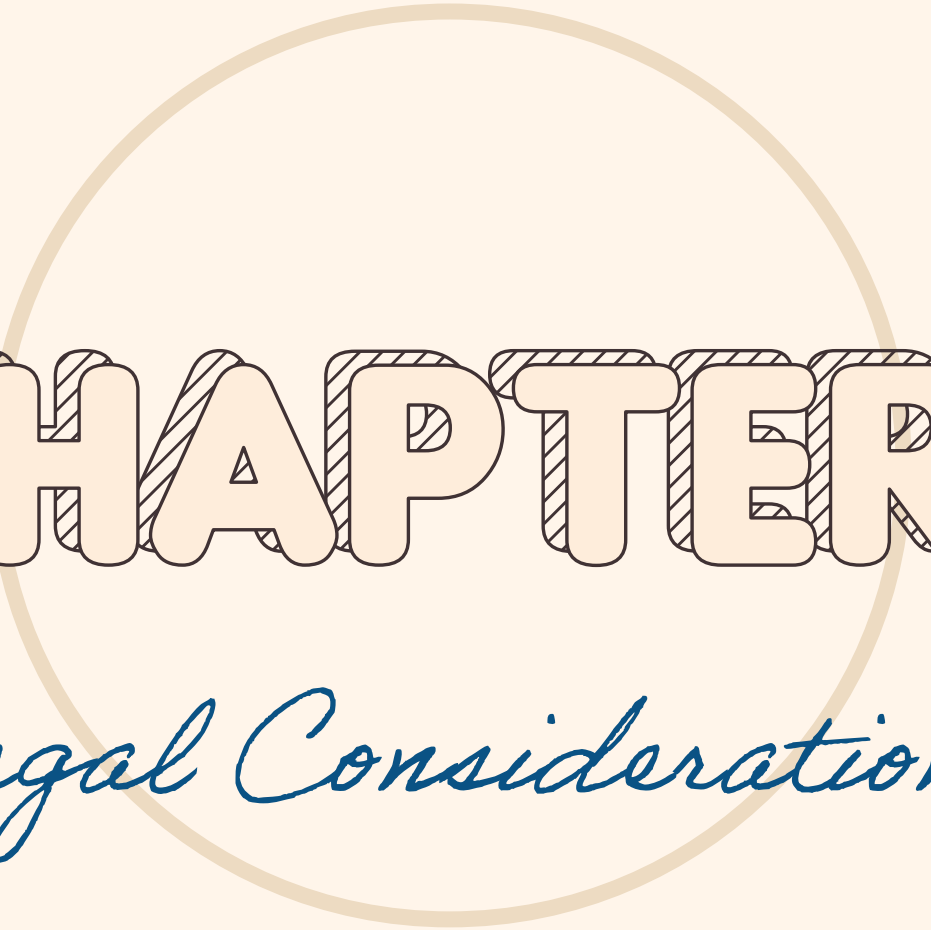


RETURNING WORKFORCES

and Covid-19 Vaccines





CHAPTER 5

Legal Considerations

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COVID-19 Vaccines and Workplace Laws

The availability of COVID-19 vaccinations may raise questions about the applicability of various equal employment opportunity (EEO) laws, including the ADA and the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA) and Title VII (which includes the Pregnancy Discrimination Act). The EEO laws do not interfere with or prevent employers from following CDC or other federal, state and local public health authorities' guidelines and suggestions.

This section provides guidance related to these key laws.

Medical Examinations and Vaccine Administration

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) is not considered a "medical examination" for purposes of the ADA.

The vaccination itself is not a medical examination. As the EEOC explained in [guidance on disability-related inquiries and medical examinations](#), a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health."

Examples include "vision tests; blood, urine and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans and MRIs." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, prescreening 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 prescreening questions it asks employees are "job-related and consistent with business necessity."

Prescreening Vaccination Questions

If an employer requires an employee to receive the vaccination from the employer (or a third party) and asks screening questions (to ensure that there is no medical reason that would prevent the person from receiving the vaccination), these questions are subject to the ADA standards for disability-related inquiries.

This is because pre-vaccination medical screening questions are likely to elicit information about a disability. Therefore, such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. If the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would 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.

By contrast, 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:

If an employer has offered a vaccination to employees on a voluntary basis (that is, employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer prescreening, disability-related questions also must be voluntary. If an employee chooses not to answer these 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.

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" restriction on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program [confidential](#).

Additionally, pre-vaccination medical screening questions may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines “genetic information” to mean:

- Information about an individual’s genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member, or of an embryo legally held by an individual or family member using assisted reproductive technology.

If the pre-vaccination questions do not include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions do include questions about genetic information, then employers that want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee’s own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires an employee to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.

COVID-19 Vaccination Verification and Disability-related Inquiries

Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry.

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. 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.” If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employees not to provide any medical information as part of the proof in order to avoid implicating the ADA.

Emergency Use Authorization (EUA) and the COVID-19 Vaccine

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The [FDA has an obligation](#) to ensure that recipients of the vaccines under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccines, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccines, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the [FDA's EUA page](#).

Employees with Disabilities Preventing Vaccination

If an employer requires vaccinations (when they are available), they must respond carefully to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability.

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.”

Employers should conduct an individualized assessment of the following 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 that causes COVID-19 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 au-

tomatically terminate the worker. Employers will need to determine whether any other rights apply under the EEO laws or other federal, state and local authorities.

For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms.

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation 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. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) [website](#) as a resource for different types of accommodations. JAN's materials specific to COVID-19 are available [here](#).

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in Question K.7, there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable OSHA standards and guidance. Employers can find OSHA COVID-specific resources [here](#).

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).

Sincere Religious Beliefs Preventing Vaccination

If an employer requires vaccinations (when they are available), they must respond carefully to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief.

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 reason-

able 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.

No Reasonable Accommodation Available

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. Employers will need to determine whether any other rights apply under the EEO laws or other federal, state and local authorities.

Genetic Information, Employment Decision-making and Vaccinations

Title II of GINA is not implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination.

Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology. However, if administration of the vaccine requires prescreening questions that ask about genetic information, the inquiries seeking genetic information, such as family members’ medical histories, may violate GINA.

Under Title II of GINA, employers may not:

- Use genetic information to make decision related to the terms, conditions and privileges of employment;
- Acquire genetic information except in six narrow circumstances; or
- Disclose genetic information except in six narrow circumstances.

Certain COVID-19 vaccines use mRNA technology. This raises questions about genetics and, specifically, about whether such vaccines modify a recipient’s genetic makeup and, therefore, whether requiring an employee to get the vaccine as a condition of employment is an unlawful use of genetic information. The

CDC has explained that the mRNA COVID-19 vaccines “do not interact with our DNA in any way” and “mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept.” ([See this link](#) for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA's prohibitions on using, acquiring or disclosing genetic information.

