

**CLIENT ALERT: EEOC ISSUES GUIDANCE ON COVID-19 VACCINATIONS IN THE
WORKPLACE
DECEMBER 18, 2020**

It seems ages ago when we first received guidance from the EEOC on face coverings, temperature screenings, and COVID-19 testing in the workplace. On December 16, 2020, the EEOC issued [guidance](#) for employers on COVID-19 vaccinations, which we summarize below. With widespread availability of vaccines on the horizon, 2021 promises to be another interesting year in the employment world. For more information, please contact Peter Lowe at plowe@brannlaw.com or Hannah Wurgaft at hwurgaft@brannlaw.com

May employers mandate COVID-19 vaccinations?

In short, probably. How's that for a lawyer's clear answer! Federal agencies generally permit employers to require employees to be vaccinated, and the EEOC's guidance suggests the same may be true for COVID-19 vaccines. The EEOC did not state explicitly that employers can mandate the COVID vaccine for employees. Instead, they advised that the administration of COVID-19 vaccines to employees is not considered a medical examination under the ADA and that employers may ask employees whether they have been vaccinated.

One reason for our hesitation on giving a definitive answer is because the Pfizer vaccine has been approved by the FDA under emergency authorization, and this raises the question whether an employee may refuse the vaccine until final FDA approval is given (which may not be until the spring). We expect more guidance from OSHA and possibly CDC.

May employers ask employees if they have been vaccinated?

Yes. How's that for a one-word answer! According to the EEOC's guidance, asking employees for proof of vaccination will not be considered a disability-related inquiry because it is not likely to reveal information about a disability. Employers may warn employees not to include any personal medical information when providing proof of vaccination.

May employers ask pre-screening questions as part of a vaccination program?

Yes. Pre-screening questions in advance of administering the vaccine might elicit information about a disability. Therefore, employers (or third party contractors) administering the vaccine must show that pre-screening questions are "job-related and consistent with business necessity." To meet this standard, employers must have a reasonable belief that an employee who does not answer the questions (and subsequently does not receive a vaccination) would pose a direct threat to the health or safety of themselves or others.

Is there a way to administer the COVID-19 vaccine and ask pre-screening questions without implicating the ADA?

Yes, the EEOC indicates there are two scenarios where disability-related pre-screening vaccination questions can be asked without implicating the ADA. First, employers (or third parties acting on their behalf) asking pre-screening questions as part of a *voluntary* vaccination program would not implicate the ADA, because answering the questions would be voluntary. Employees who choose not to answer the pre-screening questions and therefore not get vaccinated cannot be intimidated, threatened, or retaliated against.

Second, in the pre-screening context, the ADA would not apply when employees receive employer-mandated vaccinations from third parties. For example, individuals answering pre-screening questions posed by a health care provider would not trigger ADA protections even if the employee is required by their employer to receive the vaccination.

What should we do if an employee says they cannot be vaccinated for medical or disability-related reasons?

Tread carefully and engage in a dialogue with the employee. The EEOC states that employers are not required to let employees into the workplace if they would pose a direct threat to the health or safety of themselves or others. The EEOC has already determined COVID-19 to be a direct threat, but notes here that the employee's "job duties and workplaces" may be relevant in analyzing whether they pose a direct threat.

Engage with the employee to determine whether there are any reasonable accommodations that will enable them to continue working safely. For example, employees may be able to telework or take leave under the FFCRA, FMLA, or under the employer's own policies. If there are no reasonable accommodations available, EEOC states that employers may "exclude the employee from physically entering the workplace, but this does not mean that the employer may automatically terminate the worker." If you find yourself in this place, it is probably prudent to get advice before proceeding with a termination.

Employers are not obligated to provide accommodations that would result in an undue hardship. The EEOC notes "the prevalence in the workplace of employees who have already received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration."

What should we do if an employee says they cannot be vaccinated due to their religious beliefs?

Adopt the same approach as you would for a disability. The EEOC reminds employers that under Title VII, employers must provide reasonable accommodations for employees with sincerely held religious beliefs, practices, or observances, unless doing so would pose an undue hardship to the employer. The EEOC states that employers should “ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.”

Do COVID-19 vaccinations implicate the Genetic Information Nondiscrimination Act?

Most readers don’t spend too much time pondering the intricacies of this federal law. Title II of the Genetic Information Nondiscrimination Act (GINA) prohibits employers from 1) using genetic information to make decisions related to the terms, conditions, and privileges of employment, or 2) acquiring or disclosing genetic information from employees, except in limited circumstances.

The EEOC states that requiring employees to receive the COVID vaccine does not violate GINA’s prohibitions on using, acquiring, or disclosing genetic information. However, pre-screening questions may implicate Title II of GINA if those questions involve family members’ medical histories. The EEOC states employers can avoid GINA by requesting proof of vaccination instead of administering the vaccine. In asking for proof of vaccination, employers may warn employees not to provide any genetic information.

Summary:

This is certainly not the last word on COVID vaccines, but the EEOC has shared some helpful information that should enable you to start a conversation in your workplace about your approach to vaccines.