



All Things Vaccine

March 17th, 2021



The **Equal Employment Opportunity Commission (EEOC)** updated its vaccine guidance on December 16, 2020. **CDC guidance is ongoing.**

It's reasonable to expect additional updates in 2021, but for now, this what we know.

Your **state** may have additional legislation around vaccines.

UPDATE: As of April 1, the American Rescue Plan provides for paid leave for employees wishing to get the vaccine and/or recover from side effects (thru Sept 30)

Federal & State Guidance

Should we have a vaccine policy for our workplace, and should it be mandatory or voluntary?

Vaccination Policy

Yes, you *should* have a policy in place.

But, should it be mandatory or voluntary?

Vaccine Policy

Mandatory

Risks & Considerations

- **A mandated vaccine policy should be balanced with overall risk to the organization, consideration of particular job functions and the importance of the vaccine to the employer's operations.**
- Your industry may have its own guidelines.
- Reasonable Accommodations must be made for employees with disabilities or sincerely held religious beliefs.
- Worker's Compensation Claims for side effects

Vaccine Policy

Mandatory – Risks & Considerations continued

- Section 7 of the National Labor Relations Act may protect non-supervisory employees' rights to discuss and complain about your vaccine policy on social media
- Any medical information collected during the process must be kept confidential. This includes an employee's reason for NOT getting the vaccine.
- Potential legal risks of termination

Vaccine Policy

Mandatory – Risks & Considerations continued

- Vaccine roll-out is spotty, so some employees may not have access to it at the same time as others.
- You might lose employees.
- You should allow employees to get the vaccine during working hours and compensate them for that time. **As of April 1, you can realize fully refundable tax credits for those hours using FFCRA leave (through Sept 30).**

Vaccine Policy

Voluntary

- More risk-averse option right now
- Incentivizing is up to you, but carefully evaluate.*
Consider a collective goal (e.g. If we meet our 80% vaccination goal, we all get a day off!).
- Instead: educate, lead by example, and make it easy to get. Allow paid time off, cover any costs and allow paid time off for side effects. **As of April 1, you can realize fully refundable tax credits for those hours using FFCRA leave (through Sept 30).**

Vaccine Policy

Voluntary, continued

- Employers should continue to follow the [Guidance for Businesses and Employers Responding to COVID-19](#)

Vaccine Policy

Voluntary, with Incentives

- “Wellness programs” have been under scrutiny over the past few years as potentially violating the ADA.
- Because guidance has yet to emerge, employers should proceed with caution and consult counsel.
- Consider a collective incentive (if we achieve 80% vaccination, we all get a day off!)

Incentives

Question:

Employees may claim to have a disability or a religious belief to avoid getting the vaccine. How can we determine whether an employee's claim of disability or a sincerely held religious belief is legitimate?

Exemptions

- Treat every accommodation request consistently and assume that each request is bona fide.
- If an employee requests an accommodation on the basis of **disability**, the ADA allows employers to request documentation from a health care provider to support the need for accommodation if the disability and/or need for accommodation is not known or obvious.
- Where an employee requests accommodation on the basis of **religion**, Title VII allows an employer to request “additional information” if employer has *objective* doubts about the sincerity of the religious belief or the religious nature of the belief.
 - Do this **only** if you have a bona fide and objective basis for questioning either the religious nature of the belief or the sincerity of a particular belief or practice. The definition of religion under Title VII is broad and protects beliefs and practices with which the employer may be unfamiliar. Employers are likely best served by looping in counsel to navigate this.

Exemptions

Question:

**What about employees who simply don't trust
or believe in the vaccine?**

Objections

Consult legal counsel!

Objections

Question:

Is 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) a “medical examination” for purposes of the ADA?

Medical
Examination

No. 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.**

Medical Examination

Question:

According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries?

Screening
Questions

Yes. Pre-vaccination medical screening questions are likely to uncover information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, 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 her or himself or others.

Screening Questions

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.

1. If a vaccination is offered 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 questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer.
2. 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.

Screening Questions

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential. This means separate from their regular personnel file.

Confidentiality
Reminder

Question:

Can we ask an employee to show proof of receipt of a COVID-19 vaccination?

Proof of Receipt

Yes, but don't ask why if they haven't gotten it.

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 these questions 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 employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

Proof of Receipt

Question

What if an employee who is exempt due to a bona fide disability poses a health risk to our other employees?

Disability
Exemption

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 four factors in determining whether a direct threat exists:

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

Disability Exemption

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 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 automatically terminate the worker.

Request for
Disability
Exemption

Great, but what should I do now?

1. Organize a vaccine committee
2. Decide on workplace vaccine policy and incentives
3. Decide whether to collect information and how to do so (ex: use iSolved to track who has received a vaccination, upload photo of vaccination card). Who will do this? Employees? Managers? HR?
4. Decide who will field questions and exemption requests and process for that
5. Decide on whether you will use FFCRA leave to compensate employees seeking vaccination and/or unable to work due to side effects. (April 1 – Sept 30)
6. Develop communications plan

To Do List

What else should I consider?

Whether vaccination is at the workplace or in the community, employers should:

- Offer flexible, non-punitive sick leave options (e.g., FFCRA paid sick leave) for employees with signs and symptoms after vaccination.
- Allow time for vaccine confidence to grow. Workers who are hesitant at first may become more confident after seeing coworkers get vaccinated. Employers with an onsite clinic should offer more than one opportunity for vaccination. Mobile clinics can return to a worksite multiple times on a rotating schedule. Employers using community locations can provide supportive policies (e.g., paid leave, transportation support) for an extended period of time.
- Ask organizations and individuals who are respected in employee communities to help you build confidence in COVID-19 vaccines.

Best Practices

What else should I consider?

- **Share key messages with staff through breakroom posters, emails, and other channels. Emphasize the benefits of protecting themselves, their families, co-workers, and community.**
- **Encourage your leaders to be vaccine champions. These leaders should reflect the diversity of the workforce. Invite them to share with staff their personal reasons for getting vaccinated and remind staff why it's important to be vaccinated.**
- **Continue to follow common mask and social distancing guidelines**

Best Practices

Question:

If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?

Request for
Religious
Exemption

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 reasonable 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.

Request for Religious Exemption

Question:

What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?

Unable to Provide
Exemption or
Reasonable
Accommodation

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 if any other rights apply under the EEO laws or other federal, state, and local authorities.

Unable to Provide
Exemption or
Reasonable
Accommodation

**Submit questions via the Q&A
function on your screen!**

Or send to
questions@dominionpayroll.com

Questions?

Stay safe out there!

Thank you