

EEOC Vaccine Alert!

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Employers must be mindful of employment laws when making decisions related to the COVID-19 vaccination. On December 16, 2020 the EEOC issued updated guidance regarding vaccine requirements for employees under applicable non-discrimination laws. These federal rules generally apply to employers of 15 or more, but businesses must also be mindful of state and local rules and regulations, which can be different from the federal standards:

Q1. Is the administration of a COVID-19 vaccination to an employee by an employer or third party contracting with the employer to administer the vaccine a “medical examination” for purposes of the ADA?

A1. No. The vaccination itself is not a medical examination.

Q2. Some employers may require employees to receive vaccination directly from the employer or a third party contracting with the employer to administer the vaccine (e.g., in an on-site vaccination clinic). In this instance, if the entity administering the vaccine asks pre-vaccination screening questions as recommended by the CDC to safely administer the vaccine, are these questions subject to the ADA standards for disability-related inquiries?

A2. Yes. If the employer requires an employee to receive the vaccination, and an entity contracts with the employer to administer the vaccine, the employer must show that these disability-related screening inquiries are “job-related and consistent with business necessity.” This is a specific standard which should be considered thoughtfully, with guidance from legal counsel if necessary.

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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 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.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

One way to avoid this is requiring vaccination from an outside provider. If an employee receives an employer-required vaccination from an outside provider 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. As discussed in our other [article](#), the employer should be mindful of the CARES Act's requirements for a group health plan's responsibility for payment of the vaccine, regardless of where administered.

Q3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

A3. No. However, follow-up 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.

Q4. 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 or religious objection?

A4. For employees with a disability, the ADA requires employers to explore reasonable accommodations in this instance, such as exemption from vaccination or remote work. The employer should not automatically jump to the conclusion of excluding the employee from the building or terminating the employee. There is no one-size-fits-all approach to handling disability-related requests to forego vaccination; rather, the course of action will depend on a number of factors relating to the employee's unique job position and interaction with other employees, clients, customers, or vendors.

Similarly, Title VII requires employers to explore religious accommodations for those employees with a sincerely held religious practice or belief. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the

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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. Moreover, employers are only obligated to accommodate "religious" beliefs or comprehensive religious-type philosophical systems. Other types of beliefs, such as political, scientific, or medical beliefs, are not protected by Title VII.

Accommodations may be denied on the basis of undue hardship, which is a legal inquiry which must be considered thoughtfully with the advice of counsel if necessary. Compared to ADA accommodations, Title VII religious accommodation requests are less demanding on the employer, in that the accommodations granted need only be provided if they would impose "de minimis" burdens on the employer. If no reasonable accommodation is available, the EEOC says it would be lawful to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers are advised to check with legal counsel to determine if any other rights apply under other federal, state, or local requirements.

Q5. Is Title II of the Genetic Information Nondiscrimination Act (GINA) implicated when an employer requires COVID-19 vaccinations?

A5. The administration of the vaccine itself, or proof of vaccination, does not implicate Title II of GINA, which prohibits the mandatory disclosure or acquisition of genetic information to make employment decisions.

As discussed above, pre-vaccination medical screening questions are likely to elicit information about disability, and may elicit information about genetic information in violation of GINA. Again, GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information. Therefore, screening questions asked by an outside provider would not run afoul of GINA, so long as that information is not requested by or disclosed to employers in any way.

Additional discussion on whether an employer can make the COVID-19 vaccine mandatory for employees may be found in our **November 2020 Newsflash**.

The Employment, Labor, and Benefits Department at Koley Jessen is closely monitoring the COVID-19 pandemic and its effect on the workforce. Employers with questions are encouraged to contact a member of our team.