

# COVID-19 Vaccinations and the Workforce: Implications for Employers

On Dec. 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued a [revised guidance](#) addressing COVID-19 vaccinations in the employment context. The EEOC enforces two laws that impact employer vaccination programs; first, Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination on the basis of religion and pregnancy, among other protected categories; and second, the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability, requires that employee medical information be kept confidential, and limits an employer's ability to require its employees to undergo "Medical Examinations," as that term is defined in the ADA.

## Can Employers Mandate A Workforce Vaccination?

The guidance does not directly address the primary question on employers' minds: can employers require employees to receive a COVID-19 vaccine? The EEOC's consistent position with regard to vaccination during respiratory pandemics has been that an employer can maintain a mandatory vaccination program, if the program provides for exemptions. The guidance provides an overview of these exemptions and also describes issues that are likely to arise in

implementing a mandatory vaccination program.

First, the guidance establishes that vaccination programs at an employer's premises, whether administered by the employer or an outside entity, do not constitute medical examinations for purposes of the ADA and thus are not subjected to the requirements for such examinations. However, if the vaccination program requires pre-screening questions, such as those designed to determine whether a person has a serious allergy that may forecast a significant reaction to the vaccine, that pre-screening *would* constitute a medical examination and could potentially result in the disclosure of a previously unknown disability under the ADA.

Employers who wish to avoid requiring medical examination of their workforce (and employing the safeguards required by the ADA, especially those related to confidential medical information) should consider requiring employees to be vaccinated elsewhere. Requiring proof of vaccination is neither a medical examination nor a disability-related inquiry under the ADA. However the EEOC recommends employers who do require this proof provide proof-of-vaccination forms for completion by health care professionals that prohibit the disclosure of "Genetic Information" as that term is defined under the Genetic Information Non-Discrimination Act.



## Vaccination Exemption—Disability

Second, the guidance discusses how employers should respond to employees' statements that they are unable to receive a vaccine because of a disability. If the employer can demonstrate that the employee's unvaccinated status would pose a "Direct Threat" as that term is defined in the ADA, then the employer would need to consider whether a reasonable accommodation exists before considering whether to exclude that person from the workplace. This determination should be made on a case-by-case basis.

Finally, the EEOC advises that employers could benefit from notifying their managers that a request for a vaccination exemption could constitute a request for an accommodation under the ADA. Employers must be careful to abide by the EEOC's requirement to engage in an interactive process with employees who do request reasonable accommodations.

## Vaccination Exemption—Sincerely-held Religious Belief

The guidance also addresses how employers may respond to employees who request an exemption to the vaccine based on sincerely-held religious beliefs. In that instance, as with ADA-Disabilities, reasonable accommodations are required unless granting such an accommodation would pose an undue hardship.

The EEOC advised that employers may request additional information supporting an employee's sincerely-held religious belief only if the employer has an objective basis for questioning either the religious nature of the belief or the sincerity of the belief. Any inquiries made with regard to a sincerely-held religious belief should be very carefully undertaken, as an employer's attempt to correct an employee's factually incorrect underpinning for a request for a religious exemption may be viewed as religious discrimination.

## Seek Legal Counsel and Advice

Finally, in instances in which no accommodation exists either for a disability or a sincerely-held religious belief, employers may exclude unvaccinated people from the workplace. This does not mean that those individuals' employment may be terminated. These are very sensitive employment circumstances, and consultation with counsel is recommended prior to making any employment decision related to an employee's inability or refusal to receive a COVID-19 vaccination.

For additional information, please contact:

W. David Harless, Esq.  
Labor/Employment Law  
wharless@cblaw.com | 804.697.4138

Lauren E. Fisher White, Esq.  
Labor/Employment Law  
lwhite@cblaw.com | 804.697.4115

Jonathan M. Joseph, Esq.  
Health Law  
jjoseph@cblaw.com | 804.697.4125

Elizabeth S. Olcott, Esq.  
Health Law  
lolcott@cblaw.com | 804.697.4136

Christian & Barton, LLP  
cblaw.com | 804.697.4100 | Richmond, Virginia

*This article is provided as an informational service and does not constitute legal counsel or advice, which can only be rendered in the context of specific factual situations. If a legal issue should arise, please contact an attorney listed in this article, or retain the assistance of other competent legal counsel. Case results depend on a variety of factors unique to each case and results do not guarantee or predict a similar result in any future case undertaken.*

©Christian & Barton, LLP 2020 | All Rights Reserved