

EEOC weighs in with updated guidance on vaccine mandates, incentives and more



Miriam L. Rosen | Tuesday, June 1, 2021

Responding to COVID-19 was uncharted territory for many employers. The EEOC helped guide employers through many challenging employment aspects of the pandemic with regular updates to its Technical Assistance document, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*. However, since addressing just a few vaccine-related issues in December 2020, the EEOC has been silent for months. With questions mounting, employers and business groups have clamored for answers from the EEOC on critical issues such as vaccine mandates, incentives, proof of status, and confidentiality. Now, with progress on vaccines well underway and many employers implementing return to office plans, the EEOC finally weighed in with [updated guidance](#) on May 28, 2021.

The new guidance directly addresses many of the questions that employers have faced navigating the sensitive issues surrounding vaccines and the workplace. Key highlights from the guidance are immediately below followed by edited excerpts and comments regarding the new guidance.

Highlights of the EEOC guidance on key employer vaccine questions

Can an employer require an employee to be vaccinated?

Yes. Federal law does not prohibit an employer from requiring vaccines, subject to reasonable accommodations for disabilities and other EEO considerations, such as religious beliefs.

Can an employer require an employee to provide proof of vaccination?

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Yes. Requesting proof of vaccine status is not a disability-related inquiry.

Can an employer provide an incentive for employees who provide proof of vaccination?

Yes. When an employee is vaccinated by a third party, the size of the incentive is not regulated. When the employer is providing the vaccine, the incentive should not be so substantial as to be coercive.

Is information about an employee's COVID-19 vaccination confidential medical information?

Yes. Under the ADA, information about vaccine status, like all medical information, must be kept confidential and stored separately from the employee's personnel files.

Excerpts and insights from the EEOC's guidance

COVID-19 vaccinations: EEO overview

May an employer require all employees entering the workplace to be vaccinated for COVID-19?

Yes. The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations.

The EEOC guidance notes that in some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance ("religious belief"), do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.

As with any employment policy, the EEOC reminds employers that it is unlawful to apply a vaccination requirement in a way that treats employees differently based on any protected status, unless there is a legitimate non-discriminatory reason.

What are examples of reasonable accommodations or modifications that employers may provide to employees who do not get vaccinated due to disability, religious beliefs, or pregnancy?

An employee who does not get vaccinated due to an ADA-covered disability or a sincerely held religious belief, practice, or observance may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business.

As possible reasonable accommodations, the EEOC suggests that an unvaccinated employee entering the workplace might:

- Wear a face mask
- Work at a social distance from co-workers or non-employees
- Work a modified shift
- Get periodic tests for COVID-19
- Be given the opportunity to telework
- Accept a reassignment

The EEOC also notes that employees who are not vaccinated because of pregnancy may be entitled to workplace adjustments, if the employer makes modifications or exceptions for other employees. These modifications may be the same as reasonable accommodations based on disability or religion.

General

Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?

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Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. Although an employer may require employees to provide vaccine documentation/confirmation, information about vaccine status, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

With a high level of interest in vaccine status from co-workers, customers, and others in the workplace, this is important guidance for employers. Employers should be ready to answer questions internally and externally about their workforce's vaccine status. Providing training and sample responses can help prepare managers to address these sensitive topics.

Mandatory employer vaccination programs

Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though some employees may not get a vaccine because of a disability?

Yes, provided certain requirements are met. Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. An employer should work with employment counsel to determine if the direct threat criteria are met.

If an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do?

An employee who does not get vaccinated for COVID-19 because of a disability must let the employer know of the need for an exemption from the requirement or a reasonable accommodation. Managers and supervisors responsible for communicating with employees about the employer's vaccination requirement should know how to recognize and respond to a reasonable accommodation request.

Once an accommodation request is made, employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship.

Voluntary employer vaccination programs

Under the ADA, can an employer request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic?

Yes. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, the employer is not asking a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. **Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA's rules about such disability-related inquiries do not apply.**

Note that documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

May an employer offer voluntary vaccinations only to certain groups of employees?

Employers offering voluntary vaccinations must comply with federal employment nondiscrimination laws.

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For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated?

Employers who receive a reasonable accommodation request should process the request in accordance with applicable ADA standards for evaluating potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

How should an employer respond to an employee who communicates an inability to be vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance?

Once an employer is notified that an employee's sincerely held religious belief prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. An employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment.

The EEOC notes that while an employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, if an employer is aware of facts that provide 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.

Note that for purposes of accommodating religious beliefs, the courts define "undue hardship" as having more than minimal cost or burden on the employer. This is a lower standard for employers to meet than the ADA's undue hardship standard, which applies to disability accommodation requests.

What should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy?

An employee seeking a vaccine exemption due to pregnancy is not treated differently compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests.

Employer incentives for COVID-19 voluntary vaccinations under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

May an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community?

Yes. An employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted, the employer is required to keep vaccination information confidential under the ADA.

May an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent?

Yes, as long as any incentive (either rewards or penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. However, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily

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provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or its agent.

The updated EEOC guidance confirms the approach that many employers have taken on vaccines, incentives, and related issues. As workers return to the office, the guidance will help employers address on-going issues related to proof of vaccine status and accommodation requests. The EEOC's updated guidance was prepared prior to the CDC's modification of the masking requirements for fully vaccinated individuals. The EEOC has indicated that it may issue additional guidance to address that development.

[McDonald Hopkins' Labor & Employment Law Team](#) will continue to keep employers updated on COVID-19 and return to office developments. Please contact your McDonald Hopkins employment lawyer with any questions.



Miriam L. Rosen

[Team member bio](#)