

## EEOC Releases Guidance on COVID-19 Vaccine in COVID-19 Response Resource Center: Timely Counsel for your Business

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On Dec. 16, 2020, the Equal Employment Opportunity Commission (EEOC) released its much-awaited guidance on the COVID-19 vaccine in the workplace. (See section “K. Vaccinations” at this link (for the full guidance.) This guidance provides crucial information to employers who have been weighing whether, and how, to require or implement the COVID-19 vaccines in the workplace.

As with other moments during the COVID-19 pandemic, employers will need to be nimble in their response to current events, changing circumstances, and evolving scientific and legal guidance. For now, the EEOC guidance can be summarized as follows:

**The vaccine itself is not a medical examination, but pre-screening questions may be.** The EEOC currently takes a more permissive approach to medical examinations in the workplace, so long as those examinations are tied to the direct threat posed to workplace safety by the COVID-19 pandemic. Though the vaccine *itself* is not considered a “medical examination,” pre-screening information required by a vaccine provider may be. Thus, if an employer *requires* its employees to be vaccinated and the employer or the employer’s agent administers the vaccine, the employer must be prepared to show that the required pre-screening questions are “job-related and consistent with business necessity.” Employers considering making vaccines available on a *voluntary* basis should consult with legal counsel prior to implementing such a program.

**Seeking proof that an employee has received a COVID-19 vaccination is likely permissible.** It is likely permissible for employers to direct employees to obtain COVID-19 vaccinations from third-party providers, such as pharmacies, and to produce evidence of such vaccination. However, employers who take this route must exercise caution not to ask for or collect attendant health information (for example, the reason why an employee did not receive a vaccination, or the employee’s response to the screening questions) to avoid implicating the Americans with Disabilities Act (ADA) and the associated legal requirements.

**Employers should be prepared to engage in an interactive process with individuals who represent that they cannot receive the vaccine due to disability or sincerely held religious beliefs.** If an employee reports that they have a disability or sincerely held religious beliefs that prevent them from receiving the vaccine, their employer should be prepared to analyze whether that employee poses a direct threat to the workplace as a result of not being vaccinated and, if so,

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whether that threat can be mitigated through an accommodation such as teleworking. The EEOC advises employers to be flexible and interactive in this process. This would be a good time to provide supervisors a refresher on how to recognize an accommodation request and to whom that request should be referred for consideration.

**Relevant analyses are likely to evolve as the pandemic subsides.** Current estimates show large numbers of the American population may be eligible for COVID-19 vaccines over the next six to nine months. Accordingly, there is a strong possibility that the safety threat posed by an unvaccinated employee in the workplace will be different in summer 2021 than it is at present. Employers should work closely with legal counsel to conduct and refine this analysis as circumstances evolve.

**It's not time to relax yet.** Vaccine distribution is going to take several months, so it may be premature for employers in certain sectors to roll out vaccine-related workplace policies or mandates. In addition, vaccination is not instant immunity—it takes the body time to respond to the vaccine. Moreover, while the vaccines authorized to date have been shown to protect the recipients from becoming ill, much is not yet known about whether vaccinated individuals may still get, carry, and/or transmit COVID-19 to others. Until these and other uncertainties are resolved, employers and personnel alike should remain vigilant with regard to social distancing, masks, and other precautions to protect themselves and others from COVID-19.

If you have questions about the newest EEOC guidance, please contact one of the authors, linked below.

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Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our COVID-19 Response Resources page.

**Tags:** Americans with Disabilities Act, Equal Employment Opportunity Commission (EEOC)