

EEOC Issues Guidance on Employer COVID-19 Vaccination Policies

Alert

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On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) provided guidance to employers considering mandating or encouraging their employees to be vaccinated for COVID-19. The EEOC promulgated the guidance in an update to the commission's updated technical assistance publication, ["What You Should Know About COVID-19, the ADA, the Rehabilitation Act, and Other EEO Laws."](#) The vaccination guidance is found in Section K.

In sum, the EEOC guidance allows for employers to implement mandatory vaccination policies subject to business necessity, but it reinforces the importance of a thorough process in implementing such a policy and providing accommodations to employees and applicants who indicate that they cannot be vaccinated for religious or disability-related reasons.

Some highlights of the guidance include:

- A vaccination is not a "medical examination" as defined by the ADA, but the necessary pre-vaccination medical screening questions are a medical examination. This is relevant to employers that will administer vaccines to their employees themselves, such as through an occupational health nurse. Such employers must ensure that pre-vaccine medical screening meets the ADA's requirement of being job-related and consistent with business necessity. To meet the standard, the employer must reasonably believe, based on objective evidence, that employees who do not answer the questions and thereby do not receive a vaccine will pose a direct threat to health and safety, thus necessitating the pre-vaccine medical screening. (See Questions K.1 and K.2)
- Employers may impose a safety-based qualification standard, such as a vaccine requirement. Before deciding to implement a vaccination requirement, employers should analyze whether that requirement

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will screen out individuals with a disability. If so, the requirement can be implemented only if the employer determines that the unvaccinated employees pose a direct threat to health or safety of themselves or others. To determine whether a direct threat exists, the employer should analyze four factors: 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. The employer may consider the risk that unvaccinated employees may infect others in its analysis. (See Questions K.5-K.7)

- If an employee indicates they are unable to be vaccinated because of a disability, the employer must engage in the interactive process with the employee to determine whether there is a reasonable accommodation—that is not an undue hardship—that will enable the employee to perform the essential functions of their position. The interactive process must be specific to the workplace and the employee's position. (See Question K.5)
- Similarly, if an employee indicates that their sincerely held religious beliefs prevent them from being vaccinated, the employer must provide a reasonable accommodation unless the accommodation would pose an undue hardship to the employer. (See Question K.6)

The guidance reminds employers that, if no reasonable accommodation of a disability or religious belief will allow the employee to safely work in the workplace, the employer should not automatically terminate the worker's employment. The guidance expressly notes that allowing an employee to work remotely may be an appropriate reasonable accommodation. (See Question K.7)

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