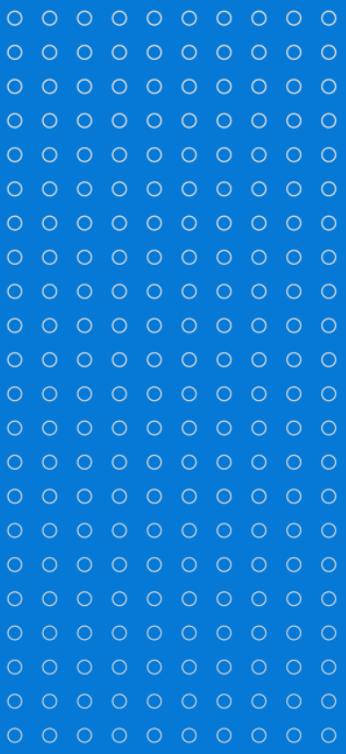
Beyond COVID-19: Vaccines and the Workplace

Understanding Employment Law and Vaccines

December 16, 2020



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As the COVID-19 vaccine becomes a larger part of the national conversation, employers will need to assess and/or develop a vaccination policy and plan. Employer-driven vaccination programs require a thorough understanding of employment law, compliance, employee well-being and education. This e-book, first in a series on **Vaccines and the Workplace,** covers federal employment law considerations and explains the specific limitations pertaining to requiring employees to be vaccinated.

Building a compliant vaccination program is complex and filled with a myriad of legal risks and pitfalls. While we have provided this information to help employers better understand the legal rules and considerations, we strongly recommend that employers work with outside counsel when building an employer vaccination program. It is important to note that this eBook only addresses federal law, other state law limitations may apply. **NOTE:** This eBook contains information from the EEOC COVID Vaccine Updates published on December 16, 2020.

As a general rule, employers, under certain circumstances, may require employees to receive the COVID-19 vaccine. However, there are specific and certain limitations. Employer vaccination policies are subject to two significant federal laws (among other legal considerations covered in this eBook): (1) the Americans with Disabilities Act; and (2) Title VII of the Civil Rights act of 1964 – Religious Discrimination. As a threshold matter, employers must ensure that the rationale requiring vaccinations is based upon objective facts, tied to employees' job descriptions, and administered consistently.

Americans with Disabilities Act[1]

The Americans with Disabilities Act ("ADA") protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he or she has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are "regarded as" having a substantially limiting impairment. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working. The ADA generally prohibits an employer from requiring a medical examination or making inquiries of an employee as to whether that employee is an individual with a disability, or as to the nature and severity of a disability, unless such examination or inquiries are "job-related and consistent with business necessity."

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation. This means that the applicant or employee must:

- Satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- Be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

[1] The Job Accommodation Network (JAN) is a free consultant service that helps employers make individualized accommodations - telephone number is 1-800-526-7234.

As threshold matter, employees with a health condition that is considered a "disability" under the ADA may not be able to receive the vaccine and may require an accommodation. For example:

- Individuals a with severe (i.e. life-threatening) allergies to eggs or to other components of the influenza vaccine
- Adults who have immunosuppression (including immunosuppression caused by HIV or medications)
- Adults and children who have chronic pulmonary, cardiovascular (except isolated hypertension), renal, hepatic, neurologic/neuromuscular, hematologic or metabolic disorders

Employers may require that employees provide documentation from a licensed healthcare provider to establish they have a disability under the ADA. The EEOC initially addressed the circumstances under which an employer may, and may not, require employee vaccinations:

> *13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?*
>
> *No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).*
>
> *Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.*

ADA, Accommodations, and the Interactive Process

While an individual with a disability may request an accommodation due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for a reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

Generally, the employer should initiate the interactive process with the employee once a request for an accommodation has been made by the employee or the employer becomes aware that an accommodation may be required. The employer may have the obligation to initiate the reasonable accommodation interactive process without being asked by the employee if the employer:

- Knows that the employee has a disability
- Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability
- Knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation

The interactive process is "at the heart of the ADA's process" and is critical for enabling individuals with disabilities to fully integrate into the workplace. The goals for the employer and qualified individual with a disability are to:

- Identify the precise limitations caused by the disability
- Explore potential reasonable accommodations that could overcome those limitations

As part of the interactive process, the employer should determine whether it is necessary to obtain supporting documentation about the employee's disability. Additionally, during the interactive process the employer may offer accommodation alternatives and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability. If the individual with a disability states that she/he does not need a reasonable accommodation, the employer will have fulfilled its obligation. It is always recommended that the employer confirm this in writing with the employee.

The employer should consider the possible accommodations in light of the nature of the workforce and the employee's position. In some industries and work environments continued enforcement of safety protocols may suffice. For example, the employer may be able to move an employee who cannot receive the vaccine from a cubicle or open environment to an office to provide additional protection. Likewise, the employer may be able to provide the employee with additional protective gear and breaks to wash his/her hands. It's important to note that even after employees are vaccinated the CDC recommends that employers continue to enforce COVID-19 safety protocols including wearing masks, regular hand washing and sanitizing, one-way hallways, social distancing, well ventilated air systems, and other safety measures (see our employer safety self-inventory here).

In some limited circumstances the employer may exclude the employee from the workplace as an accommodation. For example, the employer may conclude that the employee poses a direct threat if the unvaccinated individual will expose others to the virus at the worksite. To constitute a direct threat, an employer must have a reasonable belief, based on objective evidence, that an employee who does not receive a vaccination, will pose a direct threat due to "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." The EEOC further advises that employers should conduct an "individualized assessment" of four factors to determine whether a direct threat exists:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

"A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to a virus in the workplace."

Once the employer makes the direct threat determination, it cannot unilaterally exclude the employee from the workplace. Likewise, the employer cannot take any other action against the employee unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the direct threat. In other words, the employer must engage in the "interactive process" to determine whether an accommodation (such as safety protocols) will eliminate the risk/threat.

The employer can exclude the employee from the workplace **only if**, after going through the interactive process, it has determined that there is no way to accommodate the employee and also eliminate the risk. However, excluding the employee from the workplace does not mean the termination of employment. Employers must consider whether there is work for the employee to

perform remotely including a temporary reassignment to another position. Likewise, some employees may be eligible for other forms of state or federal leave such as the Family and Medical Leave Act (or the Families First Coronavirus Relief Act which, at the time of this publication, was slated to sunset on December 31, 2020).

ADA and Covid-19 Vaccine Medical Inquiries

In addition to the requirement to provide an accommodation to employees with a qualified condition, the ADA also governs the nature and extent of medical inquiries by employers. An employer may obtain employee medical information only when it is "job-related and consistent with business necessity". According to the EEOC, the vaccine itself is not considered a "medical examination" (under the ADA). However, pre-screening vaccination questions may trigger the ADA inquiry limits if the questionnaires are likely to elicit information about a disability. The likelihood that medical information obtained through the vaccination may trigger an ADA obligation will depend (in part) on the nature of the program:

- **Mandatory Vaccination Programs:** If the employer requires employees to obtain the vaccine and employees receive the vaccine from the employer or a vendor engaged by the employer, the medical pre-screening questions are subject to the ADA. If the employer **requires** (i.e. mandatory vaccination program) an employee to receive the vaccine administered by the employer, the employer must show that disability-related screening inquiries (for example, the medical pre-screening questions) are "job-related and consistent with business necessity."

- **Voluntary Vaccination Program**: If the employee may voluntarily choose to receive the vaccine (and is not required to do so), the employer must likewise make the medical questionnaires voluntary. If an employee chooses not to answer these questions, the employer (or its vendor) may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

- **Third-Party Vaccinations**: Employees who receive the vaccine from other third-party vendors that do not have a contract with the employer, such as their local pharmacy, clinic, or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions even if the vaccine is required by the employer.

Finally, merely requiring the employee to provide the proof or receipt of the COVID-19 vaccine would not constitute a disability related inquiry. However, employers should proceed with caution. If an employer poses any follow-up questions such "why didn't you receive the vaccine", "what medical side-effects did you experience", or "do you have any underlying health conditions that contributed to side effects" they may tread into ADA prohibited medical inquiry territory.

Title VII of the Civil Rights Act of 1964[2]

Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity. Like the ADA, Title VII contemplates accommodating individuals in certain situations. Employees and applicants are entitled to an accommodation when a person identifies a sincerely held religious, ethical or moral belief that conflicts with a specific task or requirement of the position or an application process. More specifically, a religious accommodation is any adjustment to the work environment that will allow an employee or applicant to practice his or her religion, so long as it does not cause an undue hardship to the employer. Title VII's undue hardship defense to providing religious accommodation has been defined by the Supreme Court as

[2] Title 42 U.S.C. § 2000e-2(a) applies to employers with fifteen or more employees. See 42 U.S.C. § 2000e(b).

requiring a showing that the proposed accommodation in a particular case poses “more than a de minimis” cost or burden. This is a lower standard for an employer to meet than undue hardship under the ADA, which is defined in that statute as “an action requiring significant difficulty or expense.”

Definition of Religion[3]

Title VII defines "religion" very broadly. It includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism. It likewise includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.

The EEOC instructs:[4]

> *Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.*

Under Title VII, a practice is religious if the employee's reason for the practice is religious. Social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII.

“Sincerely Held”

Like the “religious” nature of a belief or practice, the “sincerity” of an employee’s stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which an employer may assert that the employee’s claimed religious belief was not sincerely held. Employers may consider whether:

1. the employee has behaved consistently with the belief;
2. the employee is seeking the accommodation for secular reasons;
3. the timing of the request is suspect; and
4. the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

However, no single factor is dispositive.

For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual’s beliefs – or degree of adherence – may change over time, and therefore an employee’s newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion.

Reasonable Accommodation and the Interactive Process

An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. This is different than the ADA where an employer’s obligation may be triggered by its

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[3] Specially defined “religious organizations” and “religious educational institutions” are exempt from certain religious discrimination provisions, and the ministerial exception bars EEO claims by employees of religious institutions who perform vital religious duties at the core of the mission of the religious institution.

[4] On November 17, 2020, the EEOC released updated proposed guidance for comment regarding religious discrimination in the workplace. Therefore, the guidance referenced here may change based on the EEOC finalized guidance.

knowledge (rather than the employee's specific request). However, there are "no magic words." To request an accommodation, an employee may use "plain language" and need not mention any particular terms such as "Title VII" or "religious accommodation." However, the applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job.

Although an employer is not required by Title VII to discuss with an employee before deciding an accommodation request, as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, much like the ADA interactive process, the employer and employee should engage in a cooperative effort to address the conflict between the religious belief or practice and work. The employer may request, and the employee should provide any information and documentation necessary to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the employer. Likewise, when the employer does not have enough information or a bona-fide doubt regarding the sincerity of the religious belief, it may ask about the facts and circumstances of the employee's claim that the belief or practice at issue is religious, sincerely held, and it gives rise to the need for the accommodation.

Religion and Vaccines

May an employer require employees to get a vaccination? May an employee refuse? What recourse does the employer have? What obligations do both the employee and employer have?

In January 2020, the Fifth District Court of Appeals addressed this very issue in *Horvath v. City of Leander*. Brett Horvath is an ordained Baptist minister and a firefighter for the City of Leander Fire Department (the "Department"). Horvath objects to vaccinations as a tenet of his religion. Two years after he was hired, the Department adopted an infection control plan that directed fire department personnel to receive flu vaccines. Horvath sought an exemption from the directive on religious grounds, and the exemption was approved by the Chief. The Chief agreed to the accommodation on the condition that Horvath use increased isolation, cleaning, and personal protective equipment to prevent spreading the flu virus to himself, co-workers, or patients with whom he may come into contact as a first responder.

Two years later, the City mandated that all personnel receive a TDAP vaccine, which immunizes from tetanus, diphtheria, and pertussis or whooping cough and Horvath likewise sought an exemption from the directive on religious grounds. The City provided Horvath with two accommodation options: (1) he could be reassigned to the position of code enforcement officer, which offered the same pay and benefits and did not require a vaccine, and the City would cover the cost of training; or (2) he could remain in his current position if he agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature.

Horvath suggested an alternative accommodation including that he wear the protective gear only when encountering patients who were coughing or had a history of communicable illness. The Chief refused to renegotiate and gave Horvath a deadline to decide whether he "agree[d] to the accommodations as presented or [would] receive the vaccines." After several weeks of discussion with Horvath and Horvath's continued refusal to accept one of the two accommodations, the Chief terminated Horvath's employment for violating the Code of Conduct. Horvath filed suit, alleging, among other things, discrimination and retaliation in violation of Title VII – religious discrimination and retaliation.

The district court ruled in favor of the Department finding:

1. **Religious Discrimination**: The Department offered Horvath two different accommodation options. Because Horvath didn't like the accommodations does not make them illegitimate. "Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee." In fact, the court stated that the Department's offer to transfer Horvath to another position with the same salary and benefits was more generous than accommodations approved by other courts in prior cases.

2. **Retaliation:** The district court found that "Horvath was terminated not for engaging in protected activity by opposing a discriminatory practice." Instead, the court stated that the Department had terminated Horvath for a legitimate reason – "his defiance of a direct order by failing to select an accommodation."

The *Horvath* case provides employers with some important guardrails regarding mandatory vaccination programs:

1. Anti-vaccination beliefs could be (and sometimes are) protected where associated with religious adherence. Employers choosing to implement vaccination requirements must appropriately respond to employees refusing to be vaccinated. If an employee objects to a vaccine on the basis of his/her religion, employers should engage in a cooperative and interactive process to determine whether a reasonable accommodation exists that will protect the health and safety of its workers while removing the conflict between the requirement and the employee's religion.

2. Likewise, (just like with the ADA) employees are not entitled to the accommodation of their choice. Accommodations may include a job reassignment or the requirement to wear specific Personal Protective Equipment (PPE) such as a mask, face shield, and engage in more aggressive sanitizing, disinfecting, and hand washing protocols.

3. Employers must be sure that their approach and accommodations are consistent. For example, if the employer allows an employee to wear PPE instead of a vaccine under the ADA, it likewise should offer that option as a religious accommodation.

Other Employer Considerations

Pregnancy

There are two significant considerations with respect to the Pregnancy Discrimination Act (PDA) and the request for an accommodation.

1. While the PDA does not contain an obligation to provide an accommodation (like the ADA), employers must be sure that they act consistently. This means if the employer has provided an accommodation to an employee on the basis of their disability or religion, they likewise should provide the same accommodation to a pregnant employee. Failure to act consistently may result in a claim of pregnancy discrimination. More specifically, a pregnant employee may allege disparate treatment under the PDA and/or Title VII if an employer refused to excuse the pregnant employee from a vaccination requirement but permitted non-pregnant or male employees to be excused from the requirement on other grounds (such as ADA or religion).

2. Additionally, some pregnancy related impairments (for example, gestational diabetes or preeclampsia, a condition characterized by pregnancy-induced hypertension and protein in the urine) may be disabilities under the ADA (see ADA section above).

National Labor Relations Act

Mandatory vaccines can be a controversial issue and as such, may be included or addressed in an employer's Collective Bargaining Agreement (CBA). Similarly, it is likely that a vaccination requirement may be a subject to mandatory bargaining with the union. Employers with a union population and considering a vaccination policy should review the CBA and discuss their vaccination program with outside counsel.

Workers' Compensation

What happens if an employee experiences a medical complication from the vaccine that was either offered or required by the employer? Under certain circumstances, an employee's medical complications associated with the vaccine may be deemed compensable and covered by the employer's workers' compensation insurance.

Generally, an injury may be compensable when a claimant can demonstrate that the injury can be attributed to some event or circumstances connected with work. For example, one Florida court held that "to be compensable, an injury must arise out of employment in the sense of causation and be in the course of employment in the sense of continuity of time, space, and circumstances." Another Florida court stated that an injury arises out of and in the course of employment if it occurs "within the period of employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of employment, or engaging in something incidental to it." An employee who receives the vaccine while at work may be able to demonstrate that the medical complications were "in the course of employment in the sense of continuity of time, space, and circumstances."

For example, a healthcare employee that chooses to protect patients and him/herself from exposure to COVID-19 and suffers an adverse reaction to the vaccine may have a compensable claim.

It is important to note that workers' compensation is regulated individually and separately by each state. Therefore, the legal standards described above may not apply in other states. Employers should check with their workers' compensation broker and/or carrier to better understand the compensability of medical complications associated with the COVID-19 vaccine in their state.

State Required Vaccinations

In some states employers may be required by state law to mandate employee vaccinations in certain industries. For example, it is common for states to regulate vaccination programs for healthcare employers, but those rules may not apply to a call center or financial services firm. More specifically, some states require vaccinations for health care employees in varying contexts. For example:

- **Alabama** requires "each hospital to establish vaccination requirements for employees that are consistent with current recommendations from the Federal Centers for Disease Control and Prevention and the Federal Occupational Safety and Health Administration (at a minimum to require annual influenza vaccinations)."

- In **Illinois**, each health care employer must ensure that all health care employees are offered the opportunity to receive seasonal, novel, and pandemic influenza vaccine during the influenza seasons (between September 1 and March 1 of each year), unless the vaccine is unavailable. Healthcare employees who decline vaccination for any reason must sign a statement declining vaccination and certifying that he or she received education about the benefits of influenza vaccine.

- **Oregon** provides that an employer of a health care worker at risk of contracting an infectious disease in the course of employment must provide (and pay for) to the worker preventative immunization for infectious disease if such preventative immunization is available and

medically appropriate. A worker shall not be required as a condition of employment to be immunized, unless such immunization is otherwise required under state or federal law, rule or regulation.

State laws regarding employer vaccination programs can vary a great deal and may apply differently based on industry. Employers should check with counsel to better understand how these state laws apply specifically to the COVID-19 vaccine and the employer's obligations.

Confidentiality and Employee Medical Information

Americans with Disabilities Act

As employers begin to learn about an employee's individual medical concerns and conditions, it is important to remember that several laws have specific and stringent confidentiality requirements. FMLA, ADA, and Workers' Compensation laws all contain provisions that protect the confidentiality of an employee's medical information. Employers have the obligation to ensure that all medical information obtained about an employee remains private and confidential. This means, that only those who "need to know" may know both the identity and nature of the medical condition of the employee. Need to know is construed very narrowly. Employers should ask themselves why someone "needs to know" both identity and medical condition before disclosing either or both. The EEOC explains that those who "need to know" may include:

- Supervisors (to implement necessary work restrictions and accommodations)
- First aid and safety personnel (if the disability requires emergency treatment)
- Workers' compensation state offices and insurance carriers
- Government officials investigating ADA compliance

The ADA, among other laws, requires employers to protect employees' privacy by: (1) keeping the names of employees who participate in a vaccination program private; and (2) ensuring that the location of the clinic offers a degree of privacy to employees receiving vaccinations. Additionally, the employer must keep the employee's medical information received from or about an employee in a confidential medical file separate from the employee's personnel file.

Health Insurance Portability Accountability Act (HIPAA) Requirements

Medical information gathered through the FMLA, ADA, disability insurance, workers compensation, or other sick-leave documentation is generally not protected under HIPAA but is confidential. While HIPAA can be a complex law, in a nutshell, if the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely protected under HIPAA.

Generally, HIPAA obligations manifest themselves most frequently in employers with a self-funded health program that have access to claims information. Self-funded programs include health flexible spending arrangements and health reimbursement arrangements. However, employers that receive employee's Explanation of Benefits (even if fully insured) may unintentionally subject themselves to HIPAA. HIPAA also generally prohibits an employer from discriminating against an employee who has a medical condition.

Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations

The Genetic Information Nondiscrimination Act (GINA) is a federal statute prohibiting discrimination on the basis of genetic information.[5] GINA prohibits employers from discriminating against an individual based on the individual's genetic information. GINA also prohibits employers from (among other things) asking for information about an employee's current health status in a manner that is likely to result in the employer obtaining genetic information.

GINA defines "genetic information" to mean:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

Generally, vaccination programs include a pre-vaccination medical questionnaire to assess the individual's ability and/or eligibility for the vaccine. Often, pre-vaccination medical screening questions may elicit information about genetic information, such as questions regarding the immune systems of family members. However, in its December update (K questions), the EEOC stated that it "is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations."

If the pre-vaccination questions **do not** include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions **do** include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

An employer that administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination does not implicate GINA. Administering the vaccine and/or requiring proof of the vaccine does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. However, if an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee[6] (see model language in footnote) not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.

[5] Employers covered by GINA may also be subject to state laws prohibiting discrimination based on genetic information or regulating the collection and storage of genetic information.

[6] "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services." See 29 CFR 1635.8(b)(1)(i)

Likewise, GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information.

There is some concern whether certain COVID-19 vaccine candidates that use messenger RNA technology (mRNA) would be prohibited by GINA. Because the CDC has explained that mRNA vaccines "do not interact with our DNA in any way," the EEOC concludes that requiring employees to receive an mRNA vaccination is not prohibited or governed by GINA.

See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html for a detailed discussion about how mRNA vaccines work.

Employer's Vaccination Policy Considerations

- Does your state allow mandatory vaccination policies? or require vaccines?
- Have you clearly explained the company's justification for the policy including the background and basis for the policy and approach?
- Have you explained the employee's rights to request an accommodation?
- Does your policy clearly explain how an employee may request an exception or accommodation?
    - Is there an anti-retaliation section to ensure that employees who request an accommodation suffer no negative repercussions?
- Have you addressed procedures and processes to ensure employee information remains confidential?
- Have you provided the GINA warning?
- Have you had outside employment law counsel review your medical questionnaires to ensure they are compliant with ADA? GINA?
- Will you have specific procedures for receiving the vaccination?
- Who will pay for the vaccine?
- If you're paying for the vaccine, how will you make payment?
- What is the process for scheduling the vaccine? At the employee's convenience? Based on needs and demands of the employee's position/department?
- How will you promote and communicate about the vaccines? What vaccine education and informational resources will you make available and how may employees obtain them?
- Where will the vaccines be administered? If they are administered onsite, can you ensure the employee's privacy? Will it be a convenient/easily accessible location?
- If the vaccine is mandatory and the employee is not eligible for an exception (i.e. ADA, PDA, Religion) what enforcement mechanisms exist and what are the consequences for noncompliance?
- Do you have a safety protocol and contingency program for vaccine shortages or delays?
- Have you discussed any workers' compensation considerations with your broker and/or carrier?

Additional Resources

National Academies Release Framework for Equitable Allocation of a COVID-19 Vaccine for Adoption by HHS, State, Tribal, Local, and Territorial Authorities

State Healthcare Worker and Patient Vaccination Laws

Influenza Vaccination Information for Health Care Workers

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

CDC Advisory Committee on Immunization Practices (ACIP)

CDC – COVID-19 Vaccination

OSHA COVID Resources

Get the latest information, guidance and resources on Coronavirus (COVID-19) to help you protect what matters most at hubinternational.com/coronavirus. For additional support, please reach out to your local HUB office.