

HRW CLIENT ALERT

December 21

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Mandatory COVID Vaccination in the Workplace? EEOC Issues New Guidance

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) added nine new questions about COVID vaccination to its pre-existing guidance [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”](#) The new questions appear in Section K. Key takeaways include:

- Vaccination itself is not a “medical examination” under the Americans with Disabilities Act (ADA), and therefore, regardless of whether an employer’s policy requires mandatory or voluntary vaccination, such policy is not prohibited by the ADA.
- However, pre-screening questions for the vaccination could elicit information revealing a disability, and therefore such questions must be “job related and consistent with business necessity”, at least in the case of a mandatory vaccination administered by an employer as opposed to an independent third-party administering the vaccine, such as a pharmacy or other health care provider. If an employer administered vaccination is voluntary, then pre-screening questions are acceptable if the employee’s decision to answer those questions is also voluntary.
- If an employee objects to vaccination on religious or medical grounds, the employer has an obligation to engage in an interactive dialogue with the employee to determine whether a reasonable accommodation is possible. Employers need not grant an accommodation request that poses an undue burden on the organization, nor if it would pose a direct threat to safety. For more information about religious accommodation, [read our recent client alert on this topic.](#)
- The ADA does not prohibit an employer from requiring proof of vaccination, as this is not a disability-related inquiry. However, related questions could trigger the ADA, such as asking an employee why they did not get vaccinated. Again, medical inquiries of employees are only permitted under the ADA if “job-related and consistent with business necessity.” The guidance suggests that if employers require proof of vaccination that they make clear to employees not to provide any medical information as part of the proof to avoid implicating the ADA.
- Medical information received by an employer in connection with pre-screening or vaccination should be kept confidential.
- Neither vaccination nor proof of vaccination is prohibited by the Genetic Information Nondiscrimination Act (GINA).

In sum, the EEOC’s new guidance, while not surprising in its content, does provide some welcome clarity for employers. Still, employers should be aware that while courts generally defer to agency

guidance like this, the guidance does not have the force of law nor does it take into account state law considerations.

For Questions/More Information

All vaccination policy questions and accommodation questions are highly fact-specific, so please do not hesitate to contact:

- Mark Macchi (mmacchi@hrwlawyers.com / 617-348-4331);
- Pete Moser (pmoser@hrwlawyers.com / 617-348-4323); or
- Any member of the [HRW Team](#) to discuss your particular situation.