



Vaccines in the Workplace

This webinar will begin shortly!

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Meet today's panelists:



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The Equal Employment Opportunity Commission (EEOC) updated its vaccine guidance on December 16, 2020. It's reasonable to expect additional updates in 2021, but for now, the EEOC is the place to go for guidance in terms of what you the employer may (or may not) require in terms of the vaccine in your workplace.

EEOC

Question:

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

Vaccine Policy

You *should* have a policy in place.

Mandatory – Risks & Considerations

- Whereas the EEOC says it's permissible to mandate the vaccine in your workplace under *federal* law, state law might say otherwise. There are lawsuits pending in several states with the intent of protecting employees who object to the vaccine.
- 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.

Vaccine Policy

Voluntary

- More risk-averse option right now
- Incentivizing is very risky unless everyone gets the reward (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.
- Continue to require masks and social distancing even after people are vaccinated.
- Allow paid time off for side effects.

Vaccine Policy

Question:

Employees may claim to have a disability or a religious belief just 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:

Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

Disability Related
Inquiry

No. 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 employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

Disability Related Inquiry

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 disability?

Request for
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

Request for 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

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 them via the Q&A function on
your screen!**

Or send to
questions@dominionpayroll.com

Questions?

Stay safe out there!

Thank you