



National Compliance Update

USI EMPLOYEE BENEFITS

December 17, 2020

EEOC COVID-19 Guidance Updated for Vaccines

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 guidance to include information regarding how COVID-19 vaccines interact with the legal requirements of the Americans with Disabilities Act (“ADA”), Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Genetic Information Nondiscrimination Act (“GINA”). This guidance can be found in [Section K, Vaccinations](#) of the EEOC’s [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws.”](#)

Briefly, as addressed in the latest guidance, COVID-19 vaccine policies in the workplace raise issues under the following laws that apply to employers with at least 15 employees:

- The ADA prohibits employers from making disability-related inquiries or requiring medical exams of employees unless “job related and consistent with business necessity.”
- Among other things, Title VII prohibits discrimination on based on religious belief, practice or observance.
- GINA Title II prohibits genetic information discrimination in employment.

The following FAQs offer highlights from the EEOC’s recent update. This article does not address any other issues, including state law implications related to COVID-19 vaccines in the workplace.

Employers considering COVID-19 vaccination policies should review the EEOC guidance in its entirety and consult with counsel.

Q1. Is the administration of any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (“FDA”) to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a “medical examination” for purposes of the ADA?

No.

Q2. If the employer (or the employer's third-party contractor) asks pre-screening questions and requires an employee to receive the vaccination, are these questions subject to the ADA standards for disability-related inquiries?

Yes. Pre-screening questions asked **before administering the vaccine consistent with CDC guidance** may elicit information about a disability.

If the employer requires an employee to receive the vaccination, administered by the employer (or its contractor), the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to 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.

However, there are two circumstances in which disability-related screening questions associated with the COVID-19 vaccine may be asked without satisfying the "job-related and consistent with business necessity" requirement.

1. Voluntary Programs.

When an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

2. Unrelated Third Party.

When an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA's "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply.

Q3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

No.

An employer can request proof of receipt of a COVID-19 vaccination without eliciting information about a disability (therefore, not a disability-related inquiry). However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would need to be "job-related and consistent with business necessity."

If an employer requires proof that employees 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 information as part of the proof in order to avoid implicating the ADA.

USI Note. Using claims information from the group health plan without participant authorization to verify vaccination would violate the HIPAA Privacy Rule.

Q4. If an employer requires COVID-19 vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?

The employer should consider how to offer reasonable accommodations and how to demonstrate under a direct threat analysis that an unvaccinated employee poses 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.” This may, for example, entail excluding the employee from physically entering the workplace and performing the current position remotely.

Q5. If an employer requires COVID-19 vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?

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 a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.

Q6. Is GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination?

No.

Generally, administration of the COVID-19 vaccine to employees or requiring employees to provide proof of a COVID-19 vaccine would not implicate GINA because such requests do not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information¹.”

Q7. Does GINA apply when an employer asks an employee the pre-vaccination screening questions?

Probably. If pre-vaccination screening questions do not include questions about genetic information (including family medical history), then asking them will not violate GINA.

However, if the pre-vaccination 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 to avoid a potential GINA issue.

THE BOTTOM LINE

The best approach for employers considering COVID-19 vaccination policies may be to seek proof of vaccination from an employee who gets the vaccine from a non-contracted third party (i.e., a

¹ GINA defines “genetic information” to mean:

- Information about an individual’s genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

pharmacy or health care provider) and offer a reasonable accommodation for those with a disability or religious objection.

Keep in mind that vaccine supply or availability may also be an issue. The announced rollout process is targeted to certain groups (e.g., first responders, health care workers, nursing homes, and the elderly). Not all employees will have access to COVID-19 vaccines at the same time.

Other considerations such as those related to OSHA, collective bargaining agreements, and state laws should also be evaluated.

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