



# Can Employers Require Employees to Get a COVID-19 Vaccine?

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The short answer is yes: employers can mandate COVID-19 vaccinations. In response to the FDA's emergency use authorization of two different COVID-19 vaccines, the Equal Employment Opportunity Commission (EEOC) recently issued [updated guidance](#) regarding mandatory workplace vaccinations. While employers may mandate receipt of a COVID-19 vaccination as a pre-condition to re-enter the workplace, employer vaccine mandates are subject to several requirements and exceptions under the Americans with Disability Act (ADA), Title VII of the Civil Rights Act (Title VII), and Title II of the Genetic Information Nondiscrimination Act (GINA).

As vaccine distribution increases across the country, employers should keep several things in mind as they navigate vaccination issues in the workplace.

1.

## Can an Employer Terminate an Employee Who Refuses a COVID-19 Vaccine?

### **ADA Reasonable Accommodations: Direct Threat Analysis**

If an employee states that he or she cannot receive the vaccine because of a disability, an employer cannot exclude the unvaccinated employee from the workplace unless it shows that the 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 CFR 1630.2(r).

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." In its recent [guidance](#), the EEOC describes a scenario where it is permissible to mandate vaccination under the ADA, specifically, when an employee poses a "direct threat" to themselves or others by their physical presence in the workplace (without the vaccine).

The EEOC explains how an employer should evaluate whether to accommodate an employee who cannot receive the COVID-19 vaccination. The EEOC states, in relevant part:

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 accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely.

As with all accommodations, the employer and the employee must engage in an interactive process to ascertain the possibility of an accommodation that does not constitute an undue hardship (significant difficulty or expense) on the employer. Among other factors, the number of employees in the workplace 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 analysis. Whether the employee could be subject to termination would be fact-specific depending on the circumstances of the employment and the employee's essential job functions.

### **Title VII Accommodations: Religious Beliefs**

If an employee's religious belief, practice, or observance prevents the employee from receiving a vaccine, the employer must provide a reasonable accommodation for such religious belief unless it would pose an undue hardship under Title VII. "Undue hardship" under Title VII is defined differently (as compared to the ADA), as having more than a *de minimis* cost. EEOC guidance suggests that employers should ordinarily assume that a request for religious accommodation is based on a sincerely held religious belief. If an employer has an objective basis for questioning the religious nature or sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

2.

## **Is a COVID-19 Vaccine a Medical Examination? Can an Employer Request Proof of Vaccination?**

The ADA restricts when and how much medical information an employer may obtain from any employee. Any disability-related inquiries or medical exams are only permitted when "job related and consistent with business

necessity.”

In its recent guidance, the EEOC stated that an employer may administer vaccinations to its employees in accordance with the ADA. According to the EEOC, mere administration of the vaccine is not a medical examination because the employer is not seeking information about an individual’s medical condition or disability.

According to the CDC, however, an employer (or a health care provider) should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party) and asks these screening questions, those pre-vaccination medical screening questions are likely to elicit information about a disability and so must be “job-related and consistent with business necessity.” To meet this standard, an employer would need to have 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.

The EEOC describes 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, the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. An employer may decline to administer the vaccine to an employee who chooses not to answer these questions, but cannot 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. Employers must keep any employee medical information obtained in the course of the vaccination program confidential and separate from the employee’s regular personnel files.

An employer can also encourage, instead of mandate, COVID-19 vaccination but require employees to show proof of COVID-19 vaccination (which would not be a disability related inquiry according to the EEOC). However, the employer also needs to be careful about how to handle that process. Employers should advise employees not to provide any other medical information when providing proof of vaccination. Employers may also question why an employee is unvaccinated, but such questions must be “job-related and consistent with business necessity.”

3.

## GINA Issues

GINA prohibits genetic information discrimination in employment. GINA defines medical information to include: information about genetic tests of an individual or a family member; information about the manifestation of disease or disorder in a family member; information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by an individual or family member of an individual; and genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

While GINA is not necessarily implicated when an employer administers a vaccine to its employees, pre-vaccination medical screening questions might also implicate GINA. If the pre-vaccination screening questions cover genetic information, such as family medical history, these questions may run afoul of GINA. Employers may want to request proof of vaccination instead of administering the vaccine themselves.

4.

## The Effect of Emergency Use Authorization on Vaccine Mandates

The FDA granted Emergency Use Authorization to two COVID-19 vaccines. This process is different than approval under FDA vaccine licensure. An Emergency Use Authorization is a mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies. Under an EUA, the FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products, in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.

The FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, that the FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product. The FDA has provided two fact sheets, one for the [Moderna vaccine](#) and one for the [Pfizer vaccine](#), communicating this information. Employers who choose to administer one of the COVID-19 vaccines to employees while the vaccine is under an EUA must provide this information to their employees.

5.

## Conclusion

Although the EEOC has advised that employers may mandate vaccinations, this does not mean employers must or should mandate vaccinations. Some employers have taken the position that they will promote and facilitate COVID-19 vaccinations rather than require them. Others have stated that they will urge employees to receive the vaccine and even provide financial incentives instead of imposing an outright mandate. It also remains to be seen whether New York State will mandate vaccinations. (A NYS assembly [bill](#) has already been proposed that would mandate the vaccination of all individuals or groups of individuals who, as shown by clinical data, are proven to be safe to receive a COVID-19 vaccine if public health officials determine that residents of New York State are not developing sufficient immunity from COVID-19.)

If an employer is going to mandate vaccinations, additional details such as: (1) physical administration of the vaccine; (2) pre-screening questions; and (3) the confidentiality of medical information should be addressed beforehand. Employers should consider what to include in a vaccination policy and a communications plan as wider availability of the vaccine draws closer. Employers are encouraged to consult with legal counsel to ensure compliance with the myriad of responsibilities and requirements as they apply to individual businesses and

employees.

If you have any questions regarding any aspect of employment law and/or the implications of COVID-19 on your place of business, please contact James G. Ryan at 516-357-3750 or via email at [JRyan@cullenllp.com](mailto:JRyan@cullenllp.com), Thomas B. Wassel at 516-357-3868 or via email at [TWassel@cullenllp.com](mailto:TWassel@cullenllp.com), Hayley B. Dryer at 516-357-3745 or via email at [HDryer@cullenllp.com](mailto:HDryer@cullenllp.com) or Daniel Becker at 516-357-3788 or [DBecker@cullenllp.com](mailto:DBecker@cullenllp.com).

Please note that this is a general overview of the law and does not constitute legal advice.

## Practices

- Labor and Employment