

PLANNING FOR A SUCCESSFUL RETURN TO WORK

Considerations for Employers



PRESENTERS



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WHAT WE WILL COVER:

(1) VACCINATIONS

(2) RECENT EEOC GUIDANCE

(3) BEST PRACTICES FOR RETURNING
TO IN-PERSON WORK
ENVIRONMENTS





VACCINATIONS

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GUIDANCE FROM EEOC ON VACCINATIONS:

A mandatory vaccination program is not prohibited but must account for legal nuances, and differences in various states.

Most importantly, employers must understand and comply with their duty to accommodate an employee's sincerely held religious belief or disability. Employers also need to be aware of the latest guidance with respect to accommodations and the interactive process to ensure they are complying with their legal obligations.



THE MILLION DOLLAR QUESTION: EVEN IF EMPLOYERS CAN REQUIRE EMPLOYEES TO GET VACCINATED, SHOULD THEY?

As with everything else with this new legal landscape, the answer is, it depends. Here are some items that employers need to take into consideration:



DISABILITY ACCOMMODATIONS AND VACCINES

Under the Americans with Disabilities Act (ADA), employers must provide reasonable accommodations to qualified employees with a disability, unless the employer can demonstrate the accommodation would create an undue hardship. Reasonable accommodation may include appropriate adjustment or modifications of employer policies, including requirements imposed by a mandatory vaccination policy.

As with any request for an accommodation because of a disability, the employer should engage with the unvaccinated employee to identify potential workplace accommodations. The ADA creates an exception to employers' obligations in the event of an undue hardship, which may include hardships associated with accommodation costs, finances of the organization, impact of the accommodation on company operations, among other factors.

HOW SHOULD EMPLOYERS HANDLE REQUESTS FOR AN EXEMPTION BASED ON DISABILITY?

1. Require the employee documentation to substantiate the need for the accommodation, through a doctor's note. You can then evaluate whether the request is legitimate.
2. Determine whether allowing the unvaccinated employee to come to work will prove a "direct threat" to the workplace.
3. Engage in the interactive process to determine whether you can provide a reasonable accommodation, one that will not pose an undue hardship to your business.

- ▶ **UNDER TITLE VII, EMPLOYERS MUST PROVIDE ACCOMMODATIONS FOR AN EMPLOYEE’S SINCERELY HELD RELIGIOUS BELIEF WHEN IT COMES TO VACCINE REQUIREMENTS. AGAIN, THE LAW DOES ACCOUNT FOR EXCEPTIONS RELATED TO THE EMPLOYER’S UNDUE HARDSHIP.**
- ▶ **THE EEOC HAS SAID IN THE PAST THAT AN EMPLOYER SHOULD START WITH THE ASSUMPTION THAT A REQUEST FOR A RELIGIOUS ACCOMMODATION IS LEGITIMATE, AND SHOULD BE ACCOMMODATED – ABSENT AN UNDUE HARDSHIP.**
- ▶ **EMPLOYERS CAN PROBE INTO AN EMPLOYEE’S REQUESTS AND ASK FOR SUPPORTING INFORMATION WHEN THEY “HAVE AN OBJECTIVE BASIS FOR QUESTIONING EITHER THE RELIGIOUS NATURE OR THE SINCERITY OF A PARTICULAR BELIEF, PRACTICE, OR OBSERVANCE.”**

VACCINES AND RELIGIOUS ACCOMMODATIONS

WHAT ABOUT POLITICAL BELIEFS?
Social, political, economic philosophies, as well as personal preference are not protected by Title VII.



IF EMPLOYERS CAN'T ACCOMMODATE, CAN THEY TERMINATE?

THE ANSWER IS MAYBE, BUT ONLY AS A LAST RESORT.

The EEOC states: “If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.” An employer pursuing a mandatory program, therefore, should make sure they continue to meet their obligations under the ADA, and state law equivalents, to engage employees in the interactive process and think critically about how the potential harm of having an unvaccinated employee in the workplace can otherwise be mitigated.

A Mandatory Vaccination Policy May Form the Basis for **Disparate Impact** and **Retaliation** Claims

Employers should consider the legal risks stemming from an adverse employment action against an employee based on a refusal to vaccinate, even with regard to employees who do not seek disability or religious exemptions. For example, if the mandatory vaccination requirement has a disparate impact on a protected group, such as pregnant women or a particular racial group, that group may have a basis for a discrimination claim.

California DFEH's guidance makes clear that an employer cannot discipline or otherwise retaliate against an employee for requesting an accommodation or for engaging in any other protected activity related to a vaccination policy or practice, such as alleging that the employer's vaccine policy intentionally discriminates on the basis of race, national origin, or another protected characteristic, or has a disparate impact on a protected group.

WAGE AND HOUR VACCINE CONSIDERATIONS

Under federal law, employees may be entitled to compensable work time for their time spent waiting for and receiving a vaccine, if it is at the direction of the employer. Failure to adhere to wage and hour requirements is often a very expensive mistake, so it's vital to get it right.



WHAT ARE THE PITFALLS TO A MANDATORY PROGRAM?

- ▶ How will you announce this?
- ▶ How will you train your managers to handle employee questions?
- ▶ What about employee relations, think about the morale of those who feel “forced” to take a vaccine?
- ▶ If an employee is accommodated, how can you make sure that succeeds? How do you prevent feelings of exclusion or jealousy?
- ▶ Legal compliance is also likely to present a risk. Employers may for the first time be implementing a vaccination program or handling exemption requests, all of which implicate overlapping federal, state, and in some cases local laws

A Voluntary Vaccination Program Avoids Many of the Legal Risks Identified Above

Employers may consider implementing a voluntary vaccination policy to avoid the majority of the legal implications of a mandatory policy. For example, employers will not need to accommodate disability or religious based objections to a voluntary policy or consider disparate impact or wrongful termination claims. Many employers are assessing whether to offer incentives as a way to encourage employees to get vaccinated.

Employers considering how to navigate workplace vaccination policies should first ascertain how many employees have received or plan to receive the vaccine before returning to work, and which employees plan to decline the vaccine.

Determining the vaccination status of the workforce is an important first step in considering the vaccination policy that is appropriate for a particular business. In any event, employers should continue to monitor federal, state, and local guidance regarding any return to work requirements, as well as what steps employers must take to mitigate COVID-19 risks even after employees return to the office.





EEOC GUIDANCE

- ▶ **THE EEOC HAS A LOT OF HELPFUL INFORMATION ON COVID, WHICH CAN BE FOUND HERE:**

**[HTTPS://WWW.EEOC.GOV
/CORONAVIRUS](https://www.eeoc.gov/coronavirus)**

- ▶ **THEIR MOST RECENT GUIDANCE WAS LAST UPDATED IN DECEMBER 2020.**

TWO KEY DOCUMENTS ON THERE:

- ▶ **“PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT”**
 - ▶ **SOME INFO IS NOT UPDATED. EX: STILL SAYS THERE IS NO VACCINE.**
- ▶ **“WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS”**

KEY TAKE-AWAYS FROM THE EEOC GUIDANCE



DIRECT THREAT

IF AN INDIVIDUAL WITH A DISABILITY POSES A DIRECT THREAT DESPITE REASONABLE ACCOMMODATION, HE OR SHE IS NOT PROTECTED BY THE NONDISCRIMINATION PROVISIONS OF THE ADA.

“BASED ON GUIDANCE OF THE CDC AND PUBLIC HEALTH AUTHORITIES AS OF MARCH 2020, THE COVID-19 PANDEMIC MEETS THE DIRECT THREAT STANDARD...THESE FACTS MANIFESTLY SUPPORT A FINDING THAT A SIGNIFICANT RISK OF SUBSTANTIAL HARM WOULD BE POSED BY HAVING SOMEONE WITH COVID-19, OR SYMPTOMS OF IT, PRESENT IN THE WORKPLACE AT THE CURRENT TIME.”



SENDING EMPLOYEES HOME

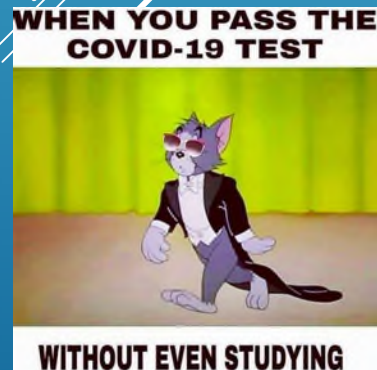
AN EMPLOYER CAN SEND HOME AN EMPLOYEE WITH COVID OR COVID-LIKE SYMPTOMS.

**na na na na
hey hey hey
goodbye**

EMPLOYERS MAY ASK EMPLOYEES WHO REPORT FEELING ILL AT WORK, OR WHO CALL IN SICK, QUESTIONS ABOUT THEIR SYMPTOMS TO DETERMINE IF THEY HAVE OR MAY HAVE COVID-19.

COVID TESTS AND SCREENING

- ▶ Employers may take screening steps to determine if employees entering the workplace have COVID-19
- ▶ Employers may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.
- ▶ The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information.
- ▶ Employers cannot ask employees whether they have family members who have COVID or COVID-like symptoms
- ▶ The ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19.



Is an employee entitled to an accommodation in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19?

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

- ▶ For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.
- ▶ Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

IS ASKING OR REQUIRING AN EMPLOYEE TO SHOW PROOF OF RECEIPT OF A COVID-19 VACCINATION A DISABILITY-RELATED INQUIRY?

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is 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 be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.”



TOP TEN BEST PRACTICES FOR RETURNING TO IN-PERSON WORK ENVIRONMENTS



- (1) Communicate Clearly With Your Employees
- (2) Prepare for Resistance
- (3) Be Flexible, Creative, Consistent
- (4) Set Expectations, Follow Through Similarly
- (5) Management Cohesiveness
- (6) Mental Health Support
- (7) Consider the Optics
- (8) Incentivize vs. Mandate
- (9) Put It In Writing
- (10) Get Help from Experts Where Needed





UPCOMING WEBINARS:

ALL WEBINARS PRESENTED LIVE AT: 10:00 PACIFIC / 11:00 MOUNTAIN / 12:00 CENTRAL / 1:00 EASTERN

JULY 15, 2021 – LAWFULLY PROMOTING DIVERSITY, EQUITY, AND INCLUSION IN THE WORKPLACE

SEPTEMBER 2021 – WHAT EMPLOYERS NEED TO KNOW ABOUT CANNABIS IN THE WORKPLACE

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