

# A Consideration of Employer Required COVID-19 Vaccinations

**W**ith the administration of COVID-19 vaccines ramping up, employers are contemplating whether they should require their employees to accept a COVID-19 vaccination. While there is no federal prohibition against mandatory vaccines, there are some important exceptions to consider.<sup>1</sup> This is a quickly evolving issue with multiple federal agencies issuing new guidance and updating guidance frequently. Although this article concludes that an employer generally *may* mandate vaccinations against specific diseases, including COVID-19, this article will not address whether any employer *should* do so.

As an initial note, the U.S. Equal Employment Opportunity Commission (EEOC)<sup>2</sup> and the Society for Human Resource Management (SHRM) have Coronavirus Resource Centers which are extremely helpful.<sup>3</sup> The EEOC maintains a question-and-answer document addressing the COVID pandemic and the workplace which was created in March 2020 and last updated on December 16, 2020. To avoid any ambiguity in language or legal requirements, this article heavily relies upon and cites frequently to that document. Employers with further questions or unique issues outside the scope of this article may find that the EEOC or SHRM pages address their situation.

In analyzing this issue, there are a few different federal statutes to keep in mind - chiefly the Occupational Safety and Health Act of 1970 (OSH), Americans with Disabilities Act of 1990 (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), Genetic Information Discrimination Act of 2008 (GINA), and the Pregnancy Discrimination Act (PDA). The OSH Act applies to most private sector employers while the remaining cited federal employment laws apply to employers with 15 or more employees. In addition to the federal laws, there are likely state law considerations as well. For instance, state law might provide for workers' compensation benefits in a circumstance where an employer requires a COVID vaccine and the employee has an adverse reaction to the vaccine.



## Occupational Safety and Health Act of 1970 (OSH)

Turning to the first of the federal regulatory schemes that apply to vaccination policies, under the OSH Act, an employer has a general duty to provide a work environment that is “free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”<sup>4</sup> With respect to mandatory vaccinations, the Occupation Health and Safety Administration (OSHA) has previously opined that an employer may require an employee take a mandatory vaccine in the context of the Novel H1N1 influenza A.<sup>5</sup>

On January 29, 2021, OSHA issued guidance for a COVID-19 prevention program, but it did not specifically address mandatory COVID vaccination.<sup>6</sup> It did state that an employer should consider making a vaccine or vaccine series available at no cost to all eligible employees, and that employers should not distinguish between workers who are vaccinated and those who are not. More specifically, OSHA concluded that workers who are vaccinated should “[c]ontinue to follow protective measures, such as wearing a face covering and remaining physically distant, because at



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this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person.”<sup>7</sup>

### **Americans with Disabilities Act (ADA)**

Title I and Title V of the ADA protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship.<sup>8</sup>

The ADA has very stringent restrictions on when an employer may ask disability related questions, require a medical exam, or otherwise identify a disability. There is a three-stage process that one must consider. The stages, each with resultant obligations, are: (1) during the employment application and interview stage, (2) after a job offer is extended, and (3) after an employee has started working.<sup>9</sup>

During the application stage, a prospective employer may not ask a job applicant to answer disability-related questions or take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability or about the nature of an obvious disability. An employer may ask a job applicant whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.<sup>10</sup>

After a job is offered to an applicant, an employer may condition the job offer on the applicant answering certain disability-related questions or successfully passing a medical exam, but only if all new employees in the same type of job must answer the same questions or take the same exam.<sup>11</sup>

Once an employee is hired and has started work, an employer generally can only ask disability-related questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.<sup>12</sup>

The EEOC, which enforces the ADA, has concluded that a COVID vaccination itself is not a medical examination; therefore, the broad prohibitions on medical exams are generally not implicated. Employers should be cautioned that although the administration of the vaccination is not a medical examination, pre-screening vaccination questions may violate the ADA's provision on disability-related inquiries (inquiries likely to elicit information about a disability), though this concern

generally only arises if the employer is administering the vaccine itself, such as a health-care facility.<sup>13</sup> Employers who coordinate with third-party providers can avoid the pre-screening issues by ensuring that they will not have access to or receive any screening information from the provider.

Asking an employee to show proof of receipt of a vaccination is also not a disability-related inquiry. Notwithstanding, if an employer asks other questions such as why an employee did not receive a vaccine, that may elicit information about a disability and implicate the ADA requirement that such inquiries be job related and consistent with business necessity. According to the EEOC, if an employer requires employees to provide proof they received a vaccine from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

How should an employer respond if the employee refuses the mandatory vaccine due to an underlying health condition? The ADA allows an employer to require that an individual not pose a direct threat to the health or safety of individuals in the workplace. The EEOC has determined that if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an 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.<sup>14</sup>

If an employer decides that an unvaccinated employee would pose a direct threat, the employer cannot exclude the employee from the workplace or take other action, unless there is no way to provide a reasonable accommodation (absent an undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.<sup>15</sup> While the EEOC advises that an employee cannot be “excluded” from the workplace, if remote work is possible, that may be considered a reasonable accommodation for the employee.

The EEOC has said if there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from the workplace, but this does not mean the employer may automatically terminate the employee. The employer and employee should engage in a flexible, interactive process to identify possible accommodations that do not create an undue hardship for the employer.<sup>16</sup> In its guidance, the EEOC also advised that employers may rely upon CDC recommendations and OSHA standards when considering an accommodation request.<sup>17</sup>

## TITLE VII

Title VII protects applicants and employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), sexual orientation, gender identity, and national origin.<sup>18</sup>

The EEOC has opined that if an employee's sincerely held religious belief, practice, or observance prohibits the employee from receiving the COVID vaccine, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless any such accommodation would pose an undue hardship for the employer.<sup>19</sup> According to the EEOC, if no reasonable accommodation is possible without undue hardship, it would be lawful to exclude the employee from the workplace, but this does not mean the employer may automatically terminate the employee. The employer will need to consider whether any other legal protections apply under EEO laws or other authority.

## Genetic Information Nondiscrimination Act (GINA)

Title II of GINA protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.<sup>20</sup> GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.<sup>21</sup>

The EEOC has said that requiring employees to provide proof they have received a vaccine does not violate GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of genetic information as defined by the statute.<sup>22</sup> However, employers should be careful with pre-vaccination screening questions as they may elicit genetic information, such as questions regarding family medical history. The EEOC cautioned that if an employer requires proof of vaccination, the employer may want to warn the employee not to provide any genetic information with the proof.<sup>23</sup> If such warning is provided, any genetic information the employee provides in response to the proof of vaccination will be considered inadvertent and not unlawful under GINA.<sup>24</sup> EEOC guidance refers employers to 29 C.F.R. § 1635.8(b)(1)(i)(B), which provides model language for such a warning.

## Pregnancy Discrimination Act (PDA)

The PDA prohibits discrimination based on pregnancy in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.<sup>25</sup> While pregnancy itself is not a disability pursuant to the ADA, pregnancy-related complications may be. Even if the ADA's reasonable accommodation provisions are not implicated, many employers that are choosing to implement mandatory vaccination policies are providing temporary exceptions to pregnant employees and employees who are nursing mothers.

## Vaccine Incentives

As of this writing, the EEOC has not issued specific guidance concerning an employer's ability to offer incentives to employees to get voluntary COVID vaccines. Due to this lack of information, in a February 1, 2021 letter,

SHRM and 41 other business groups asked the EEOC to clarify "the extent to which employers may offer employees incentives to vaccinate without running afoul of the Americans with Disabilities Act [ADA] and other laws enforced by the EEOC." The ADA prohibits employers from coercing employees to participate in wellness activities. . . . The business groups encouraged the EEOC "to define what qualifies as a permissible incentive as broadly as possible."<sup>26</sup>

SHRM's reference to the ADA's restrictions on "coercing" employees may be useful in determining the limits of vaccine incentives. The EEOC has proposed (but not finalized) a rule clarifying the law as applied to wellness program incentives. The proposed rule provided that nominal incentives such as a water bottle are not coercive, whereas things like a paid gym membership or an increased insurance premium would be coercive. Employers may look to that proposed guidance for a hint at what would or would not be an acceptable incentive for employees to accept the vaccination.

Many of the options for incentives can be made available to employees who do not plan to accept a vaccination and creating an incentive plan to allow alternatives may be the best way to mitigate the risks associated with the outlined laws. If incentives are offered to all employees, without the employer requiring proof of vaccination, there is very little risk of violating the ADA or Title VII. These incentives could be something like paid time off for all employees "to

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allow time for vaccination” at a third-party provider. Every employee will receive the same time off, and the employer simply educates the employees on the vaccine and encourages them to use their added time off for that purpose. Even if an employer chooses to limit incentives, it is still important to avoid risk by ensuring that the incentive is available to those who give a reason for refusing the vaccine that may fall under the protective scope of the preceding laws.

Another consideration, particular to monetary incentives is the likelihood that a payment to employees for accepting a vaccination would be considered a one-time bonus under the Fair Labor Standards Act. This bonus would then have to be included in the calculation of the employee’s regular rate of pay for that week when determining overtime pay, if any.

While some employers are certainly offering newsworthy incentives such as direct payments to employees,<sup>27</sup> but until further guidance is issued, I would tread lightly with offering incentives for employees to voluntarily receive a vaccine.

#### Disclaimer

The opinions in this article are mine alone and do not represent the position of the NACTT or the Human Resource Committee of the NACTT. This does not constitute legal advice and should not be relied upon as such. Please consult with your local labor-employment attorney before making any decisions. 🏠

#### Endnotes

- <sup>1</sup> The US Supreme Court has previously considered the issue of mandatory vaccinations. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (upholding mandatory smallpox vaccinations).
- <sup>2</sup> EEOC, *Coronavirus and COVID-19*, <https://www.eeoc.gov/coronavirus>.
- <sup>3</sup> SHRM, *Coronavirus and COVID-19*, [https://www.shrm.org/resourcesandtools/pages/communicable-diseases.aspx?utm\\_source=marketo](https://www.shrm.org/resourcesandtools/pages/communicable-diseases.aspx?utm_source=marketo).
- <sup>4</sup> 29 U.S.C. § 654(a)(1).
- <sup>5</sup> OSHA, *OSHA's Position on Mandatory Flu Shots for Employees, Standard Interpretations*, <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09> (November 9, 2009).
- <sup>6</sup> OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, <https://www.osha.gov/coronavirus/safework>.

<sup>7</sup> *Id.*

<sup>8</sup> EEOC, Equal Employment Opportunity Poster, [https://www.eeoc.gov/sites/default/files/migrated\\_/employers/eeoc\\_self\\_print\\_poster.pdf](https://www.eeoc.gov/sites/default/files/migrated_/employers/eeoc_self_print_poster.pdf)

<sup>9</sup> EEOC, *Disability Discrimination*, <https://www.eeoc.gov/disability-discrimination>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated December 16, 2020).

<sup>14</sup> *Id.* (citing 29 C.F.R. § 1630.2(r)).

<sup>15</sup> *Id.*

<sup>16</sup> The Job Accommodation Network (JAN) is an excellent resource for employers considering accommodation requests. JAN has a specific section devoted to COVID-19 accommodation scenarios. See Job Accommodation Network, *Coronavirus Disease 2019 (COVID-19)*, <https://askjan.org/topics/.cfm>.

<sup>17</sup> EEOC, *What You Should Know*, supra note 13.

<sup>18</sup> EEOC, *Poster*, supra note 8.

<sup>19</sup> EEOC, *What You Should Know*, supra note 13.

<sup>20</sup> EEOC, *Poster*, supra note 8.

<sup>21</sup> EEOC, *Poster*, supra note 8.

<sup>22</sup> EEOC, *What You Should Know*, supra note 13.

<sup>23</sup> EEOC, *What You Should Know*, supra note 13.

<sup>24</sup> EEOC, *What You Should Know*, supra note 13.

<sup>25</sup> EEOC, *Pregnancy Discrimination*, <https://www.eeoc.gov/pregnancy-discrimination>.

<sup>26</sup> SHRM, *Employer Groups Seek Clarity on COVID-19 Vaccination Incentives*, <https://www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/employers-seek-clarity-on-covid-vaccination-incentives.aspx> (February 5, 2021).

<sup>27</sup> Kroger, *Kroger Announces New Vaccine Payment for All Associates*, <http://ir.kroger.com/Corporate/press-releases/press-release/2021/Kroger-Announces-New-Vaccine-Payment-for-All-Associates.aspx> (February 5, 2021).