

# CONSIDERING WHETHER TO MANDATE A COVID-19 VACCINATION? EEOC RELEASES NEW GUIDANCE

*Hodgson Russ Labor & Employment Alert*  
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On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidance regarding COVID-19 vaccinations. The guidance attempts to answer many pressing employer questions, but does not have the force of law or regulation. Rather, it offers the EEOC’s view on the application of existing federal equal employment laws to the COVID-19 vaccine in the workplace. The key takeaways from the EEOC’s guidance follow.

## Mandatory Vaccine Policies

- An employer may require its employees to obtain the COVID-19 vaccine **if** the employer considers potential accommodations for individuals due to their disabilities or sincerely held religious beliefs.

## Vaccine Administration & Pre-Screening Questions

- The administration of a COVID-19 vaccine by an employer or a third party with whom the employer contracts to administer the vaccine is not a “medical examination” under the Americans with Disabilities Act (“ADA”), so the ADA’s limitations on medical examinations do not apply.
- Vaccination pre-screening questions (which are recommended by the CDC) are likely to elicit disability-related information. If the vaccine is administered by the employer (or a contractor of the employer), any such pre-screening questions would likely constitute disability-related inquiries. To ask such questions, an employer must be able to demonstrate that it has 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.
- If an employer-mandated vaccine is administered by an unrelated third-party, any pre-screening questions posed will not constitute a disability-related inquiry. So, an employer that requires vaccinations be obtained from an unrelated third-party (e.g., pharmacy) avoids this complication.

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### Proof of Vaccination

- An employer may ask or require an employee to provide proof that he or she received a COVID-19 vaccination. According to the EEOC, doing so is not considered a disability-related inquiry (i.e., a question likely to elicit information about a disability) as there are many reasons that may explain why an employee has not been vaccinated which may or may not be disability-related. This position is arguably at odds with at least one federal court which has held that asking whether an employee is immune to a disease is a disability-related inquiry. The EEOC agrees, however, that follow-up questions from the employer (e.g., asking why an individual did not receive a vaccination) may elicit information about a disability. If so, such questions would need to be “job-related and consistent with business necessity” in order to be asked.

### Requests for Vaccine Policy Accommodations

- If an employee requests an accommodation from a vaccination requirement based on 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 reduced by reasonable accommodation” by individually assessing the following factors (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.
  - 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. 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. Employers will also need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

### GINA Implications

- The Genetic Information Non-Discrimination Act prohibits an employer from asking for an employee’s genetic information, but does not prohibit an employee’s own medical health care provider from asking such questions. When considering vaccine pre-screening questions (if the employer or its contractor will administer the vaccine), an employer should avoid asking for information that could reveal genetic information or family medical history.

This is a fast-developing area of law, and while this guidance from the EEOC is welcome, it is almost certainly not the last word on this hot-button issue. If you are considering whether to mandate vaccines for employees, or you have any related questions, please contact Lura Bechtel (416.595.2693), John Godwin (716.848.1357), or any other member of our Labor & Employment practice.

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