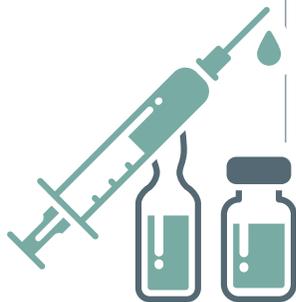


# VACCINE CONSIDERATIONS FOR EMPLOYERS

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As vaccines against COVID-19 become available, many employers are trying to decide what role they can or should take in getting their employees vaccinated. Many employers are interested in protecting their employees, their employees' families, and their customers as well as increasing the number of vaccinated people to accelerate "herd immunity."

Below are some questions employers may be asking along with excerpts from Equal Employment Opportunity Commission guidance concerning COVID-19 vaccinations. This information is available on the EEOC's website ([FAQs issued by the Equal Employment Opportunity Commission](#)) and is intended as a reference only and not as legal advice. It does not attempt to cover the various state laws that may impact issues surrounding COVID-19 vaccinations in the workplace. **Nothing here is a substitute for consulting with appropriate outside counsel before taking action.**

**1 Can my business mandate that employees are vaccinated?** The EEOC has not stated definitively whether an employer can or should mandate that its employees receive COVID-19 vaccinations. It has, however, provided considerations for those who do. In particular, the EEOC has said:

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.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: 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. 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. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) K.5. (Dec. 16, 2020).

**2 Can I require one segment of my workforce get vaccinated but not others?**

See discussion above.

**3 Can I require my employees to show me proof that they have been vaccinated?**

In considering concerns under the ADA by requiring proof of vaccination, the EEOC provides:

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. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) K.3 (Dec. 16, 2020).

Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate the Genetic Information Nondisclosure Act (GINA) because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) K.8. (Dec. 16, 2020).

**4 Can I require my employees to take a temperature before coming into the business?**

According to the EEOC:

Generally, measuring an employee’s body temperature is considered a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) A.3. (Dec. 16, 2020).

**5 Can I have my employees and their families vaccinated at my business, warehouse, parking lot?**

Based on the EEOC’s guidance:

The vaccination itself is not a medical examination. As the EEOC explained in [guidance on disability-related inquiries and medical examinations](#), 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.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are “job-related and consistent with business necessity.” [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) K.1. (Dec. 16, 2020).

By contrast, 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. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. [42 U.S.C. 12112\(d\)\(4\)\(B\); 29 C.F.R. 1630.14\(d\)](#). 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. Second, 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 questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program [confidential](#). *EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”* K.2. (Dec. 16, 2020).

## **6 Can I reduce the hours or shift for employees who fail to get vaccinated?**

Similar to the EEOC guidance referenced above under Question 1:

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.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: 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.

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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accept a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies. See also *EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”* Section J, EEO rights relating to pregnancy.

## **7 What if an employee refuses to be vaccinated due to religious belief?**

The EEOC advises:

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. Courts have defined “undue hardship” 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. *EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”* K.6. (Dec. 16, 2020).

## **8 What if a health condition or disability prevents an employee from being vaccinated?**

EEOC guidance states:

Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue

hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, [www.askjan.org](http://www.askjan.org). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in [Question K.7.](#), there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: [www.osha.gov/SLTC/covid-19/](http://www.osha.gov/SLTC/covid-19/).

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#). *EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," K.5. (Dec. 16, 2020).*

## **9 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? Can I fire an employee for not getting vaccinated?**

The EEOC provides:

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. *EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," K.7. (Dec. 16, 2020).*

## **10 Can I ask my employees and their families if they have had COVID?**

According to the EEOC:

Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a [current list of symptoms](#).

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions. *EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," A.8. (Dec. 16, 2020).*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following [recommendations by the CDC](#) or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. *EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," A.9. (Dec. 16, 2020).*

The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19. *EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," A.10. (Dec. 16, 2020).*

## 11 Can I require my employees to have proof of a negative COVID test before I permit them to enter the worksite?

The EEOC guidance states:

The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus with pose a direct threat](#) to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following [recommendations by the CDC](#) or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA’s “business necessity” standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review [information](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require—to the greatest extent possible—that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” A.6.](#) (Dec. 16, 2020).

## 12 Can I require my employees to have proof that their family members have tested negatively for COVID before permitting them in the worksite?

According to the EEOC:

The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee’s potential exposure to COVID-19. [EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” A.10.](#) (Dec. 16, 2020).

For more on vaccine questions, including state-specific guidance and information, employer vaccine communication and strategy guidance, and reliable safety and efficacy information, visit [uschamber.com/vaccine](https://www.uschamber.com/vaccine).