# Coronavirus (COVID-19): Top 4 Employer Questions About Vaccines

As COVID vaccines are being rolled out, employers are grappling with what it means for their workplace and their employees. While there are many questions and unknowns, guidance is starting to trickle in to assist employees in determining how to address the issue of COVID vaccinations in their workplace. Below are four of the top questions employers facing:

## 1. May employers require employees to get a vaccine?

Generally, yes. An employer may require employees to get vaccinated as long as the vaccination is job-related and consistent with business necessity. For example, employees in certain workplace settings such as health care, education and hospitality may pose a clear "direct threat" to the health and safety of others thereby lending support to a justifiable business reason.

Notably, the Equal Employment Opportunity Commission (EEOC) updated its [Pandemic Preparedness in the Workplace Guidance](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws) (Section K) to address COVID vaccinations and whether employers may mandate them. According to the EEOC, employers may, in fact, require employees to get vaccinated because the vaccination is not considered a "medical examination" which would be prohibited under the Americans with Disabilities Act (ADA).  The EEOC also stated that certain pre-screening questions are allowed, but employers should be careful not to implicate the ADA and the Genetic Information Nondiscrimination Act (GINA) by soliciting the disclosure of protected medical and genetic information.

Additionally, the EEOC stated that employers may indeed require proof of vaccination but should warn employees not to provide any medical or genetic information as part of the proof in order to avoid implicating the ADA and GINA.

Importantly, the EEOC reiterated that any vaccination policy must include a procedure for employees to request an exemption - a reasonable accommodation on the basis of a disability under the ADA or a sincerely held religious belief under Title VII of the Civil Rights Act of 1964 (Title VII). Each accommodation request is fact-sensitive and must be evaluated on its own merit. Employers should make sure to document and engage in the interactive process upon a request for an accommodation.

In the event that 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 an employer may exclude the employee from the workplace, according to the EEOC.  However, this does not mean the employer may automatically terminate the worker as employers should determine whether the employee has any other rights apply under the EEO laws or other federal, state, and local authorities.

Also, employers should note that under the General Duty Clause of the Occupational Safety and Health Act, an employer has a duty to rid the workplace of all known hazards. COVID-19 has been recognized as a known hazard, so employers should do what they can to eliminate it from their workplaces. This could lend support to an employer's decision to mandate vaccinations, depending on the nature of its business. However the Occupational Safety and Health Administration (OSHA) has not issued any guidance directly addressing the vaccination of employees against COVID-19.

Employers with a unionized workforce should also know that a vaccination mandate may be considered a mandatory subject of collective bargaining, which gives rise to a duty to bargain with the union prior to implementing such a policy. However, employers should review their existing collective bargaining agreement to see if it provides for a management right to implement this type of decision without having to come to the bargaining table.

## 2. What should be included in a vaccination policy?

A vaccination policy should explain the employer's position, whether it is requiring employees to get the vaccine or advising them that it is voluntary.  If the employer is mandating that employees get vaccinated, then the policy should state why getting the COVID vaccination is job-related and consistent with business necessity. Employers should consider providing insight regarding their reasoning, e.g., they are following public health guidance and/or striving to protect employees and customers against COVID-19. This can help assuage employee concerns and questions.

All policies should also be explicit about who is covered under the policy, e.g., all employees. Importantly, as noted above, the policy must include the process for submitting requests for exemptions/reasonable accommodations based on a disability or a sincerely held religious belief, and the fact that medical information submitted will be kept confidential in accordance with the ADA.

Employers that choose to have employees submit proof of vaccination should address the type of proof required (e.g., date and time but not medical or genetic information) and where the proof should be submitted. The consequences for refusing to get vaccinated, e.g., exclusion from the workplace, should also be addressed in the policy.

## 3. May employers require proof of vaccination?

Yes. According to the EEOC, requesting proof from an employee that they have been vaccinated against COVID-19 is not likely to elicit information about a disability and therefore is not a disability-related inquiry.  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 or genetic information as part of the proof in order to avoid implicating the ADA and GINA.

However, subsequent questions may run the risk of eliciting information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."

## 4. What may an employer do if an employee resists getting a vaccine?

Even though employees in the private sector are typically at-will and therefore may be terminated for any lawful cause, an employer should nonetheless tread carefully if confronted with an employee who resists or outright refuses to get vaccinated.

For instance, an employee may object to getting vaccinated due to a medical condition, a disability or a sincerely held religious belief. As discussed above, an employee may then request a reasonable accommodation on the basis of a disability under the ADA (or applicable state laws) or a sincerely held religious belief under Title VII. At that point, employers must engage in the interactive process.  If no accommodation is possible, then the employer may exclude that employee from the workplace.

Also, an employee may raise concerns or fears about the safety of COVID vaccines, most likely due to the fast development timelines. Employers should also be prepared for this type of objection as some may have personal thoughts or beliefs about the vaccine and the virus, in general. This division among the workforce may lead to employee discussions and other protected activity that may be protected under Section 7 of the National Labor Relations Act.

If an employer determines that a number of its employees may resist getting a COVID vaccine, it may want to consider having a voluntary policy rather than a compulsory one. Otherwise, it may be faced with excluding or terminating a large segment of its workforce for noncompliance. That will undoubtedly endanger the ability for the business to continue operating effectively as well as breed division in the workplace.