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COVID -19 VACCINATIONS – Frequently Asked Questions

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Employer driven requirements and/or incentives for vaccination against COVID-19 are a current hot topic. This coincides with an increased public campaign by the federal government and health officials to support vaccination of all eligible individuals against COVID-19. Before imposing workplace policies in this area, it is advisable that employers wishing to require or incentivize employees to get vaccinated against COVID-19 consider the myriad federal and individual state laws that could govern any such policies. The federal laws employers should be aware of are the Equal Employment Opportunity laws, particularly the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and the Genetic Information Nondiscrimination Act (GINA). In addition, as of early August, 2021, 20 states have enacted laws and policies governing COVID-19 protocols in the workplace and private establishments and more are under consideration.

This document will focus on the federal laws surrounding vaccination incentives and requirements in the workplace. Employers are encouraged to review any and all state policies on vaccination incentives or requirements in the workplace as well.

MANDATORY VACCINATION PROGRAMS

May an employer require all employees physically entering their workplace be vaccinated for COVID-19?

The short answer is yes. However, employers should be aware of the impact of the ADA, Title VII, and GINA before devising and implementing such a requirement, as well as the law in the state where the workplace is located. The policy must be clearly stated, communicated and applicable to all employees and ownership of the business. Sufficient time must be provided for employees to comply, and it is advisable that employers furnish information and support regarding access to the vaccines. Any policy should also explicitly state what documentation is acceptable as proof of vaccination. Additionally, any employer requiring employees to be vaccinated for COVID-19 should be prepared for any potential legal challenge from an employee under the above-mentioned laws to the vaccination requirement.

If there is a vaccination requirement, what can an employer do if an employee refuses to get vaccinated?

Generally, if an employee refuses to get vaccinated before reporting to work, you may take appropriate employment actions, i.e., terminating the employee unless the

employee is in a protected class under federal law that would exempt them from such a requirement. These exemptions revolve generally around health and religious beliefs. If an employee notifies you of a mental or physical disability or sincerely held religious belief that they feel precludes them from being vaccinated the employer must conduct a thorough review of the situation under the ADA and Title VII. If, after this review, it is determined that an employee is not entitled to a reasonable accommodation under either of those acts, then an employer may take appropriate action to terminate the employment of the employee if they do not obtain or provide proof of receiving the vaccine.

On July 6, 2021, the Department of Justice (DOJ) issued an opinion “[w]hether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization”. DOJ evaluated the issue because the COVID-19 vaccine is approved only under emergency provisions and has not received formal approval through the regular Food and Drug Administration process. This opinion states that employers and private business are not restricted from requiring proof of vaccination when the underlying vaccine has “Emergency Use Authorization” as the three available COVID-19 vaccinations do. This is not binding on any court but can be seen as a persuasive argument from the DOJ. Finally, though DOJ issued this opinion, employers must ensure that their state has not restricted the ability to require proof of vaccination.

If I make it a requirement that all employees get vaccinated against COVID-19 before entering my workplace, what must I do under the ADA if an employee tells me they cannot get vaccinated because of a medical condition?

Generally, an employee with a disability, including pregnancy, that precludes them from getting vaccinated may request a reasonable accommodation from an employer’s vaccination requirement. The request does not have to be formal in nature and the term “reasonable accommodation” does not have to be used (i.e., an employee telling their manager they cannot get the vaccine because of a medical condition is sufficient to trigger the ADA). Finally, the request does not have to come from the employee, it can be a family member or other representative.

Employers and managers charged with enforcing a vaccination requirement should develop in advance protocols to deal with any requests for reasonable accommodation. See <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>.

Once the employer receives the request for accommodation, the employer must determine if a reasonable accommodation exists that does not pose an undue hardship on the employer’s business operation. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

If the employee, with a reasonable accommodation, would still pose a “direct threat” to the health or safety of the employee or others in the workplace an employer may still

require vaccination to enter the workplace if the vaccine requirement is job-related and consistent with the business necessity (i.e., to ensure the safety and health of other employees, the employer, and the public who interact with the employer's employees). A "direct threat" means a "significant risk of substantial harm" that cannot be eliminated by a reasonable accommodation.

To determine if an employee who is not vaccinated due to disability is a "direct threat" the employer must conduct an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (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. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If after this assessment a determination is made that no reasonable accommodation exists that would not place an undue hardship on the employer, the employer may require the employee to be vaccinated or show proof of vaccination if the vaccination requirement is a universally applied qualifying safety-standard for employment that is job-related and consistent with business necessity. Employers are advised to seek legal counsel if an employee represents that they have a disability that precludes them from being vaccinated for COVID-19 before an employer decides not to provide a reasonable accommodation because it would not reduce a direct threat.

If I make it a requirement that all employees get vaccinated against COVID-19 before entering my workplace, what must I do under Title VII if an employee tells me they cannot get vaccinated because it is against their religion or a sincerely held moral or ethical belief?

If an employee tells you they cannot get vaccinated because of their religion or sincerely held moral or ethical belief, you should generally assume that this is a request for accommodation based on a sincerely held religious belief. There is little room to question this, unless an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. In such a case, the employer would be justified in requesting additional supporting information.

If the employer determines that the belief meets the standard of protection under Title VII, the employee is entitled to a reasonable accommodation unless such accommodation would cause an undue hardship on the employer. The undue hardship defense to providing a reasonable accommodation requires a showing that the

accommodation in a particular case poses a more than *de minimis* cost burden on the employer's operation of their business.

Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work.

Employers are advised to seek legal counsel if an employee represents that they have a sincerely held religious belief or moral or ethical belief that precludes them from being vaccinated for COVID-19 before an employer decides not to provide a reasonable accommodation.

If I make vaccination for COVID-19 a requirement before entering the workplace, must I arrange for workers to be vaccinated?

No, you can rely on the healthcare system in the community to provide vaccination to your employees. However, you should be aware that having a vaccination requirement and not providing the ability of your employees to be vaccinated could cause a disparate impact on some employees. Because some individuals or demographic groups face more challenges in obtaining a COVID-19 vaccination than others, some employees may be negatively impacted by a vaccination requirement when the employer is not providing the vaccination to its employees.

When determining how to implement a vaccination requirement, employers are encouraged to seek legal counsel to ensure that no disparate impact occurs. It is advised that employers provide vaccination site information at a minimum if imposing a requirement and consider other methods of supporting employee access such as transportation and time off.

How can I determine if an employee has been vaccinated in the community?

You are permitted to ask employees to provide proof of vaccination from a community provider if you are not providing the vaccinations to your employees directly or through an arranged third-party. Any documentation an employee provides is considered confidential medical information and must be stored properly and separate from the employee's personnel file.

If you do decide to make vaccination a requirement to enter the workplace, the EEOC encourages employers to notify all employees that you will accept requests for reasonable accommodation. Again, any request for reasonable accommodation should be reviewed with your legal counsel.

If I decide to make vaccination a requirement to enter the workplace and want to arrange for my employees to be vaccinated by myself or an agent (i.e., someone with the ability to act on behalf of, or at the direction of, the employer) are there any additional ADA concerns regarding the pre-screening questions to receive the vaccination?

Yes, employers arranging for their employees to be vaccinated through a mandatory vaccination program will first have to ascertain whether the requirement of receiving the COVID-19 vaccination is job related and consistent with business necessity. To meet this standard of being job related and consistent with business necessity the EEOC has stated that “an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee’s own health or safety or to the health and safety of others in the workplace.”

VOLUNTARY VACCINATION PROGRAMS

If I decide to encourage vaccination of my employees through arranging for my employees to be vaccinated by myself or an agent (i.e., someone with the ability to act on behalf of, or at the direction of, the employer) are there any additional ADA concerns regarding the pre-screening questions to receive the vaccination?

No, you do not have to show that the pre-screening questions of job related and consistent with business necessity. Because you are making the vaccination voluntary an employee can choose not to answer the questions and therefore not be vaccinated without fear of reprisal. The ADA prohibits an employer taking **ANY** adverse action against an employee for refusing to participate in a voluntary vaccination program. Further any information collected in a voluntary vaccination program is considered confidential medical information and is required to be kept separate from an employee’s personnel file.

EMPLOYER INCENTIVES TO BE VACCINATED

May I offer an incentive to my employees to be vaccinated by myself or an agent (i.e., someone with the ability to act on behalf of, or at the direction of, the employer)?

Yes, provided the incentive is not so substantial as to be coercive. Because vaccination requires employers or their agents to ask the mandatory pre-screening questions that may reveal a disability, an employee may feel pressured to disclose protected medical information under the ADA. Further, any information collected in a voluntary vaccination program is considered confidential medical information and is required to be kept separate from an employee’s personnel file.

May I offer an incentive to my employees or their family members for providing proof that they were vaccinated in the community?

Yes, requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Further, because it is a free choice by the employee to provide you with such documentation or to get the vaccination, there is no issue with the size of the incentive, unlike with the employer sponsored vaccination program. As stated previously any vaccination related information is confidential medical information and is required to be kept separate from an employee's personnel file.

May I offer an incentive to my employees for having a FAMILY MEMBER vaccinated by myself or an agent (i.e., someone with the ability to act on behalf of, or at the direction of, the employer)?

No, under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. The person administering the vaccination would be required to ask the pre-screening questions to the family member, thus obtaining family medical history information of the employee through providing incentives in exchange for genetic information which is prohibited under GINA. The employer is still able to provide the vaccination to the family member, however no incentives can be provided for the family member receiving the vaccine.

Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

NON-DISCRIMINATORY APPLICATION

If I make vaccines available to a certain group of my employees either on a voluntary or mandatory basis, is that permissible?

Most likely not. It would be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason. Just like with any employment policy employers should be mindful of the discriminatory or disparate impact that the policy would have in violation of EEO laws.

I have H-2A employees that live in communal housing and domestic employees that do not live in communal housing. Can I require my H-2A employees to get vaccinated while not requiring my domestic employees?

Perhaps. An argument could be made that the legitimate non-discriminatory reason for requiring the H-2A employees to be vaccinated is their proximity to each other in the communal housing that can create a situation ideal for the spread of the COVID-19

virus. However, a counter argument could be made that you are discriminating against the H-2A employees based on their national origin, or vice versa that your domestic employees are being discriminated against because they are U.S. citizens, so a uniform policy is preferable.

H-2 PROGRAM SPECIFIC ISSUES

I employ H-2A/H-2B employees at my workplace. Prior to filing my application with the Department of Labor (DOL) I had not decided to require vaccinations to enter the workplace or provide incentives to have employees get vaccinated. Am I able to now make vaccination a condition of employment or provide an incentive to my employees to get vaccinated?

Technically, no. When you filed your job order and application with DOL you included all conditions of employment in the job order. If the requirement to be vaccinated before entering the workplace or the incentives to be vaccinated were not disclosed, you technically should not now change the conditions of employment. DOL could view the providing of incentives or providing of the vaccine as an inducement of employment that a U.S. worker would have seen as a benefit and therefore you withheld beneficial terms of employment that would have attracted a U.S. worker. DOL could also view it that an H-2A/H-2B worker could have seen those terms as a negative that would have caused them to decline the employment opportunity and now are required to return home early because of a change in the employment conditions invoking additional consequences to the employer such as unlawful termination and period of pay requirements.

I am preparing to file an upcoming H-2A/H-2B application with DOL. I have decided to require vaccinations to enter the workplace, or I am providing an incentive to have employees get vaccinated. Should I include this information in my job order?

Yes, the only way to ensure that these conditions or benefits of employment are not later seen by DOL as being misleading to the foreign worker or the U.S. worker is to include these material terms and conditions in the job order before being approved by DOL.