

Mandatory COVID 19 Vaccinations **by Lisa L. Walker**

In response to recent questions about mandating vaccines, I wanted to provide updated EEOC guidance specifically addressing mandatory vaccinations along with some other considerations.

Bottom Line: As I interpret applicable guidance and law, an employer can impose a mandatory vaccination requirement for employees that are expected to have physical contact with staff, clients, and/or others, as long as there are exceptions provided for medical needs (reasonable accommodations), sincerely held religious beliefs, and hardship. It does not appear to be lawful to mandate vaccinations for employees who:

1. Telework, or who have another form of alternative work arrangement that would not require them to have physical contact with other staff, clients, or other third parties in furtherance of their work duties.
2. Have existing physical, mental, or emotional medical conditions that would make their compliance with a vaccination a hardship.
3. Hold a sincere religious belief against the COVID-19 vaccination.
4. Can otherwise demonstrate hardship in complying with the mandate.

PHAs should consider developing standards for administering vaccines, pre-vaccination screening inquiries, for providing accommodations and/or alternative work arrangements, and for what is considered a “sincerely held religious belief” in these circumstances. Please consult applicable state/local law.

Applicable Guidance. To my knowledge, there is no direct statement by the CDC or HUD approving or even recommending mandatory vaccination requirements. However, the EEOC has issued guidance upon which employers can rely. Previous EEOC guidance did not directly state that mandatory vaccinations were permissible; however, it listed the exceptions to a mandatory requirement, thus inferring that it is lawful to impose a mandatory vaccination requirement. See EEOC’s [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act \[PDF version\]](#). EEOC updated its guidance to address mandatory vaccinations. See <https://www.eeoc.gov/wysk/what-you->

[should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws](#). I still do not see a direct EEOC statement that it is lawful for employers to mandate that their employees be vaccinated. However, the guidance added a new Section K on mandatory vaccinations. So, we can assume that the EEOC would approve of a mandatory vaccination requirement that meets the terms of its guidance.

Following are salient points from Section K of the guidance. The rationales supporting these salient points are more fully set forth in the guidance.

- **Qualification Standard.** A vaccination requirement can be considered a safety-based “qualification standard” under the ADA. Employers can have requirements that an individual not pose a “direct threat to the health or safety of individuals in the workplace.”
- **Who Administers the Vaccine.** The EEOC states that employers, themselves, can administer vaccinations; or, they can arrange for third parties to administer them, ostensibly in the employer’s offices. Permitting PHA staff to administer the vaccinations, whether or not they are trained or certified to do so, would seem to open up the Pandora’s Box of tort liability. If PHAs want to offer onsite vaccinations, I recommend that PHAs contract with trained and certified third parties to do so.
- **Vaccination Screening Questions.** According to the CDC, health care providers 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 with whom the employer contracts to administer a vaccine) and asks these screening questions, these questions are subject to the ADA standards for disability-related inquiries.

It is not yet clear what screening checklist questions relating to contraindications may be provided with COVID-19 vaccinations. But employers can ask pre-screening vaccination questions within certain limitations. If the employer has offered a vaccination to employees on a

voluntary basis and the employee's decision to answer the pre-screening questions was voluntary, or if the employee has received a vaccination from a third party, like a pharmacy or other health provide, there are no restrictions on the employer's ability to ask pre-screening questions. In all other cases, pre-screening vaccination questions are lawful as long as the questions are "job-related and consistent with business necessity." Here, the employer must 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.

- **Genetic Information.** Title II of the Genetic Information Nondiscrimination Act (GINA) is not implicated when an employer requires employees to provide proof that they have received a COVID-19 vaccination 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. However, if administration of the vaccine requires pre-screening questions that ask about genetic information, such as inquiries about family members' medical histories, the inquiries may violate GINA. Additionally, requiring employees to get the COVID 19 vaccine, whether it uses mRNA technology or not, does not violate GINA's prohibitions on using, acquiring, or disclosing genetic information.

If the pre-screening questions *do* include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves. Likewise, if an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. See 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.

Remember that the ADA requires employers to keep all employee medical information obtained in the course of the vaccination program confidential.

- **Employers can require employees to provide proof of receipt of a COVID-19 vaccination.** Such inquiry is not considered a “disability-related inquiry” under the ADA because the question is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, going further and asking why an individual did not receive a vaccination may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” The EEOC suggests that employers warn employees not to provide any medical information as part of the proof in order to avoid implicating the ADA.
- **Employers must provide employees fact sheets about Emergency Use Authorizations (EUA) of COVID-19 vaccines before administering the vaccine. The EUA is the basis for current COVID-19 vaccines, which is different than approval under FDA vaccine licensure.** Employers must also post the fact sheets on its website.
- **Employees With Disabilities and Reasonable Accommodations.** Employers must consider requested reasonable accommodations to the vaccination requirement. Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. There may be situations where an accommodation is not possible, considering the employee’s position and job duties and the nature of the workforce. However, some employees may be entitled to accommodations, such as permitting them to telework or take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies. Employers have the right to determine whether it is necessary to obtain supporting documentation about the employee’s disability.

The guidance identifies the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>. See also the Occupational Safety and Health Administration standards and guidance at: www.osha.gov/SLTC/covid-19/.

If 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. In making the "direct threat" determination, employers must 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. Nonetheless, employers cannot automatically terminate the employee. Employers must determine, through an interactive process, if there is a reasonable accommodation, such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms.

Remember that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).

- **Employees With Sincerely-Held Religious Belief/Practice/Observance.** Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide an exemption for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.

Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. In most of these cases, the exemption will be provided unless the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. Employers can request additional supporting information. (Note that the EEOC guidance uses the term "accommodation" in place of the term "exemption." I prefer to distinguish between disability-based accommodations and religious-based exemptions).

- **Where there is no alternative arrangement or accommodation possible.** If there is no reasonable alternative or accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. 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.

Other EEOC Materials. The EEOC has posted a pre-recorded webinar addressing questions related to the COVID-19 pandemic. The video can be [seen on YouTube](#) and there is a [transcript of the webinar](#). Additionally, EEOC's dedicated COVID 19 website is found here: [Coronavirus and COVID-19 | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#).

Court Precedent. There is a U.S. Supreme Court case, *Jacobson v. Massachusetts*, that permitted states to enforce mandatory vaccinations during the smallpox pandemic of the early 1900s. Interestingly, the EEOC guidance does not even mention this case. I think it could be used as persuasive authority to require PHA employees to be vaccinated.

Executive Orders. If the CDC, President Biden, another federal government agency, or your state or local government imposes mandatory or even recommended vaccination requirements, and you don't, your PHA potentially could be exposed to liability in tort. And finally, unionized employers need to also consult collective bargaining agreements and/or visit this issues with their union representatives.