

EEOC Guidance Update on COVID-19 Vaccines

Just as people were leaving work at the start of Memorial Day weekend, the Equal Employment Opportunity Commission (EEOC) quietly released guidance for employers about the COVID-19 vaccine as sections K.1.-K.21. The updated guidance is very detailed, but we are providing a summary that provides that major premises of the guidance. For detailed information, please go directly to the EEOC website, here: [EEOC Guidance](#)

- Employers may mandate employees receive the COVID-19 vaccinations as long as they also provide reasonable accommodations under Title VII, the Americans with Disabilities Act (ADA), and other EEOC considerations.
 - Title VII issues that must be considered are the disparate impact that a vaccine mandate may have on people who are in a protected group on the basis of their race, color, religion, sex, national origin, or age. For instance, access to the vaccine may be more difficult for some groups of workers.
 - The vaccine mandate cannot be applied differently for groups of workers based on disability, race, color, religion, national origin, age, genetic information, or sex – which includes pregnancy, sexual orientation, and gender identity.
 - Reasonable accommodations do not pose an undue hardship on the operation of the employer’s business. Examples of reasonable accommodation include:
 - Wearing a mask;
 - Social distancing;
 - Working a staggered shift;
 - Changing the work environment – e.g.: improved ventilation, physical barriers, telework, job reassignment where the risk is mitigated;
 - Periodic COVID-19 testing for that employee.
 - An employee does not need to mention the ADA or use the phrase “reasonable accommodation” in order to begin the reasonable accommodation colloquy.
 - As with all reasonable accommodations, employers cannot disclose that a person is receiving a reasonable accommodation, nor can the employer retaliate against anyone who is requesting an accommodation.
- Employees who are not vaccinated because of pregnancy may be entitled to adjustments to keep working if the employer makes modifications or exceptions for other employees. These modifications may be like those extended for accommodations due to religion or disability.
- Unvaccinated employees may remain in the workplace unless the employer can demonstrate that an unvaccinated person poses a direct threat and is a significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation.

- The “direct threat” analysis is as follows:
 - The duration of the risk;
 - The nature and severity of the potential harm;
 - The likelihood that the harm will occur; and
 - The imminence of the potential harm.
- This analysis should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19, for instance, the level of community spread.
- Employers MAY, but are not required, to provide employees with information to educate themselves. These may come from the federal government’s [vaccines.gov](https://www.vaccines.gov) website (and <https://www.vacunass.gov/> for Spanish speakers), the [Centers for Disease Control and Prevention tool kit](#) (use extends beyond essential workers), or their [local health departments](#).
- Requesting proof of vaccination is not a disability-related inquiry under the ADA and does not violate the Genetic Information Nondiscrimination Act (GINA).
- Proof of vaccination information is confidential medical information and must be treated as HIPAA protected.
- If employees are being vaccinated through an on-site program or by the employer’s agent:
 - Employers may ask screening questions if they are job-related and consistent with business necessity;
 - The screening questions are not to be considered a disability-related inquiry for purposes of the ADA;
 - Administration of the vaccine is not considered a medical examination pursuant to the ADA;
 - Responses to the screening questions are confidential medical information and is HIPAA protected; and
 - The screening questions should not include family medical history to avoid violating GINA.
- Employers may use incentives to encourage employee vaccination. These incentives cannot be so rich that they are considered coercive.
- Employers cannot use incentives to encourage employee’s family members to be vaccinated.

As with all things COVID-19, there is a lot of information to process in the EEOC updated guidance. Employers should consider consulting with their attorneys to ensure that any vaccination policy or program conforms with federal law. Again, for all of the detailed information, please go directly to the EEOC website to review the updates found in sections K.1.-K-21, found here: [EEOC Guidance](#).