should know how to recognize an employee’s accommodation request. You should also train your managers about the process they should follow to refer accommodation requests through the proper channels for consideration. While the EEOC’s guidance does not mention this, you should strongly consider providing details about the accommodation request procedure in writing to all of your employees (whether in hard copy, electronically, or both).

Next, the EEOC indicates you should engage in a flexible, interactive process with any employee requesting an accommodation to identify options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability and considering the possible options for accommodation given the nature of the workforce and the employee’s position. Some things you should consider include the prevalence in the workplace of employees who already have received a COVID-19 vaccination, the amount of involvement with customers, and the rate of vaccination in your community, as well as the amount of contact with others whose vaccination status could be unknown. You should consult your Fisher Phillips’ attorney in developing a medical inquiry for an employee’s doctor or a protocol for responding to requests for accommodation more generally.



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Finally, the EEOC reminds employers that it is unlawful to disclose that an employee is receiving a reasonable accommodation, just as it is a violation of federal law to retaliate against an employee for requesting an accommodation. Likewise, you should not reveal which employees have or have not been vaccinated.

### **3. Similarly, employers need to consider reasonable accommodations for employees who are unable to receive the vaccine for religious reasons.**

The EEOC says you must provide a reasonable accommodation if an employee's sincerely held religious belief, practice, or observance prevents them from receiving the vaccination – unless it would pose an undue hardship under Title VII. The definition of "undue hardship" is slightly different in the religious context compared to the disability context, as courts have defined it as simply "having more than a *de minimis* cost or burden" on an employer.

While you should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, you would be justified in requesting additional supporting information if you have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. The key word here is "objective." This is a delicate area of the law and you should not unilaterally contact the employee's place or worship seeking proof about their level of belief, or engage in any conduct that could raise potential discrimination issues. We recommend consulting with your Fisher Phillips attorney before making such a request to any of your employees.

### **4. Employers can require employees to show proof that they received a COVID-19 vaccination.**

Assuming you can demonstrate that a mandatory vaccine is appropriate and that no accommodation requirements are in play, the EEOC indicates you can require workers to prove they have received the COVID-19 vaccine. The EEOC says that simply requesting proof of receipt of the vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry.

However, subsequent questions, such as asking *why* an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that disability-related inquiries be "job-related and consistent with business necessity." For this reason, if you require employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, you may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA. If you do receive medical information along with proof of vaccination, you should store the medical information in a confidential medical file consistent with ADA requirements.



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### **5. The administration of a COVID-19 vaccine is not a “medical examination” for purposes of the ADA.**

The EEOC confirmed that the act of administering the COVID-19 vaccine is not an ADA “medical examination.” Therefore, if you (or a third party with whom you contract to administer the vaccine) simply administer the vaccine to an employee, the EEOC does not consider you to be seeking information about an individual’s impairments or current health status – but see the next point about questionnaires relating to giving the vaccine.

### **6. Employers can pose pre-screening vaccination questions, so long as they comply with ADA requirements.**

The EEOC’s FAQs offered some direction for employers who want to ask pre-screening vaccination questions as they administer the inoculation. The first thing employers need to know is that pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries (defined as any such inquiries likely to elicit information about a disability). Therefore, if you administer the vaccine, you must show that any pre-screening questions are job-related and consistent with business necessity. To meet this standard, the EEOC says, you need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of themselves or others.

The EEOC does explain that there are two circumstances in which these screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement. First, you can offer the vaccination to employees on a *voluntary* basis (i.e. employees choose whether to be vaccinated), which means the employee’s decision to answer pre-screening, disability-related questions would also be voluntary. If an employee chooses not to answer these questions, you may decline to administer the vaccine to them but may not retaliate against, intimidate, or threaten them for refusing to answer the questions.

Second, if an employee receives an employer-required vaccination from a third party with whom your organization does not have a contract (such as a pharmacy or other healthcare provider), the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply.

Finally, regardless of whether you meet the “job-related and consistent with business necessity” standard, the ADA requires you to keep any employee medical information obtained in the course of the vaccination program confidential. On a related note, the agency reminds employers that any pre-screening questions that ask about genetic information, such as family members’ medical histories or immune systems of family members, may violate the Genetic Information Nondiscrimination Act



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(GINA). As the EEOC explicitly says that “it is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations,” this is an issue that employers should be aware of as we move closer to vaccines being provided to members of the general population.

To avoid these complications, the EEOC says that employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves. However, to steer clear of unintended GINA violations, you may still want to warn the employee not to provide genetic information as part of the proof. If this warning is provided, the EEOC says any genetic information you receive in response to your request for proof of vaccination will be considered inadvertent and, therefore, not a GINA violation.

### **7. Employees may be confused about their ability to “refuse” the vaccine as a result of the EUA.**

We expect that some employees may believe they have the right to “refuse” the vaccine even if mandated by their employer. That’s because of language in the EEOC’s updated guidance about the EUA that may cause confusion.

The EEOC notes that, for any vaccine issued under an Emergency Use Authorization, the FDA (and the vaccination provider) has an obligation to inform vaccine recipients about its potential benefits and risks, the extent to which such benefits and risks are unknown, whether any alternative products are available, and “that they have the option to accept or refuse the vaccine.” This language comes from the federal statute governing the EUA.

The FDA’s website (cited by the EEOC) says that the option to refuse is typically included in a “fact sheet” provided to the individual receiving the vaccine (or, alternatively, the party administering the vaccine can direct the individual to the weblink to view the fact sheet online). That fact sheet for the Pfizer/BioNTech vaccine can be found [here](#), and it explicitly says that “the recipient or their caregiver has the option to accept or refuse [the] Pfizer-BioNTech COVID-19 Vaccine.”

This directive seems to be targeted at whether an individual can be forced to take the vaccine by a government entity (as a New York lawmaker recently suggested), not whether an employer can condition an individual’s continued employment on taking the vaccine. After all, in at-will employment settings, an employee can always pursue alternative employment if they do not want to get vaccinated as a condition of their current job. Note that this analysis may be different in unionized settings governed by a collective bargaining agreement. If you are working with a union, you should consult with your Fisher Phillips counsel before proceeding with any mandatory vaccination plan.



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### Conclusion

Although the EEOC seems to permit mandating vaccinations of employees in certain circumstances, most employers should consider encouraging rather than mandating vaccinations due to potential related risks. Whether you simply encourage or mandate vaccinations, you should be prepared with at least a policy framework and a communications plan as wider availability of the vaccine draws closer. We will continue to monitor developments related to the new vaccines and related workplace questions that arise. Make sure you are subscribed to Fisher Phillips' alert system to get the most up-to-date information.

If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact any attorney in on our FP Vaccine Subcommittee.

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