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## EEOC ISSUES GUIDANCE ON COVID-19 VACCINATION POLICIES

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On December 16, 2020, the U.S. Equal Employment Opportunity Commission issued much-anticipated [guidance](#) to employers considering COVID-19 vaccination programs for their employees as to their obligations under federal civil rights laws, particularly if the employer plans to require its employees to be vaccinated. While it will likely be months before a vaccine is available to the vast majority of Americans, the guidance does shed some light on how the EEOC views questions relating to vaccination under the laws within its jurisdiction. Equally important, as we obtain new information about vaccine efficacy and longevity, distribution, and vaccination plans, it is likely the EEOC and other federal agencies will issue additional guidance, or revise guidance to reflect the most current information available.

Given this uncertainty and extended timeline, it may be premature for many private-sector employers to commit to any particular “vaccination/return-to-work” policy immediately. Employers may also wish to consider whether encouraging or recommending employees be vaccinated, rather than mandating vaccination, is a viable and/or preferable alternative.

### EEO LAWS AT ISSUE

Vaccination requirements implicate a number of federal civil rights laws, including the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the religious protections of Title VII of the Civil Rights Act of 1964 (Title VII). While the EEOC guidance does not directly state that mandatory vaccination policies are lawful, it does answer a series of questions predicated on the assumption that an employer has adopted such a policy, focusing on how an employer should respond to requests from employees who cannot or do not wish to obtain a vaccination. This suggests, at a minimum, that requiring a vaccination as a condition of returning to the workplace is not *per se* unlawful, provided certain conditions are met.

The EEOC's guidance makes clear that employers that wish to adopt mandatory vaccination policies may be obligated to provide exemptions or accommodations to employees with religious objections to vaccines, pregnant workers, and employees with disabilities that may prevent them from obtaining a vaccination. Employers should also be mindful of what questions they can ask employees about their health and vaccination status, and how they use the information obtained in response to those questions.

## DISABILITY LAW IMPLICATIONS

By way of background, the ADA generally prohibits an employer from requiring a medical examination or making inquiries of an employee as to whether that employee is an individual with a disability, or as to the nature or severity of a disability, unless such examination or inquiries are both "job-related and consistent with business necessity." EEOC's guidance makes clear that neither the administration of a vaccination nor the requirement that an employee show proof of vaccination are in and of themselves a "medical examination" or "disability-related inquiry," and thus do not implicate the ADA. This general rule is subject to several important caveats, discussed below.

For example, the guidance provides that "[s]imply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a [generally prohibited] disability-related inquiry. *However, subsequent employer 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 they be 'job-related and consistent with business necessity'*" (emphasis added). As a practical matter, this means that while requiring vaccination, or proof of vaccination, does not implicate the ADA, follow-up questions, such as why an employee has not been vaccinated, may trigger employer obligations under the ADA.

Pre-vaccination screenings may also face ADA scrutiny. Under current U.S. Centers for Disease Control and Prevention (CDC) guidance, health care providers who administer vaccinations are advised to ask certain questions before administering a vaccination, to ensure that there are no medical reasons that would prevent an individual from receiving one. When the employer is administering the vaccine, or contracting with a third party to administer the vaccine, these pre-vaccination medical screening questions are likely to elicit information about a disability, and thus must be job-related and consistent with business necessity. To meet this standard, the EEOC explains, an employer would need "to have a reasonable belief, based on objective evidence, that an employee who does not answer the [pre-vaccination screening] questions, and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of themselves or others" in the workplace.<sup>1</sup> Pre-vaccination questions should also be careful to avoid questions about an individual's family medical or genetic history that implicate GINA, the EEOC guidance cautions.

Many have asked whether an employer may require vaccination as a condition of returning to the workplace. As noted, the EEOC's guidance suggests that such policies may be lawful. Before excluding an employee from the workplace, however, the agency notes, "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.'" Employers are further advised that they 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 unvaccinated worker poses a direct threat, the EEOC cautions that it cannot then exclude that employee from the workplace “unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat.”

The ADA also requires employers to provide reasonable accommodation to any employee whose disability prevents them from being vaccinated, unless doing so is an “undue hardship,” defined as “significant difficulty or expense.” The EEOC’s guidance explains that an employer must consider possible options for accommodation in light of the nature of its workforce and the employee’s particular position. Further, the agency advises that prevalence in the workplace of workers who have already obtained a vaccination, as well as the potential contact of an unvaccinated worker with others whose vaccination status is unknown, may also impact this analysis.

## **RELIGIOUS-BASED OBJECTIONS**

An employer is similarly required to accommodate employees who have a sincere religious belief that prevents them from being vaccinated, unless doing so is an “undue hardship.” With respect to requests for religious accommodations under Title VII, the “undue hardship” standard differs from, and is less stringent than, the ADA concept, requiring only that the employer show that providing an accommodation imposes “more than a *de minimis* cost or burden on the employer.” Under both the ADA and Title VII, “reasonable accommodation” is intended to be an individualized, fact-based, and interactive process between the employer and the employee. Employers that adopt vaccination policies and then face requests from individuals for accommodation or exemption are strongly advised to consult with counsel.

## **OTHER OPTIONS?**

Finally, the EEOC’s guidance explains that if an employee’s failure to be vaccinated poses a direct threat that cannot be reduced to an acceptable level, the employer can exclude that unvaccinated employee from the workplace, but cautions that a decision to exclude does not mean that an employer can automatically terminate the employment of that employee. For example, if an unvaccinated employee cannot be brought back into the workplace, the employer may be obligated to offer the option to work remotely as an accommodation (as many have done during the pandemic), or to offer leave under other laws or the employer’s existing leave policy. Employers should also evaluate whether allowing unvaccinated workers to work under existing COVID protocols (masking, social distancing, etc.) is a viable option. As with general questions of reasonable accommodation, employers that conclude that an unvaccinated employee poses a direct threat, and that no reasonable accommodation is possible to mitigate the threat or otherwise allow the employee to continue working, are advised to consult with counsel.

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## Notes

- 1 Conversely, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement. First, if an employer has offered a vaccination to employees on a voluntary basis, the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these pre-screening questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions asked by the third party.