

## Employer-Mandated COVID-19 Vaccinations Are EEOC Approved, With Limited Exceptions

### Related Practices

COVID-19 Task Force  
Employment Law and Litigation

By Peabody & Arnold on December 18, 2020

On the heels of the U.S. Food and Drug Administration's issuance of an Emergency Use Authorization for a COVID-19 vaccine, on December 16, 2020, the U.S. Equal Employment Opportunity Commission ("EEOC") issued [updated guidance](#) to address questions about the applicability of various equal opportunity laws to the requirement or availability of COVID-19 vaccinations in the workplace. More specifically, the EEOC has provided guidance on how employer-administered or required COVID-19 vaccinations may interact with the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act ("Title VII"), and the Genetic Information Nondiscrimination Act ("GINA"). As has been the case with most workplace impacts of the COVID-19 pandemic, while the guidance answers some key questions, it leaves yet more to be decided.

The ever-evolving nature of the pandemic and federal and state responses to it, including related to the accelerated approval of COVID-19 vaccinations, continue to create challenges for employers and their workforces. We expect that other state and federal agencies will follow the EEOC's lead and issue similar guidance. This post provides only an overview of some of the key issues identified by the EEOC in addressing the impact COVID-19 vaccinations may have on the workplace. Because of the complexity and individual-nature of many such challenges, we urge employers to consult with counsel for assistance in evaluating the legality, practicability, and advisability of a mandatory or voluntary COVID-19 vaccination program for their workforce.

### COVID-19 Vaccinations and the ADA, Title VII, and GINA

#### **ADA Implications – Disability-Related Inquiries, Direct Threats, and Reasonable Accommodations**

##### *Pre-Vaccination Screening May Be Deemed "Disability-Related" Inquiry*

While the administration of a COVID-19 vaccination does not constitute a "medical examination" under the ADA, pre-vaccination medical screening questions—which have been recommended by the Centers for Disease Control and Prevention ("CDC")—may be deemed "disability-related" under the ADA if they are likely to elicit information about a disability. For example, screening before an employer-mandated vaccination administered by the employer or someone contracted by the employer may be "disability-related" under the ADA and, therefore, the employer must be able to establish that the screening inquiries are "job-related and consistent with business necessity." In such instances, according to the EEOC, the employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the disability-related screening questions, and therefore does not receive the vaccination, will pose a "direct threat" (the definition of which is further described below) to the health or safety of himself/herself or others in the workplace.

In some circumstances, however, a pre-vaccination disability-related screening will not implicate the

ADA's "job-related and consistent with business necessity" standard. For example, the EEOC specifies that an employer need *not* meet such a test in the following two scenarios:

- **Voluntary Basis:** If an employer offers vaccinations on a voluntary basis, it must also make pre-screening, disability-related inquiries voluntary. In those circumstances, if an employee refuses to answer disability-related questions, the employer may decline to administer the vaccination so long as the employer does not otherwise retaliate against, intimidate, or threaten the employee for refusing to answer.
- **Employer-Required, But Third-Party Administered:** If an employee received an employer-required vaccination from a third party that does not contract with the employer (i.e. a pharmacy or health care provider), the ADA's restrictions would not apply to the pre-vaccination medical screening questions even if disability-related.

#### *Proof of Vaccination Is Not Considered "Disability-Related" Inquiry*

Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is *not* a disability-related inquiry. Nevertheless, subsequent follow-up questions, including why an employee has not or will not receive the vaccination, may elicit disability-related information and would be subject to the aforementioned "job-related and consistent with business necessity" standard in order to justify an employer's inquiry.

Should an employer choose to require proof of vaccination from a pharmacy or other third party, the employer may want to consider expressly warning employees not to provide any further medical information as part of their proof of vaccination so as to avoid implicating the ADA.

#### *Direct-Threat Analysis and Reasonable Accommodations*

The ADA permits employers to exclude employees from the workplace who present a "direct threat" to the health or safety of persons in the workplace. Employers, therefore, can require that employees be vaccinated to reduce that threat. In doing so, however, employers must be prepared to respond to employees who claim they are unable to be vaccinated because of a disability.

Before excluding an employee who is unable to be vaccinated as a result of a disability from the workplace, the employer must demonstrate that the unvaccinated employee presents a significant risk of substantial harm to health or safety that cannot be eliminated or reduced through reasonable accommodations. In other words, the employer must show, first, the existence of a "direct threat" and, second, that the threat cannot be reduced or eliminated by reasonable accommodation.

Whether a "direct threat" exists is assessed by analyzing the following four 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. A direct threat in these circumstances would include a determination that an unvaccinated individual would expose others in the workplace to COVID-19. Given preexisting guidance on community-spread of COVID-19 by the EEOC, CDC, and other government agencies, it likely will not be difficult for an employer to establish the existence of a direct threat in most workplace environments.

The more complex question will be whether the threat can adequately be reduced or eliminated by a

reasonable accommodation that does not pose an undue hardship for the employer. This question, as with all reasonable-accommodation requests, can only properly be answered through engagement in a flexible, interactive process between the employer and employee. Considerations involved in this assessment will likely include whether supporting documentation of the employee's claimed disability is necessary; the nature of the workforce and the unvaccinated employee's position; the prevalence in the workplace of employees who have been vaccinated; and the amount of contact between employees in the workplace, including with those whose vaccination status may be unknown. Employers are encouraged to consult public health standards and guidance, including from the CDC and Occupational Safety and Health Administration, in determining whether effective accommodations that do not pose an undue hardship are available and practicable under the circumstances.

If an employer determines that an unvaccinated employee poses a direct threat that cannot be reduced to an acceptable level by a reasonable accommodation without undue hardship, the employer can exclude the employee from physically entering the workplace. This, however, does not necessarily mean the employer can terminate the unvaccinated employee. In such cases, employers are advised to evaluate other employment laws that may apply.

#### *Confidentiality*

Employers, consistent with the ADA and other related laws, must keep employees' medical information, including information obtained during a vaccination program, confidential. The fact that employees have requested or are receiving a disability-related accommodation similarly must be kept confidential.

#### **Title VII Implications**

In addition to considering ADA-accommodation requests, employers with mandatory COVID-19 programs must be prepared to respond to and evaluate requests by employees claiming that their sincerely held religious beliefs, practices, or observances prevent them from receiving a COVID-19 vaccination. In such circumstances, employers must provide a reasonable accommodation unless it would pose an undue hardship under Title VII—defined as more than a *de minimis* cost or burden on the employer.

Questions are sure to arise as to what is a sincerely held religious belief, practice, or observance as opposed to a political belief or practice. The EEOC instructs employers to ordinarily assume an employee's request for religious accommodation is rooted in a sincerely held religious belief, practice, or observance because of the broadness of the definition of religion. Nevertheless, if an employer has an objective basis for questioning either the religious or sincere nature of the particular belief, practice, or observance, the employer may request additional supporting information to evaluate the request for accommodation.

#### **GINA Implications**

Title II of GINA generally prohibits employers from using genetic information to make decisions about the terms, conditions, and privileges of employment, or from acquiring or disclosing genetic information about employees except in very limited circumstances. As with the ADA, administering a COVID-19 vaccination or requiring proof of vaccination does not implicate GINA. Pre-vaccination screenings,

however, may implicate the statute if they involve inquiries seeking genetic information (i.e. information about family members' medical histories).

Until it is clear what the scope of COVID-19 vaccination screening checklists for contraindications are, the EEOC advises, employers may want to consider simply requesting proof of vaccination rather than administering the vaccine (and pre-screening) themselves. In such cases, it would be the best practice for employers to warn employees not to provide genetic information as part of their proof of vaccination. With such a warning, any genetic information received by the employer will be deemed inadvertent and not unlawful under GINA.

#### **Further Information about COVID-19 Vaccinations for Employers**

We will continue to monitor issues related to the impact COVID-19 vaccinations have on the workplace and how employers should position themselves for compliance with applicable employment and labor laws while maintaining the safety of their workforce and workplaces. This post provides a high-level summary only with regard to the EEOC's guidance on applicable equal opportunity laws. Other federal and state agencies are likely to weigh in with similar particularized guidance in the coming days and weeks. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group with any questions or for further information.