

COVID-19 Vaccinations: Top Questions



As the rollout of the COVID-19 vaccine continues, employers have questions about how the vaccine can or should tie into their business policies. To help you navigate these continuing unprecedented times, following is a summary of several of the top questions submitted to your McGriff team as well as helpful links to additional resources:

Q Can an employer require its employees to be vaccinated with the COVID-19 vaccine?

A In short, yes – employers may be able to require the COVID-19 vaccine as a mandatory condition of employment, subject to several policy exemptions and conditions as discussed in the questions below. In [guidance](#) issued on December 16, 2020, the EEOC confirmed that the vaccine itself is not a “medical examination” under the Americans with Disabilities Act (ADA), however also noted that pre-vaccination questions may be “disability-related inquiries” under the ADA. This guidance is significant in that it gives employers discretion to require employees to obtain a vaccine through their own preferred means and/or provide proof of receipt of the vaccine, while it also potentially limits an employer’s direct involvement in the administration of the vaccine absent proof the vaccine is both “job related and consistent with business necessity.” Of course, even if an employer can require the vaccine, there are a number of additional considerations, including organizational culture, employee relations, risk tolerance, industry standards, and vaccine availability. The EEOC and most legal counsel are encouraging employers to *recommend* rather than *require* the vaccine.

Q What vaccination policy exemptions must an employer consider?

A As noted above, employers requiring the COVID-19 vaccine must ensure their vaccination policy includes several mandatory policy exemptions: (1) medical exemptions under the ADA and (2) religious belief exemptions under Title VII of the Civil Rights Act (Title VII). In reviewing whether an ADA exemption may apply, employers should engage in the ADA’s required interactive process to determine whether the employee has a medical condition preventing the

employee from receiving the vaccine for medical reasons, while a religious belief exemption may apply if an employee has a “sincerely held” religious objection to the vaccine.

If one of these exemptions applies, then employers must provide a reasonable accommodation to the vaccine, unless that accommodation would cause an undue hardship *or* unless the employee poses a “direct threat” even after provision of the accommodation. If no accommodation can be made, the employee may be terminated; however, employers should be aware that showing undue hardship in these scenarios will be a very high burden and should exercise extreme caution as well as consult with legal counsel.

Q What if an employee is fearful of the vaccine or is politically or ethically opposed to the vaccine? Do these objections fall under EEOC protection?

A No. The COVID-19 vaccine is an emotionally charged subject; however, fear of the vaccine or political, ethical or other general objections do not fall under an ADA or religious exemption. Employers will need to be prepared to deal with the employee relations backlash if they choose to mandate a vaccination. In addition, employers will need to determine in advance whether they will allow for objections such as these or if they will make the decision to terminate those employees whose objections are not protected by the EEOC.

Q Can an employer require employees to be vaccinated while the vaccine is under an FDA Emergency Use Authorization (EUA)?

A Vaccines are currently being administered under an EUA. When a vaccine is issued under an EUA, as opposed to FDA vaccine licensure, the FDA has an obligation to:

*[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, **that they have the option to accept or refuse the vaccine**, and of any available alternatives to the product (emphasis added).*

Because EUA guidance specifically states recipients have the option to accept or refuse the vaccine, employers should consult with legal counsel if they are considering mandating the vaccine under an EUA.

Q What should an employer consider if wanting to provide incentives through a wellness program to employees receiving COVID-19 vaccinations?

A Depending upon how a wellness program is structured, compliance concerns under ADA, ERISA, HIPAA, or GINA are often triggered.

While the EEOC has confirmed that administration of the vaccine itself is not a medical examination and does not trigger the ADA, vaccine administration is typically accompanied by medical questions to determine whether the person is a good candidate for the vaccine. Such questions could be considered a disability-related inquiry and subject the program to ADA regulations - particularly if this information is requested by the employer or a third party who has been hired by the employer to administer the vaccine as part of a wellness program. If the ADA applies, the employer's program will be subject to the ADA's "voluntary" standard, which, among other compliance requirements, limits the incentive allowed. Recently proposed regulations could limit this reward even further to a "de minimis" threshold, such as a water bottle or gift card of modest value.

There is an argument that ADA limitations may possibly be avoided if the employer remains hands-off with the vaccination process itself. For example, a program designed to allow an employee to qualify for an incentive by going to a provider of their choice, *not* contracted by the employer, to obtain the vaccine and by providing proof of vaccination may potentially avoid ADA wellness plan regulations. However, depending on the design of the program, additional restrictions may be imposed by HIPAA.

With any wellness program, there are also concerns with allowing employees who are not on the employer's health plan to participate, as it can be difficult to comply with laws such as ERISA, COBRA and the ACA's group health mandates. An employer should consider these added compliance challenges when determining which employees will be eligible for any COVID-19 vaccination incentive.

Finally, an unintended consequence of a seemingly neutral policy providing an incentive for vaccinations is the potential for discrimination by disparate impact. Even if this is meant as a neutral policy, the policy could in fact discriminate against employees with medical conditions (ADA discrimination) or sincerely held religious beliefs (Title VII discrimination) that would exclude them from participating in such a benefit program.

Q Are there other ways to encourage employees to get a COVID-19 vaccinations?

A Yes. Employers can encourage employees to obtain the vaccine by developing communication programs; providing CDC information to aid employees in making vaccination decisions; and assisting employees with logistical information to help navigate the information gathering process of rapidly changing state and local guidelines. Some employers are also offering paid time off to receive – and to recover from - the vaccine.

Additional Resources

- [McGriff COVID-19 Frequently Asked Questions](#)
- [CDC – COVID-19 Vaccine FAQs, Data Tracker and State Vaccine Locator](#)
- [CDC: COVID-19 Vaccine Employer Communication Toolkit for Essential Workers](#)
- [WebMD: State-by-State Guide to COVID Vaccination Information](#)
- [Kaiser Family Foundation: "Vaccination Line": An Update on State Prioritization Plans](#)
- [Kaiser Family Foundation: State COVID-19 Vaccine Priority Populations](#)