

EEOC Issues COVID-19 Vaccination Guidance

On Wednesday, December 16, the Equal Employment Opportunity Commission (EEOC) released new guidance (the Guidance) for employers regarding COVID-19 vaccinations. While the Guidance offers some insight for employers who are considering offering vaccinations to employees or requiring that employees get the COVID-19 vaccination, a number of questions still remain unanswered. The following are some key takeaways from the Guidance.

ADA Implications of Vaccine Pre-Screening Questions

While the administration of a vaccination itself is not a “medical examination” for purposes of the Americans with Disabilities Act (ADA), employers should take note that vaccination pre-screening questions are likely to elicit information about a disability and could, therefore, constitute disability-related inquiries. Disability-related inquiries may only be made when they are “job-related and consistent with business necessity.” In the context of a vaccination, that means such questions may only be asked when the employer has a reasonable belief, based on objective evidence, that an employee who declines to answer the questions and receive a vaccination “will pose a direct threat to their own health or safety or the health and safety of others.” This is a fact-specific inquiry, and employers considering administering a vaccination to their employees or entering into a contract for a third-party to administer the vaccine to its employees should contact their attorney to evaluate the risks associated with any required pre-screening questions, as well as other risks posed by administering the vaccine or requiring that employees obtain the vaccine from a third-party contractor.

The Guidance identifies two scenarios in which the employer is not required to demonstrate that pre-screening questions related to the administration of the vaccination are “job-related and consistent with business necessity.” The first scenario is where the vaccination is offered by the employer on a voluntary basis. In order for the vaccination to be considered voluntary, however, the employee’s decision to answer pre-screening questions must also be voluntary. If the employee declines to answer the pre-screening questions, the employer may decline to vaccinate the employee; however, an employer may not threaten, intimidate or retaliate against an employee for refusing to answer any questions.

The second scenario in which the employer will not be required to show pre-screening questions are “job-related and consistent with business necessity” is when the employer requires employees to obtain a vaccination from a third-party with whom it does not have a contract, such as a pharmacy or other healthcare provider.

The Guidance also makes clear that requesting proof of an employee’s vaccination is not a disability-related inquiry subject to ADA restrictions. Nevertheless, employers should be mindful that any follow-up questions about why an employee did not obtain a vaccine may be likely to elicit information about the employee’s disability and would, therefore, be considered a disability-related inquiry.

Employees Declining Vaccination Due to Disability or Religious Belief

Employers mandating that employees obtain a COVID-19 vaccination should advise workers to notify the employer if they are unable to obtain a vaccination for disability or religious reasons. With respect to employees who indicate they cannot be vaccinated for disability reasons, employers must engage in an individualized assessment to determine if the employee, if unvaccinated, would constitute a “direct threat,” which means that the lack of a vaccination would constitute a “significant risk of substantial harm to the health or safety of the [employee] or others.” The factors that employers must consider in evaluating whether an unvaccinated employee poses a direct threat are:

- The duration of risk,
- The nature and severity of the potential harm,
- The likelihood that the potential harm will occur, and
- The imminence of the potential harm.

If the employer determines an employee poses a direct threat, the employer must then ascertain if they can provide a reasonable accommodation that would eliminate or reduce the risk to an acceptable level. Accommodations that eliminate or sufficiently reduce the risk caused by an unvaccinated employee—including permitting the employee to work remotely—must be provided unless they would cause the employer “undue hardship.” We noted [earlier this year](#) that the EEOC adjusted its guidelines regarding what constitutes an undue hardship, which is a very high standard for employers to satisfy.

Employees may also indicate they cannot obtain a vaccination for religious reasons. Similar to employees who are unable to be vaccinated because of a disability, employees whose sincerely held religious beliefs preclude vaccination must be given a reasonable accommodation unless an accommodation would pose an undue hardship; however, the threshold for what constitutes an undue hardship with respect to a religious accommodation request is significantly lower than what must be shown to establish the undue hardship posed by a disability. Employers should be aware that the EEOC’s definition of religion is very broad, and that beliefs that are unfamiliar to the employer or may not initially appear to be religious in nature, may be considered by the EEOC to be sincerely held religious beliefs in the absence of an objective basis for questioning the religious nature or sincerity of the employee’s stated belief.

Due to the individualized and fact-specific considerations at play, employers mandating that employees obtain the COVID-19 vaccination should consult with their attorneys when considering whether employees who claim that they cannot be vaccinated are entitled to a reasonable accommodation because of a disability or religious belief.

Genetic Information Nondiscrimination Act and Vaccination

The Genetic Information Nondiscrimination Act (GINA) generally prohibits employers from using genetic information to make employment decisions, subject to a handful of narrow exceptions. Just as pre-screening questions may implicate the ADA if they are likely to elicit information about an employee’s disability, questions may implicate the GINA when they seek genetic information, including questions regarding an employee’s family medical history. Nevertheless, the Guidance makes it clear that requiring employees to obtain the vaccine or to provide proof of vaccination would not implicate the GINA.

Bond will continue to keep you updated as more information regarding COVID-19 vaccinations becomes available. Please contact your Bond attorney or any [attorney](#) in our [labor and employment practice](#) if you have questions about requiring or administering COVID-19 vaccinations for employees.



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