

# **COVID-19: Employers, Vaccine Issues, and the Federal Equal Employment Opportunity Laws**

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# EEOC and Other Resources

All EEOC resources on COVID-19: [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus). Including:

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❖ **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (WYSK)**

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (check here for updates)

# May Employers Ask Under the ADA if Employees are *Fully Vaccinated*?

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- Employers may ask for proof that employees have received a COVID-19 vaccination: *WYSK question K.9*
- Asking for proof of vaccination is not a disability-related question under the ADA – but be aware of any state/local laws (or other relevant guidance) that prohibit asking employees about vaccination status
- Be careful about asking why an employee is not vaccinated because that may result in an employee revealing information about a disability
- Verbal confirmation/documentation of vaccination status is confidential medical information: *WYSK questions K.4 and K.9*

# ADA and COVID-19 Vaccinations

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- EEOC's role in addressing vaccines is limited to certain specific issues
- If employers **require** employees to be vaccinated (a qualification standard), AND an employee says **cannot be vaccinated because of a disability**, then under ADA employer must show that this requirement is *job-related and consistent with business necessity*.
- Since health/safety concerns behind this requirement (i.e., slowing or eliminating spread of coronavirus; preventing serious illness, hospitalization, death), employer must show that this employee's disability would pose **direct threat** if remains unvaccinated: **WYSK question K.5**

# ADA Reasonable Accommodation and COVID-19 Vaccinations

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- Direct threat is an individualized assessment – so for each employee who says can't be vaccinated due to a disability, employer must assess that employee's situation to determine if remaining unvaccinated meets direct threat standard (significant risk of substantial harm)
- If employee remaining unvaccinated meets direct threat standard, then employer must consider whether it can eliminate or sufficiently lower high level of risk with reasonable accommodation (absent undue hardship): *WYSK questions K.2 and K.11*

# Religious Accommodation and COVID-19 Vaccinations

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- Employee may request religious accommodation under Title VII of Civil Rights Act based on sincerely held religious practice, belief, or observance. If employee requests religious accommodation in connection with mandatory vaccine requirement, employer may have to grant request except if it can show undue hardship: *WYSK question K.12*
- Undue hardship in this context is defined as imposing more than a *de minimis* cost or burden, a lower standard of undue hardship than used in the ADA (significant expense or difficulty).
- Employers generally should assume employee's request is based on sincerely held religious practice, belief, or observance, but employer may request additional information if it has objective basis for questioning

# Pregnancy and Mandatory Vaccination

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- To avoid disparate treatment: If employer requires vaccinations, and pregnant employee seeks exception/modification, employer may need to approve the request to extent that these same things were given to other employees who are similar in their ability/inability to work: *WYSK question K.13*
- This means if reasonable accommodation is granted to employees based on disability and/or religious objections to being vaccinated, the same modifications may need to be given to a pregnant worker who cannot be vaccinated due to pregnancy: *WYSK question K.2*

# ADA & Offering Incentives for Employees to be Voluntarily Vaccinated *by Employer or Its Agent*/Potential Legal Uncertainty with This Approach

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- Permissible as long as the *incentive is not so substantial as to be coercive*: *WYSK question K.17*
- ADA regulates the ability of employers to require employees to answer disability-related questions/can't use incentives to coerce
- Certain pre-vaccination screening questions are disability-related questions
  - To avoid having to show the questions are “job-related and consistent with business necessity” requires employees *voluntarily* agree to answer questions and **to achieve voluntary participation means the incentive cannot be coercive**



# ADA & Offering Incentives to Employees to Provide Documentation of Voluntary Community Vaccination/Avoids Legal Uncertainty

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- Permissible because does not involve employer asking disability-related questions: *WYSK question K. 16*
  - Independent Third Party Provides Vaccination: For example, personal physician, medical clinic, pharmacy, local public health or health department
  - **Employer does not get access to the answers to the pre-vaccination screening questions: This is what makes the legal difference**
- Employer only asking for proof (or verbal confirmation) of vaccination which is not a disability-related question (See Slide 3)
- Since no disability-related information is requested, **incentive limitation (i.e., cannot be so substantial as to be coercive) does not apply in this situation:** *WYSK question K. 17*

# GINA and Vaccinations/Issue is Whether Employer Is Seeking Genetic Information (in this case, family medical history): No GINA Problems in These Scenarios

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- No GINA issues if employer requires employees to be vaccinated by the employer/its agent or requires employee to arrange for own vaccination (no genetic information being requested): *WYSK questions K.14 and K.15*
- No GINA issue if employer offers incentives to employees to provide documentation/confirmation that they or their family members have been vaccinated in community (no genetic information being requested): *WYSK question K.18*
- No GINA issue if employer offers incentive for employee to be vaccinated by employer (no genetic information being requested): *WYSK question K.19*

# GINA and Vaccinations/ Issue is Whether Employer Is Seeking Genetic Information (in this case, family medical history): GINA Problem

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- GINA issue if employer offers incentive to employee if family member is **vaccinated by employer/its agent**: *WYSK question K.20*

--Employer or its agent must ask pre-vaccination medical questions about the family member and that medical information about the employee's family member constitutes genetic information about the employee

--GINA prohibits employers from offering *any* incentives to employees to obtain genetic information, including family medical history

# Other Vaccination Issues

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- Examples of reasonable accommodations for disability and religious objections: *WYSK question K.2*
- If employer requires employees to be vaccinated, *best practices* related to ensuring reasonable accommodation requests are properly considered:
  - Notify employees that employer will consider requests for reasonable accommodation based on disability (and religion) on an individualized basis: *WYSK question K.5*
  - Before implementing mandatory vaccination policy, provide clear information to managers/supervisors/those implementing the policy about reasonable accommodation obligations: *WYSK question K.6*
- Actions employers may take to encourage employees (and their family members) to be vaccinated without violating any Federal EEO laws: *WYSK question K.3*