

# Locke Lord QuickStudy: EEOC Releases Updated Vaccination Guidance for Employers

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In May 2021, the Equal Employment Opportunity Commission (“EEOC”) updated Section K of its COVID-19 [guidance](#) to provide additional insight on workplace vaccination programs. Since December 2020, when the EEOC first issued COVID-19 vaccine guidance, the vaccine landscape has changed considerably—vaccines are more widely available and [more than 40%](#) of the U.S. population is fully vaccinated. Given these developments, employers may be considering whether to incorporate vaccination policies into their plans to fully and safely welcome employees back to the office. The EEOC updated its guidance to address the applicability and impact of federal equal employment opportunity (“EEO”) laws on both mandatory and voluntary vaccine programs, clarify how and when employers may use vaccine incentive programs, and discuss employee privacy considerations.

## Topics Not Included in EEOC Guidance

Two pressing concerns for employers are not addressed in the EEOC guidance. First, the EEOC does not address recently-issued guidance from the Centers for Disease Control (“CDC”) on safe activities for vaccinated individuals because the EEOC prepared its guidance before the CDC guidance came out. Thus, the EEOC does not address what distinctions employers can make in its workplace protocols (masks, etc.) between vaccinated and unvaccinated employees. Employers will need to stay tuned for more EEOC guidance on this topic. In addition, the EEOC noted that while it received many inquiries regarding the impact on workplace vaccination programs of the Emergency Use Authorization status of the COVID-19 vaccines, as determined by the Food and Drug Administration, this topic is beyond its jurisdiction.

## Mandatory vs. Voluntary Vaccination Programs: ADA and Title VII Considerations

### A. Mandatory Vaccination Programs Permitted

The EEOC guidance is premised on its position that the act of administering the vaccine is not a “medical examination” under the Americans with Disabilities Act (“ADA”) nor does it involve the use of an employee’s genetic information under the Genetic Information Nondisclosure Act (“GINA”). As such, the EEOC contends that these and other federal employment nondiscrimination and EEO laws do not prohibit an employer from implementing a mandatory vaccination program. These include programs that require employees who physically enter the workplace to either: (1) receive the vaccine from the employer or the employer’s agent; or (2) confirm

receipt of the vaccine from a third party. Employers should note that other applicable laws or practical considerations may impact an employer's ability to implement a mandatory vaccine program for certain workplaces and should be considered in conjunction with this EEOC guidance. Employers are also reminded to apply any vaccination requirement in a way that does not treat employees differently based on a protected category or result in a disparate impact on a protected group.

## B. Reasonable Accommodations

Vaccination programs are subject to the reasonable accommodation requirements of the ADA and Title VII of the Civil Rights Act. In fact, the EEOC suggests as a best practice that employers who mandate vaccines should notify employees that the employer will consider reasonable accommodation requests on an individualized basis.

The EEOC opines that under the ADA, an employer cannot require that an employee with a disability (including pregnancy-related disabilities) comply with its mandatory vaccination program unless: (1) the employee poses a direct threat to the health and safety of the employee or others in the workplace because the employee is not vaccinated; and (2) allowing a reasonable accommodation would not reduce or eliminate such threat.

In order to establish that an employee with a disability that prevents the employee from receiving the vaccine poses a direct threat, an employer must prove that the employee causes a substantial risk of harm because the employee is not vaccinated. The updated guidance notes that the direct threat analysis requires the employer to make an individualized assessment of the employee's present ability to safely perform the essential functions of the job, based on the following factors: (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. Further, the EEOC guidance states that the direct threat analysis should be based on reasonable medical judgment that relies on current medical knowledge about COVID-19, including the level of community spread, available CDC guidance, and information from the employee's medical provider with the employee's consent. Finally, the EEOC notes that the direct threat analysis should take into account the employee's work environment, including among other things the number of partially or fully vaccinated individuals already in the workplace, whether other employees are wearing masks or undergoing routine screening testing, and the space available for social distancing. However, as previously discussed, even if an employer is able to establish that an unvaccinated employee with a disability poses a direct threat based on these factors and considerations, if such threat can be reduced or eliminated by a reasonable accommodation, the employee does not pose a direct threat.

Employees with a disability who are fully vaccinated may also request an accommodation from a return-to-work program based on the employee's concern of a heightened risk of severe illness from COVID-19.

The guidance also states that under Title VII, an employer must provide a reasonable accommodation to an employee with a sincerely-held religious belief, practice, or observance that prevents the employee from getting the COVID-19 vaccine, unless the accommodation would pose an undue hardship to the employer. Employers may request additional supporting information if the employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. However, employers should note that courts have historically held a very broad view of what can constitute a religious belief.

For any accommodation request, employers should engage in the interactive process to determine if there is a need for a reasonable accommodation due to disability or religious belief, practice or observance. The EEOC provides examples of potentially reasonable accommodations, including face masks, social distancing, modified shifts, periodic COVID-19 testing, telework if feasible, or reassignment if possible. The EEOC cautions employers to “consider all options before denying an accommodation request” and that an accommodation is considered reasonable if it does not pose an undue hardship. Undue hardship for a religious-based accommodation is a lower standard to meet than for a disability based accommodation. Accommodations made to employees must be kept confidential and should not subject employees to retaliation.

### C. Medical Inquiries and Confidentiality

The ADA generally restricts when and how much medical information an employer can obtain from an employee. Specifically, the ADA only allows employers to make disability-related inquiries about employees if they are job-related and consistent with business necessity. Therefore, an additional legal issue an employer may face in implementing its vaccination program involves the CDC’s COVID-19 vaccine **pre-screening questions**. The EEOC states that these pre-screening questions are likely to elicit information about an employee’s disability, and as such, must be job-related and consistent with business necessity to comply with the ADA.

In the context of mandatory vaccination programs in which employees are required to obtain the COVID-19 vaccine from the employer or the employer’s agent, that EEOC guidance indicates that in order for the pre-screening questions to meet this standard, an employer must have a reasonable belief, based on objective evidence, that an employee’s failure to answer the questions, and thus inability to obtain the vaccine, causes a direct threat in the workplace. The same “direct threat” analysis applies here as with the disability accommodation analysis previously discussed.

Conversely, the EEOC notes that if the employer has a voluntary vaccination program, such that employees can choose whether to answer the CDC’s pre-screening questions, the ADA’s restrictions on disability-related inquiries do not apply to the pre-screening questions. Likewise, when an employer asks employees whether they obtained the COVID-19 vaccine from a third party unaffiliated with the employer, the ADA’s restrictions also do not apply because this inquiry is not likely to disclose the existence of a disability.

Importantly, regardless of whether the pre-screening questions constitute disability-related inquiries per the EEOC guidance, the EEOC states that employers must keep the information obtained in response to pre-screening inquiries confidential and stored separately from the employee’s personnel file. The EEOC also considers information or documentation an employer receives from an employee regarding the employee’s vaccination status to be medical information, which must also be kept confidential and stored separately. State and local laws may provide additional protections for vaccination status as well.

Additionally, inquiries regarding why an employee is not vaccinated may inadvertently elicit information about an employee’s disability status. As such, the ADA’s restriction that such questions be job-related and consistent with business necessity applies. Given the requirements the EEOC guidance dictates are necessary to meet this standard, employers should generally refrain from posing these questions to employees.

### **Vaccine Education and Incentives**

In K.3 of the EEOC guidance, the EEOC emphasizes incentivizing vaccinations through education by employers. The EEOC provides links to resources as well as a summary of vaccination-related obstacles employees may face and how employers may assist employees in overcoming them.

For monetary or other incentives, while the legality and scope of such employer-sponsored wellness programs remain in limbo after the EEOC withdrew its [proposed wellness rules](#) earlier this year, the EEOC provides some guidance on how employers may use these incentives to encourage employees and their family members to voluntarily obtain the COVID-19 vaccine. The EEOC distinguishes between those employers who administer the vaccine directly and those who want to incentivize vaccination by third parties, finding that:

- Under the ADA and GINA, an employer may offer incentives to employees without restriction to encourage employees and their family members to obtain the vaccine from third parties not acting on the employer's behalf.
- Under the ADA, employers may offer incentives to employees who receive the vaccine administered by the employer or the employer's agent; however, the incentives may not be so substantial as to be coercive.
- Under GINA, employers may vaccinate an employee's family members, but may not offer incentives in exchange for a family member's receipt of a COVID-19 vaccine administered by the employer or the employer's agent because the CDC's pre-screening questions would reveal the employee's family medical history.

However, additional legal issues may further complicate vaccine incentive programs. For example, the EEOC did not define what constitutes a substantial or coercive incentive. Further, the updated guidance is silent on how employers should apply incentive programs to employees with disabilities or sincerely-held religious beliefs preventing them from receiving the vaccine. Finally, even when EEO laws permit employers to offer incentives, employers should be wary of any incentives that could trigger state and federal wage and hour laws.

## Conclusion

Given the significant legal and practical considerations involved with implementing a vaccination program, there is no one-size-fits-all approach. In addition to weighing the pros and cons of particular vaccination policies, as we addressed in more detail in a prior article found [here](#), each employer should also carefully evaluate the EEOC's updated guidance, as well as the ever-changing guidance from federal, state, and local officials, on issues ranging from workplace safety to privacy to vaccination status, in order to decide whether and how to implement the right vaccination program for each of its locations and for each segment of its workforce.

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