

ENGAGE PEO

# TODAY IN HR



## The COVID-19 VACCINE GUIDANCE FOR THE WORKPLACE

The roll out of the largest vaccination program in history is underway, signaling for many the beginning of the end of the pandemic. We are also at the start of a new phase in the public response to COVID-19. New questions and concerns are emerging, especially in the workplace, which only adds to the already unprecedented burden on business owners and their employees.

It's important to remember that mask wearing, social distancing and other public health precautions must stay in place for the foreseeable

future to ensure the health and safety of employees and customers. Employers also should have a plan for how to address the myriad issues related to the coronavirus vaccine that will impact their people, customers, and workplace practices. It will be months before the majority of the population is vaccinated, and data suggests that a significant number of individuals are hesitant to take the vaccine initially, if at all. This is uncharted territory to be sure, but there is existing employment law in place and well-established human resources best practices to provide a roadmap for businesses.

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To help employers prepare for the vaccine, federal agencies including the Equal Employment Opportunity Commission (EEOC) issued early guidance on some workplace vaccination questions in December. More direction will follow. Businesses should track federal, state and local information about the vaccine(s) and any guidelines issued as they become available. Engage is here to assist as well.

**The following are some of the key matters employers should be prepared to address regarding the COVID-19 vaccine:**

### Mandating Vaccination

***Can a private sector employer mandate that employees and new hires take the COVID-19 vaccination?***

The federal guidance as of December 15, 2020, indicates that employers may require that employees get vaccinated before returning to the workplace, however, an employer's vaccination policy will require appropriate exceptions for employees that will not be vaccinated due to a medical condition or seriously held religious belief.

Just as employers created a compliant vaccination program policy in response to the H1N1 pandemic (and the flu vaccine), an employer's COVID-19 vaccination policy must comply with Title VII, the Americans with Disabilities Act (ADA), state, and local ordinances.

Some employers may prefer to encourage vaccination rather than mandate it, while others may have compelling reasons to require vaccination to ensure the safety of employees and customers.

***Can a private sector employer recommend which COVID-19 vaccination the employee must take?***

An employer should allow for an employee's medical provider to make any recommendations regarding which coronavirus vaccination should be administered to the employee.

### Religious Accommodation

***When requesting a religious accommodation, how can an employee or new hire show that a religious belief is one that is "legitimate and genuine."***

As with the ADA, both the employer and the employee must engage in an Interactive Process to determine whether the held belief is deemed "legitimate and genuine." Employers are encouraged to seek the advice of an HR consultant when making this determination as religious definitions are broad and employers may be unfamiliar with certain beliefs and practices.

***Is an employer compelled to provide a reasonable accommodation based on a sincerely held non-religious belief?***

No. An applicant or employee's personal beliefs or opposition to vaccinations do not create a duty on the employer to create a reasonable religious accommodation. The EEOC defines undue hardship as "more than a minimal burden" on a business, creating a relatively low bar for the employer to overcome.

### Reasonable Accommodation

***What are some examples of a reasonable accommodation?***

This would ultimately be up to the individual employer. What is reasonable for one employer may not be reasonable for another. However, some examples of a reasonable accommodation include, remote work, mask wearing, or an adjustment of work duties. Though employers

have no duty to change or remove the essential functions of the employee's position as a means of providing a reasonable accommodation.

***An employer is not required to offer a reasonable accommodation when the unvaccinated employee would cause substantial harm or pose a threat to others. What does the ADA consider to be a "direct threat" to the health and safety of others?***

There are four factors and employer should consider in determining whether an employee poses a direct threat:

1. Duration of the risk;
2. Nature and severity of potential harm;
3. Likelihood potential harm will occur; and
4. Imminence of the potential harm.

## Testing and other requirements

***If an employee refuses vaccination or needs an ADA reasonable accommodation or Religious Belief accommodation, can the employer require for the employee to take frequent COVID tests?***

Potentially, but situations should be evaluated on a case by case basis. Ultimately, a reasonable accommodation will be created after the employer and employee engage in the mandatory Interactive Process under the ADA and Title VII.

***When an employer has determined that a reasonable accommodation cannot be offered to an employee with a disability or sincerely held religious belief, can the employee be let go?***

Not necessarily. First, the employer should consider whether the employee can be removed from the workplace, but still able to perform their essential duties. The employer must determine

whether there are any other employment rights that apply before termination can occur.



***Can an applicant or employee's psychological or mental medical condition be considered as a disability under the ADA, to qualify the employee for a reasonable accommodation for not taking the COVID-19 vaccination?***

Potentially. Both physical and mental medical conditions can qualify as a recognized disability under the ADA and thereby eligible for a reasonable accommodation.

***Can a private sector employer organize onsite vaccinations to ensure their employees are receiving the vaccination?***

This is generally not recommended. Any and all vaccinations should be administered by a medical professional at a medical facility.

***What information or questions can an employer ask an applicant or employee that does not violate the Americans with Disabilities Act (ADA)?***

Employers requiring vaccination must be careful with the types of questions posed to employees regarding their health or whether they can receive the vaccination.

The Americans with Disabilities Act states that employers can ask pre-screening vaccinations

questions to the employee. However, keep in mind that pre-screening questions may illicit information from the employee related to their disability. Employers should limit pre-screening vaccination questions to those that are “job related and consistent with business necessity.” Employers should consult with an HR advisor when considering prescreening questions.

***Can an employer require applicants for employment or existing employees to provide proof of vaccination?***

Yes. As of December 15, 2020, the CDC has provided a [“COVID-19 Vaccination Record Card,”](#) which shows proof of vaccination. It includes the name of the individual, date of birth, dates that each dose of the COVID-19 vaccination was given and name of medical provider.

An employer should not intentionally ask any questions that solicit information about the individual’s medical condition or family history. Asking an applicant or employee to provide proof of vaccination does not elicit this confidential information. If an applicant or employee has not received the vaccination, employers may ask follow-up questions regarding why the applicant or employee did not receive the vaccination.

***Can failing to extend or revoking a job offer based on an applicant refusing COVID-19 vaccination be considered in violation of Title VII, the ADA, or any other state or local ordinances?***

Potentially. Employers should review each situation on a case by case basis with an HR consultant or employment attorney.

***Can terminating an employee because he/she refuses COVID-19 be considered violation of Title VII, the ADA, or any other state or local***

***ordinances (i.e. retaliation, discrimination, or harassment).***

Potentially. Whether or not an employee has reported a medical condition or seriously held religious belief, an employer must confirm whether an employee is protected by EEO laws or any other federal, state, or local protections before termination can occur.

***If an employer requires an employee to be COVID-vaccinated and the employee subsequently experiences an allergic reaction, injury, or death, can the employer be held liable?***

It depends. There is the potential that a workers’ compensation claim may arise due to a reaction from the vaccine, but whether it ultimately results in a compensable worker’s compensation claim will depend upon the individual state workers’ compensation laws.

## Occupational Safety and Health Administration (OSHA) Guidance

***What does OSHA say about mandatory COVID-19 vaccinations?***

OSHA has not provided any guidance related to employers mandating use of the coronavirus vaccine, but we anticipate guidance will be forthcoming. While OSHA has mandated some vaccines under the blood borne pathogen standard like the flu vaccine for certain employers, it appears they do not have that ability with COVID-19 as the vaccine is only authorized under an Emergency Use Authorization, which by definition means that long term safety data is unknown. It is important to note however that OSHA is recommending that their inspectors receive the vaccine when available.