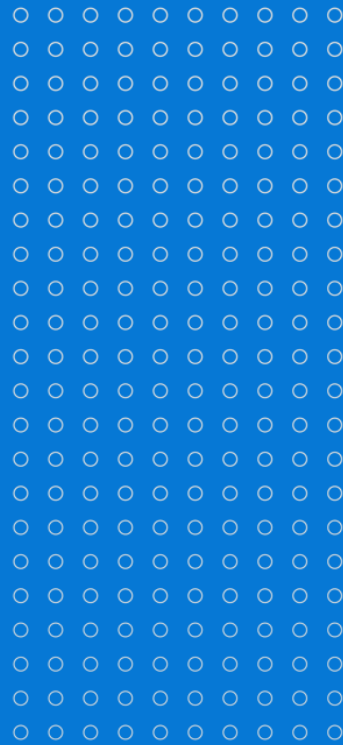


Beyond COVID-19: Vaccines and the Workplace

Employer Guide to Mandatory Vaccination Programs

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HUB has developed this document to assist clients interested in mandatory vaccine programs with designing and implementing a compliant program. This document should not be construed as advocacy or a recommendation for a workplace mandatory vaccine program. Employer-driven mandatory vaccination programs require a thorough understanding of employment law, compliance, employee well-being and education. This e-book covers federal employment law considerations and explains the specific limitations pertaining to requiring employees to be vaccinated. Laws may differ and/or vary by state.

How to use This Document

Throughout this document we address many important employer considerations that are often also addressed by various government agencies such as the Centers for Disease Control (CDC), Department of Labor (DOL), and the Equal Employment Opportunity Commission (EEOC). We have placed links to the applicable guidance throughout this document for your easy reference. While the EEOC has issued guidance regarding vaccines under federal law, states may interpret their own employment laws differently. Likewise, many municipal, county, state and federal agencies have announced and/or already implemented mandatory vaccination programs. **This guide has been developed exclusively for private employers.** Private employers with government contracts should consult with counsel regarding the ability and/or obligations to offer or mandate the COVID-19 vaccine in the workplace. **Because the laws, rules, and regulations regarding COVID health and safety and COVID vaccines is evolving and changing quickly, we strongly recommend that employers consult with outside legal counsel before implementing any vaccine program. Where local, state or federal law varies from the guidance in this document, the local, state, and/or federal law applies.**

As a general rule, employers, under certain circumstances, may require employees to receive the COVID-19 vaccine even while such vaccinations are available only through Emergency Use Authorizations (EUA).¹ However, there are specific and certain limitations. Employer vaccination policies are subject to various significant federal laws (among other legal considerations covered in this eBook): (1) the Americans with Disabilities Act; (2) Title VII of the Civil Rights act of 1964 – Religious Discrimination; and (3) the Pregnancy Discrimination Act. 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.²

Mandatory Vaccine Programs

Mandatory vaccine programs are not all created equal. There seems to be essentially two approaches to a mandatory vaccine program:

1. **The Purist:** employer requires all candidates and employees to become vaccinated by a certain date or within a specified timeframe. Failure to become vaccinated results in withdrawal of offer of employment or termination of employment unless the individual is eligible for an exception under state and/or federal law.

¹ The U.S. Department of Justice (DOJ) issued an opinion stating that the Food, Drug and Cosmetic Act does not prohibit employers from mandating vaccination for COVID-19, even while vaccinations are available only through an EUA. <https://www.justice.gov/olc/file/1415446/download>

² See [EEOC FAQ K.5](#). Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? (12/16/20, updated 5/28/21)

2. **The Hybrid:** employer requires all candidates and employees to become vaccinated by a certain date or within a specified timeframe. Employees that fail to become vaccinated will retain employment but will be subject to greater safety scrutiny and standards including regular COVID-19 testing.

Before deciding which approach to take, employers should consider the following:

- The potential impact of a vaccination policy on your business;
- The potential reception to different policies by your candidates, employees, customers, and the public;
- The applicable laws, regulations and orders at the federal, state and local level.

Once an employer has determined its approach to its employee vaccination policy it should develop a written vaccination policy. Employers should likewise develop and implement robust communication and education programs for employees allowing employee feedback and Q&A.

Employee COVID-19 Testing and Mandatory Vaccine Programs

For employers adopting a hybrid approach, or those who must provide a workplace accommodation, regular and frequent employee COVID-19 testing may be part of an alternative solution. The EEOC has addressed employer COVID-19 testing:

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? (4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)

The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following [recommendations by the CDC](#) or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's “business necessity” standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review [information](#) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require—to the

greatest extent possible—that employees observe infection control practices (such as social distancing, regular handwashing, and other protective measures) in the workplace to prevent transmission of COVID-19.

Americans with Disabilities Act

Employers considering a mandatory vaccination program must be prepared to address employees with underlying health conditions that conflict with the ability to become vaccinated.

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 the 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.

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 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 FAQ “K”](#) series of questions addresses employer workplace vaccination programs and the ADA. The EEOC has made clear that employers may require employee vaccinations so long as they provide for certain exceptions:

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? (5/28/21)

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the [reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below](#). These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see EEOC FAQ K.6) or for religion (see EEOC FAQ K.12).

Mandatory Vaccines, 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 accommodation or job modification. 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 have already 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 with a door to provide additional protection. Likewise, the employer may be able to offer the employee a modified shift or provide the employee with additional protective gear and breaks to wash his/her hands. Additionally, employers should consider telecommuting or reassignment accommodations.

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](#). Employers should check with local counsel regarding state paid leave laws. Some states continue to provide other forms of COVID-19 related Paid Sick Leave. For example, CA provides leave to recover from vaccine side effects.

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:

- o **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.”

- **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. Likewise, the documentation of the vaccine (i.e. the vaccine card) is confidential medical information, must be stored in a separate and secure medical file, and only those who “need to know” may be informed of the employee’s vaccine status.

Title VII of the Civil Rights Act of 1964³

Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity.

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)) or other protected classes. Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, or other protected class, unless there is a legitimate non-discriminatory reason.

Title VII and Religion

Like the ADA, Title VII contemplates accommodating individuals who’s sincerely held religious belief conflicts with receiving the vaccine. 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 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.”

³ Title 42 U.S.C. § 2000e-2(a) applies to employers with fifteen or more employees. See 42 U.S.C. § 2000e(b).

Definition of Religion⁴

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:

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.

The EEOC provides specific and detailed guidance to employers regarding employee religious accommodation requests. Specifically, in FAQ K.12 the EEOC instructs (among other things):

Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (updated 5/28/21).

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

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 ([EEOC FAQ K5](#)).

⁴ 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.

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 own 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.

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. 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

The [CDC has stated](#) that there is “limited data Available about the Safety of COVID-19 Vaccines for People Who Are Pregnant” along with breastfeeding women. Therefore, employers may consider allowing pregnant and/or breastfeeding employees to “opt out” of a mandatory vaccination program until the CDC can assure the safety of the vaccine in pregnant and breastfeeding women.

Additionally, 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 may need to 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). Specifically, the EEOC instructs (see EEOC FAQ K13):

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid [disparate treatment in violation of Title VII](#).

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.

Fair Labor Standards Act

Employers implementing mandatory vaccine programs may have an obligation under the Fair Labor Standards Act (FLSA) to pay employees for the time the spending traveling to/from the vaccine site along with the time to receive the vaccine. While the Department of Labor has not specifically addressed mandatory vaccines, the following [DOL guidance](#) is instructive:

After being hired, employers often require their employees to take certain tests as they begin employment or on a periodic basis during their employment, such as physical examinations, fingerprinting and drug testing. Whenever you impose special tests, requirements or conditions that your employee must meet, time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked.

It does not matter whether these tests are scheduled during your employee's normal working hours or during his or her non-working hours. Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving your business and during which he or she is subject to your discretion and control.

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 because of a mandatory employer program 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."

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 and Federally Required Vaccinations

Various states and the federal government are adopting a myriad of vaccination policies. For example, some states are beginning to regulate vaccination programs for state employees, but those rules may not apply to private employers. For example:⁵

- President Biden's [announced](#) (see [fact sheet](#)), that the federal government will require employees to attest to their vaccination status. Employees who fail to provide an attestation or are not vaccinated will be required to:
 1. mask at all times,
 2. test one to two times per week,
 3. socially distance, and
 4. generally will not be allowed to travel for work.
- Likewise, the Department of Defense [announced](#) that it will [seek presidential approval](#) to require all of its employees including uniformed, civilian and contractors to be vaccinated by mid-September, or when the vaccine receives U.S. Food and Drug Administration licensure, whichever occurs first.

California: According to the governor's [announcement](#), and [this public health order](#), all state workers along with workers in health care and high-risk congregate settings must "either show proof of full vaccination or be tested at least once per week". The new policy for state workers will take effect August 2 and health care workers and congregate facilities will take effect on August 9. Health care facilities will have until August 23 to come into full compliance." See state [Q&A guidance](#).

On [August 5th](#), state officials expanded the vaccination requirement to cover additional health care facilities and issued two new public health orders. "The [first order](#) requires workers in health care settings to be fully vaccinated or receive their second dose by September 30, 2021." Health care employees that fail to become vaccinated for religious or

⁵ See Littler Mendelson vaccine program tracker: <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you>

qualifying medical reasons must be tested regularly. The [second order](#) applies to visitors at hospitals, skilled nursing facilities, and intermediate care facilities.

On August 11, California state officials issued another health [order](#) requiring all school staff to provide proof of vaccination or take mandatory weekly COVID tests. This order applies to all public and private schools serving students in transitional kindergarten through grade 12. All schools must be compliant by October 15, 2021.

Colorado: According to the governor's [announcement](#), and [FAQs](#), "unvaccinated state workers must begin serial testing and continue mask-wearing indoors in public spaces. . . . The plan is effective Sept. 20, 2021."

Kentucky: According to the governor's [announcement](#), "the cabinet will strongly encourage all contractors and state employees working in these state-operated facilities be fully vaccinated against COVID-19 by Oct. 1, unless there is a religious or medical reason they cannot be vaccinated. If any of the staff in these facilities is unvaccinated, they will be tested at least twice weekly for their safety and the safety of the Kentuckians they serve."

Massachusetts: According to the governor's [announcement](#) and [public health order](#), Massachusetts will implement a vaccine mandate for staff at certain private skilled nursing facilities at two Soldiers' Homes. Covered "[p]ersonnel includes all individuals employed directly or by contract by the LTC provider. All unvaccinated personnel are to receive a first dose of a two-dose series by September 1, 2021; and be fully vaccinated by October 10, 2021."

Oregon: The Oregon Health Authority (see governor's [announcement](#)) will issue a rule that will require "weekly COVID-19 testing for personnel in health care settings to prevent the spread of COVID-19 in health care settings, which can be waived with a proof of vaccination." The requirement "to be vaccinated or undergo weekly testing will apply starting September 30th."

Moreover, the governor's [August 10 announcement](#), requires that "all State of Oregon executive branch employees will be required to be fully vaccinated on or before October 18, or six weeks after a COVID-19 vaccine receives full approval from the U.S. Food and Drug Administration, whichever is later. . . . Individuals unable to be vaccinated due to disability or sincerely held religious belief may be able to qualify for an exception, as required by state and federal law. State of Oregon employees will not have the option of weekly testing instead of showing proof of vaccination."

Employer Liability for Vaccination Programs

There is not currently any state law that expressly provides immunity to private employers who mandate the COVID-19 vaccine. However, at the federal level under the Public Readiness and Emergency Preparedness Act (PREP Act), a health care employer or a private employer that provides a "facility to administer or use" the COVID-19 vaccine could have immunity under the law.⁶ The PREP Act does not provide immunity to employers who simply mandate or encourage employees to get vaccinated on their own.

Confidentiality and Employee Medical Information

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.

⁶ <https://www.phe.gov/emergency/events/COVID19/COVIDvaccinators/Pages/PREP-Act-Immunity-from-Liability-for-COVID-19-Vaccinators.aspx>

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 employees 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, or as the employee's own healthcare provider (for example, a hospital or doctor's office that administers the vaccines to its own employees) then that information is likely protected under HIPAA.

Otherwise, HIPAA obligations generally 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.⁷ 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);

⁷ 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.

- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by 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.

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 employee⁸ (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.

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.

Family Members

EEOC guidance states that employers cannot require an employee's family members to become vaccinated or punish an employee if his or her family members decide not to get vaccinated. Employers can, however, provide access for employees' family members to get vaccinated as long as the vaccination is administered by an independent provider (so that GINA won't apply). Specifically, the EEOC provides:

⁸ "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)

K20: . . . an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of the employee. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

Policy Drafting Considerations

New Hires

Employers should be transparent and up-front in their job advertisements and recruitment efforts regarding their vaccine policy. While the employer cannot ask the candidate about his/her COVID-19 vaccine (or antibody) status during the interview process, they can state their vaccination policy. For example, employers may state that they require all employees to become fully vaccinated unless eligible for a specific exception.

Employers must remember that candidates have the same rights under the ADA and Title VII (religion). Therefore, employers should create a handout or communication piece for candidates apprising them of their rights under ADA and Title VII (religion) and outlining the accommodation request process. Likewise, employers also note any other exceptions under the mandate (such as pregnancy and/or breastfeeding).

Offer letters should specify that the offer of employment is contingent on becoming fully vaccinated (much like offers of employment contingent on successful completion of pre-employment drug screen and/or background checks). Employers may require candidate COVID-19 testing and vaccines after the offer of employment has been made and the candidate has accepted (even if the candidate has not yet begun employment).

While employers implementing a mandatory vaccination program may require new hires to become vaccinated as a condition of employment, there are some important and specific guardrails. Importantly employers may not:

- Ask about a candidate's vaccination status, prior COVID-19 diagnosis, or antibodies on the employment or job application
- Ask about a candidate's vaccine status, prior COVID-19 diagnosis, or antibodies in the job interview
- Deny a reasonable accommodation under the ADA and for a qualified disabling condition that conflicts with receiving the vaccine and does not pose and undue hardship on the organization
- Deny a reasonable accommodation under the Title VII (religion) for a sincerely held religious belief that conflicts with receiving the vaccine and does not pose and undue hardship on the organization
- Discrimination against a pregnant or breastfeeding candidate

Ongoing Employees

Employers implementing mandatory vaccination programs generally should provide advanced notice to its employees for a number of reasons. In particular:

- Some employees may require time to conduct their own research and become comfortable with receiving the vaccination

- Employees may need time to gather documentation and information that substantiates a legitimate exception to the requirement (such as medical documentation)
- Employees may need time to get medical clearance from their healthcare provider
- In some cases, employees may want to consult with their religious leader or community leaders
- It may take some time to schedule and attend a vaccine appointment
- In some communities it may be more difficult to get access to the vaccine and/or vaccine appointments.

Employer vaccine programs may design deadlines in at least two ways:

1. A first deadline for the first dose (when receiving the multi-dose vaccine) and a second deadline to receive the second dose; or
2. A single deadline by which employees without a legitimate exception must become fully vaccinated. [According to the CDC](#), people are considered fully vaccinated:
 - 2 weeks after their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines, or
 - 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine

Prior COVID-19 Diagnosis

Employer mandatory vaccination deadlines should also address employees who have previously tested positive for COVID-19. The [CDC instructs](#):

Vaccination of people with known current SARS-CoV-2 infection should be deferred until the person has recovered from the acute illness (if the person had symptoms) and they have met [criteria](#) to discontinue isolation. This recommendation applies to people who experience SARS-CoV-2 infection before receiving any vaccine dose and those who experience SARS-CoV-2 infection after the first dose of an mRNA vaccine but before receipt of the second dose.

While there is no recommended minimum interval between infection and vaccination, [current evidence](#) suggests that the risk of SARS-CoV-2 reinfection is low in the months after initial infection but may increase with time due to waning immunity.

Ongoing Safety Protocols

It's important to remember that a vaccinated workforce is only one tool in the COVID-19 toolbox. Specifically, both OSHA and the CDC are very clear that employers must continue to follow COVID-19 safety protocols including handwashing, disinfecting, air circulation and purification. See our [COVID-19 Safety Self-Inventory](#) for more guidance on developing a safety policy.

Vaccinated and Exposed

The CDC has indicated that vaccinated individuals are less likely to transmit the virus and less likely to become seriously ill. For these reasons, there are specific COVID safety rules for fully vaccinated individuals that come into Close Contact⁹ with a COVID-19 positive (or likely positive) individual.

⁹ Close Contact: (1) Someone who was within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time the patient is isolated; (2) You provided care at home to someone who is sick with COVID-19; (3) You had direct physical contact with the person (hugged or kissed them); (4) You shared eating or drinking utensils (5) They sneezed, coughed, or somehow got respiratory droplets on you.

Mandatory Vaccines and the American Rescue Plan/COBRA

The American Rescue plan provides 100% employer subsidized COBRA (through September 30th, 2021) to employees who are involuntarily terminated and are covered under a COBRA eligible plan at the time of termination. Employees who are terminated for failure to become vaccinated under a mandatory vaccine program (and are not eligible for a legal exception) would be considered an “involuntary termination” under ARPA. While the termination would be “for cause” – failure to follow the employer’s mandatory vaccination policy – it is not gross misconduct and therefore, is an ARPA COBRA subsidy eligible termination. Specifically, [the IRS provides](#):

Q-27. Does involuntary termination of employment include involuntary termination of employment for cause?

A-27. Yes. However, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the loss of the health coverage of the employee and other family members by reason of the employee’s termination of employment does not lead to eligibility for COBRA continuation coverage. Therefore, the loss of coverage due to a termination of employment for gross misconduct will not result in an individual becoming a potential Assistance Eligible Individual.

However, the answer becomes more murky when dealing with an employee who quits prior to the vaccination deadline. *For example, the employer hands out the new mandatory vaccine policy on a Monday requiring full vaccination status by not later than 60-days from the date of dissemination. Bob immediately turns in his resignation.* Employers facing this scenario should speak with their counsel to obtain a legal opinion regarding the application of the ARPA COBRA subsidy under these circumstances.

Additional Resources

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

[CDC Advisory Committee on Immunization Practices \(ACIP\)](#)

[CDC – COVID-19 Vaccination](#)

[OSHA COVID Resources](#)

[OSHA Emergency Temporary Standards](#)

[OSHA – Mitigating and Preventing the Risk of COVID-19 in the Workplace](#)

[EEOC FAQ](#)

[IRS ARPA COBRA Subsidy FAQ](#)

[EEOC Guide on Religious Discrimination](#)

[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)

[Job Accommodation Network](#)

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.

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Sample Mandatory Vaccine Policy

Mandatory Employee COVID-19 Vaccination Policy

In the [midst/wake/era] of the COVID-19 pandemic, [EMPLOYER NAME] wants to assure you of its continued commitment to maintaining a safe and healthy workplace and that we are taking additional measures to protect you, your coworkers, and your families from contracting and spreading COVID-19.

Now that COVID-19 vaccines have been approved [for Emergency Use Authorization] by the US Food and Drug Administration (FDA) and are readily available to [the general public/in [EMPLOYER NAME's] geographic location[s]], we are implementing a mandatory vaccination policy, subject to the exceptions in this policy (explained below).

This policy is based on guidance from the Centers for Disease Control and Prevention (CDC) [,/and] the Equal Employment Opportunity Commission[, and [OTHER ADMINISTRATIVE OR GOVERNMENTAL AGENCY]] and is designed to comply with all applicable federal, state, and local laws.

[Compliance with this policy is a condition of your continued employment.] Please read this policy carefully.

Information About COVID-19 Vaccines

The CDC has promoted the benefits and safety of approved COVID-19 vaccines. [In addition, [JURISDICTION] recommends that all individuals aged 12 and over who can safely do so get vaccinated against COVID-19.] [According to the CDC:

- COVID-19 vaccines currently approved or in development in the US do not contain the COVID-19 virus and will not make you sick with COVID-19.
- Getting the COVID-19 vaccine will not make you test positive for COVID-19.
- COVID-19 vaccinations have been shown to be highly effective at preventing you from getting sick with COVID-19 and experiencing the most severe consequence of the disease.
- COVID-19 vaccines reduce the risk of spreading COVID-19.
- COVID-19 vaccines do not change your DNA.
- COVID-19 vaccinations are an important tool in helping to stop the pandemic.
- COVID-19 vaccines will be free to you, though some charges may be billed to your insurance company.]

[The CDC also now advises that fully vaccinated individuals can resume pre-pandemic activities in all settings [with/without] wearing a mask or social distancing [, subject to state or local laws or regulations and local business and employer requirements]. An individual is considered fully vaccinated two weeks after the second dose of a two-dose vaccine (Moderna or Pfizer) or two weeks after a single-dose vaccine (Johnson & Johnson).]

More information about COVID-19 vaccines and the vaccine approval process is available and frequently updated on the CDC's website at: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/>.

[Additional information from [OTHER PUBLIC HEALTH AGENCIES] is available at: [WEBSITE OR PHYSICAL LOCATION].]

Continued Applicability of Other Infection Control Policies [and Protocols]

This Mandatory Vaccination Policy is a key part of our overall strategy and commitment to maintaining a safe and healthy workplace in light of the COVID-19 pandemic. This policy is designed for use together with, and not as a substitute for, other COVID-19 prevention measures[, including [EMPLOYER NAME]'s:

- [Face Mask Policy.]
- [Social Distancing Policy.]
- [Temperature Check and Health Screening Protocols.]
- [Cleaning and Sanitation Policy.]
- [Health and Safety Policy.]
- [Infection Prevention and Control Policy.]

[OTHER COVID-19 PREVENTION POLICIES OR PROTOCOLS.]

[However, fully vaccinated individuals may be exempt from complying with certain COVID-19 prevention measures[, such as face mask or social distancing requirements]. For more on those exemptions, see [EMPLOYER NAME]'s [SPECIFIC RELEVANT POLICIES].]

We need your full cooperation and compliance with this and other health and safety workplace policies to make them effective.

Vaccination Requirements

[Following/consistent with] the CDC's guidance [and other applicable public health guidance/ the guidance/requirements] of [STATE/OTHER JURISDICTION]], to prevent the infection and spread of COVID-19, and as an integral part of its public health and safety measures, [EMPLOYER NAME] requires that [all employees/all employees hired after the effective date of this policy/employees in [SPECIFIED UNIT OR WORKPLACE]/[TITLE OR POSITION OF COVERED EMPLOYEES]/individuals entering the workplace[, including temporary workers and independent contractors,]] get vaccinated against COVID-19 [at the [EMPLOYER NAME]'s designated facilities/and show proof of [an FDA-approved] COVID-19 vaccination] [before returning to the workplace/by [DATE]], unless an exemption from this policy has been granted as an accommodation or otherwise. For more on the accommodation and exemption process, see Accommodation and Exemption Requests below.

Employees who fail to comply with these requirements will be [barred from entering the worksite [and]][subject to disciplinary measures[, up to and including termination of employment]/placed on unpaid leave/required to work from home/[OTHER CONSEQUENCE]], subject to reasonable accommodation and other requirements of applicable federal, state, and local law].

Vaccine Administration [by the Employer or it's Agent Onsite]

[[EMPLOYER NAME] will make the [NAME OF VACCINE OR VACCINES] available to all employees [and other covered individuals] at [LOCATION] [during regular business hours] on [SCHEDULED DATES AND TIMES]. You must schedule [the first dose of] your vaccine by [PROCEDURE FOR SCHEDULING] [and must schedule and receive your second dose of the vaccine before returning to the workplace]. [[EMPLOYER NAME] will keep employees' vaccination information strictly confidential.]

[OR]

[from Administrator Offsite]

You are responsible for scheduling and obtaining [all recommended doses of] an FDA-approved COVID-19 vaccine [or a COVID-19 vaccine granted Emergency Use Authorization by the FDA]. You [must/may] get the vaccine during your regularly scheduled work hours [if feasible].

[[EMPLOYER NAME] will pay [nonexempt] employees for time travelling to or spent getting the vaccine [if done during your regular work hours] [up to [NUMBER] per vaccine injection]. [EMPLOYER NAME] will pay all employees for vaccine costs not fully covered by insurance, including any unreimbursed vaccine administrator fees[, and other expenses incurred getting the vaccine, such as parking at vaccination sites, and other incidental costs]./[EMPLOYER NAME] will pay all employees a stipend of [DOLLAR AMOUNT OR HOURLY PAY REASONABLY CALCULATED TO COVER EMPLOYEES' TIME AND COSTS]. If your actual costs exceed the stipend amount, you may request reimbursement of the additional amount by [PROCESS FOR REQUESTING REIMBURSEMENT].]

Proof of Vaccination [from Administrator Offsite]

[If you already have received a vaccine from another health care provider,] [Y/y]ou must provide written proof of vaccination from the vaccine administrator[or a CDC-issued vaccination card], including the vaccination place, date(s), and name, [before returning to the workplace/before your first day of employment/by [DATE]]. Do not include any medical or genetic information with your proof of vaccination. [EMPLOYER NAME] will keep your vaccination information confidential.

Accommodation and Exemption Requests

Disability Accommodation

[In accordance with [EMPLOYER NAME]'s Disability Accommodations Policy,] [EMPLOYER NAME] provides reasonable accommodations, absent undue hardship, to qualified individuals with disabilities that enable them to perform their job duties. Reasonable accommodation may include appropriate adjustment or modifications of employer policies, including this Mandatory Vaccination Policy.

If you believe you need an accommodation regarding this policy because of a disability, you are responsible for requesting a reasonable accommodation from the [Human Resources /[DEPARTMENT NAME]] Department.

Religious Accommodation

[In accordance with [EMPLOYER NAME]'s Religious Accommodations Policy,] [EMPLOYER NAME] provides reasonable accommodations, absent undue hardship, to employees with sincerely held religious beliefs, observances, or practices that conflict with getting vaccinated [or receiving the type of vaccine currently available].

If you believe you need an accommodation regarding this policy because of your sincerely held religious belief, you are responsible for requesting a reasonable accommodation from the [Human Resources /[DEPARTMENT NAME]] Department.

Interactive Process

[EMPLOYER NAME] will engage in an interactive dialogue with you to determine the precise limitations of your ability to comply with this mandatory vaccination policy and explore potential reasonable accommodations that could overcome those limitations. [EMPLOYER NAME] encourages employees to suggest specific reasonable accommodations. However, [EMPLOYER NAME] is not required to make the specific accommodation requested and may provide an alternative effective

accommodation, to the extent any reasonable accommodation can be made without imposing an undue hardship on [EMPLOYER NAME] [or posing a direct threat to you or others in the workplace].

Exemption for Other Medical Reasons

Exemptions for other medical reasons may be available [on a case-by-case basis/for conditions such as [pregnancy,] [breastfeeding,] [history of certain allergic reactions,] and [any other medical condition that is a contraindication to the COVID-19 vaccine]] even if they do not qualify as a disability under federal, state, or local law. [EMPLOYER NAME] will engage in an interactive dialogue with you to determine whether an exemption is appropriate and can be granted without imposing an undue hardship on [EMPLOYER NAME] [or posing a direct threat to you or others in the workplace]. However, [EMPLOYER NAME] reserves the right to take any necessary and appropriate steps, including imposing alternative COVID-19 prevention measures, to ensure that the individual does not pose a direct threat to the health or safety of others in the workplace.]

How to Request an Accommodation [or Other Exemption]

[You may request a reasonable accommodation or other exemption from this policy by completing [EMPLOYER]'s Request for Exemption from Vaccination Policy Form and returning it to the [Human Resources/[DEPARTMENT NAME]] Department. The form is [attached to this policy and] available at [LOCATION WHERE EMPLOYEES CAN GET FORMS].

OR

You may request a reasonable accommodation or other exemption from this policy orally or in writing from the [Human Resources/[DEPARTMENT NAME]] Department.]

When requesting an accommodation, please provide all relevant information, including [OR REFERENCE EMPLOYER'S SPECIFIC FORM HERE]:

- A description of the accommodation or exemption requested.
- The reason for the requested accommodation or exemption.

[EMPLOYER NAME] reserves the right to request additional documentation supporting the need for an accommodation or request for any other exemption. [EMPLOYER NAME] will keep confidential any medical information obtained in connection with your request for a reasonable accommodation or other exemption. [However, we ask that you not provide any genetic information to [EMPLOYER NAME] when responding to a request for additional information [or providing proof of vaccination] in compliance with this policy [(see GINA Safe Harbor below)].]

Determinations

[EMPLOYER NAME] makes determinations about requested accommodations and exemptions on a case-by-case basis considering various factors and based on an individualized assessment in each situation. [EMPLOYER NAME] strives to make these determinations expeditiously and in a fair and nondiscriminatory manner and will inform you after we make a determination. If you have any questions about an accommodation or exemption request you made, please contact [[POSITION]/the [DEPARTMENT NAME] Department].

GINA Safe Harbor

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,

[EMPLOYER NAME] asks 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.

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.]

Policy Administration and Questions

The [COVID-19 Task Force/[DESIGNATED DEPARTMENT OR PERSON]] is responsible for administering and enforcing this policy. If you have any questions about this policy or about health and safety issues that are not addressed in this policy, please contact the [DESIGNATED DEPARTMENT OR PERSON].

Policy Modification

Government and public health guidelines and restrictions and business and industry best practices regarding COVID-19 and COVID-19 vaccines are changing rapidly as new information becomes available and further research is conducted. [EMPLOYER NAME] reserves the right to modify this policy at any time in its sole discretion to adapt to changing circumstances and business needs, consistent with its commitment to maintaining a safe and healthy workplace.

Enforcement and Non-Retaliation

Failure to comply with or enforce this policy may result in discipline, up to and including termination of employment.

[EMPLOYER NAME] prohibits any form of discipline, reprisal, intimidation, or retaliation for reporting a violation of this policy or any other health and safety concern. Employees also have the right to report work-related injuries and illnesses, and [EMPLOYER NAME] will not discharge or discriminate or otherwise retaliate against employees for reporting work-related injuries or illnesses or good faith health and safety concerns.

[Employees Covered Under a Collective Bargaining Agreement

The employment terms set out in this policy work in conjunction with, and do not replace, amend, or supplement any terms or conditions of employment stated in any collective bargaining agreement that a union has with [EMPLOYER NAME]. [Employees should consult the terms of their collective bargaining agreement. Wherever employment terms in this policy differ from the terms expressed in the applicable collective bargaining agreement with [EMPLOYER NAME], employees should refer to the specific terms of the collective bargaining agreement, which will control.]]

[Disclaimer of Restrictions on Employees' Rights Under the National Labor Relations Act

This policy is not intended to preclude or dissuade employees from engaging in legally protected activities under state or federal law, including the National Labor Relations Act, such as discussing wages, benefits, or terms and conditions of employment[, forming, joining, or supporting labor unions][,

bargaining collectively through representatives of their choosing][, raising complaints about working conditions for their and their fellow employees' mutual aid or protection], or legally required activities.]

[Acknowledgment of Receipt and Review

I, _____ (employee name), acknowledge that on _____ (date), I received a copy of [EMPLOYER NAME]'s [POLICY NAME] and that I read it, understood it, and agree to comply with it. [I also understand that at the time of vaccination I will be provided with information from the vaccine administrator about the benefits and risks of the COVID-19 vaccine, and that signing this policy acknowledgment does not constitute consent to receiving the vaccine.] I understand that [EMPLOYER NAME] has the maximum discretion permitted by law to interpret, administer, change, modify, or delete this policy at any time[with or without notice]. No statement or representation by a supervisor or manager or any other employee, whether oral or written, can supplement or modify this policy. Changes can only be made if approved in writing by the [POSITION] of [EMPLOYER NAME]. I also understand that any delay or failure by [EMPLOYER NAME] to enforce any work policy or rule will not constitute a waiver of [EMPLOYER NAME]'s right to do so in the future. I understand that neither this policy nor any other communication by a management representative or any other employee, whether oral or written, is intended in any way to create a contract of employment. I understand that, unless I have a written employment agreement signed by an authorized [EMPLOYER NAME] representative, I am employed at will and this policy does not modify my at-will employment status [FOR AT-WILL STATES]. If I have a written employment agreement signed by an authorized [EMPLOYER NAME] representative and this policy conflicts with the terms of my employment agreement, I understand that the terms of my employment agreement will control.

OR

I, _____ (employee name), acknowledge that on _____ (date), I received and read a copy of [EMPLOYER NAME]'s [NAME OF POLICY][, dated [EDITION DATE]] and understand that it is my responsibility to be familiar with and abide by its terms.[I understand that the information in this policy is intended to help [EMPLOYER NAME]'s employees to work together effectively on assigned job responsibilities.] This policy is not promissory and does not set terms or conditions of employment or create an employment contract.]

[signature page follows]

Signature _____

Printed Name _____

Date _____



Sample Forms

SAMPLE REQUEST FOR RELIGIOUS ACCOMMODATION

Instructions for Completing This Form

[Consistent with Title VII of the Civil Rights Act of 1964 (Title VII)[and any applicable state or local law] and [EMPLOYER NAME]'s [Religious Accommodations Policy/[POLICY NAME]], [EMPLOYER NAME] will provide a reasonable accommodation for an[applicant's or] employee's sincerely held religious belief if the accommodation would resolve a conflict between the individual's religious beliefs or practices and a work requirement, unless doing so would create an undue hardship for [EMPLOYER NAME].]

If you believe you need an accommodation because of your sincerely held religious beliefs or practices or lack thereof, you should request an accommodation from the [Human Resources/[DEPARTMENT NAME]] Department. Although you may make an accommodation request orally or in writing, [EMPLOYER NAME] encourages employees to make their requests in writing using this Request for a Religious Accommodation form. Please submit the completed form to the [[POSITION]/Human Resources Department/[DEPARTMENT NAME] Department] at [[EMAIL ADDRESS]/[LOCATION]] as soon as possible after your need for an accommodation is known. If you need extra space to complete this form, please attach additional pages.

[After receiving this form, [EMPLOYER NAME] will contact you [as quickly as possible/within [NUMBER] days] to discuss your accommodation request and, if necessary, request additional information to assess your request. It is important for you and [EMPLOYER NAME] to engage in this interactive process together, so please be sure to respond promptly to any communications you receive from the [[POSITION]/Human Resources Department/[DEPARTMENT NAME] Department] relating to this request.]

[As stated in [EMPLOYER NAME]'s [Religious Accommodations Policy/[POLICY NAME]], [EMPLOYER NAME] prohibits retaliation against any individual for requesting a religious accommodation in good faith.]

If you have any questions about this form or the status of any accommodation request, or if you need assistance with filling out this form or making a request, please contact the [[POSITION]/Human Resources Department/[DEPARTMENT NAME] Department]. For more information, see [EMPLOYER NAME]'s [Religious Accommodations Policy/[POLICY NAME]].

Employee Information

Employee Name:

Position/Department:

Supervisor:

Work telephone number [and email address]:

Home or mobile telephone number [and personal email address]:

Accommodation Request

- Provide a description of the accommodation you are requesting (for example, a special exception from, or adjustment to, a job requirement). Please identify a specific accommodation or suggestion(s) if you are not sure:

- Provide the reason you need an accommodation (that is, how your sincerely held religious belief, practice, or observation conflicts with one or more of your job requirements):

- Is this request time-sensitive? Yes/No (circle one) If yes, please explain:

- Provide any additional information you think may be relevant to this request:

Employee Affirmation and Acknowledgment

I have read and understand [EMPLOYER NAME]'s [Religious Accommodations Policy/[POLICY NAME]]. This accommodation request is based on a sincerely held religious belief. I understand that [EMPLOYER NAME] is not required to make the specific accommodation I requested and may provide an alternative, effective accommodation. I also understand that [EMPLOYER NAME] is not required to provide any accommodation that would impose an undue hardship on [EMPLOYER NAME].

Employee Signature:

Date:

FOR OFFICE USE ONLY:

Date Request Received:

Request Received By:



Sample ADA Accommodation Forms

Job Accommodation Network www.askjan.org

The Job Accommodation Network (JAN) is the leading source of free, expert, and confidential guidance on job accommodations and disability employment issues. Serving customers across the United States and around the world for more than 35 years, JAN provides free one-on-one practical guidance and technical assistance on job accommodation solutions, Title I of the Americans with Disabilities Act (ADA) and related legislation, and self-employment and entrepreneurship options for people with disabilities. JAN is funded by a contract from the U.S. Department of Labor, [Office of Disability Employment Policy \(ODEP\)](#) (#1605DC-17-C-0038).

SAMPLE REASONABLE ACCOMMODATION REQUEST FORM

A. Questions to clarify accommodation requested.

What specific accommodation are you requesting?

If you are not sure what accommodation is needed, do you have any suggestions about what options we can explore?

Yes

No

If yes, please explain.

Is your accommodation request time sensitive?

Yes

No

If yes, please explain.

B. Questions to document the reason for accommodation request.

What, if any, job function are you having difficulty performing?

What, if any, employment benefit are you having difficulty accessing?

What limitation is interfering with your ability to perform your job or access an employment benefit?

Have you had any accommodations in the past for this same limitation?

Yes

No

If yes, what were they and how effective were they?

If you are requesting a specific accommodation, how will that accommodation assist you?

C. Other.

Please provide any additional information that might be useful in processing your accommodation request:

Signature

Date

Return this form to _____

SAMPLE MEDICAL INQUIRY FORM¹⁰

Note: This form should be customized each time it is used. Under the ADA, employers should only ask for necessary medical documentation. Do not ask for information you already have or do not need.

| | |
|--|--|
| A. Questions to help determine whether an employee has a disability. | |
| For reasonable accommodation under the ADA, an employee has a disability if he or she has an impairment that substantially limits one or more major life activities or a record of such an impairment. The following questions may help determine whether an employee has a disability: | |
| Does the employee have a physical or mental impairment? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| If yes, what is the impairment or the nature of the impairment? | |
| <i>Note: Some state laws may prohibit asking for a diagnosis.</i> | |
| Answer the following question based on what limitations the employee has when his or her condition is in an active state and what limitations the employee would have if no mitigating measures were used. Mitigating measures include things such as medication, medical supplies, equipment, hearing aids, mobility devices, the use of assistive technology, reasonable accommodations or auxiliary aids or services, prosthetics, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy. Mitigating measures do not include ordinary eyeglasses or contact lenses. | |
| Does the impairment substantially limit a major life activity as compared to most people in the general population? | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| <i>Note: Does not need to significantly or severely restrict to meet this standard. It may be useful in appropriate cases to consider the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.</i> | OR Describe the employee's limitations when the impairment is active. |
| If yes, what major life activity(s) (includes major bodily functions) is/are affected? | |
| <input type="checkbox"/> Bending <input type="checkbox"/> Hearing <input type="checkbox"/> Reaching <input type="checkbox"/> Speaking <input type="checkbox"/> Other: (describe) <input type="checkbox"/> Breathing <input type="checkbox"/> Interacting With Others <input type="checkbox"/> Reading <input type="checkbox"/> Standing <input type="checkbox"/> Caring For Self <input type="checkbox"/> Learning <input type="checkbox"/> Seeing <input type="checkbox"/> Thinking <input type="checkbox"/> Concentrating <input type="checkbox"/> Lifting <input type="checkbox"/> Sitting <input type="checkbox"/> Walking <input type="checkbox"/> Eating <input type="checkbox"/> Performing Manual Tasks <input type="checkbox"/> Sleeping <input type="checkbox"/> Working | |
| Major bodily functions: | |
| <input type="checkbox"/> Bladder <input type="checkbox"/> Digestive <input type="checkbox"/> Lymphatic <input type="checkbox"/> Reproductive <input type="checkbox"/> Bowel <input type="checkbox"/> Endocrine <input type="checkbox"/> Musculoskeletal <input type="checkbox"/> Respiratory <input type="checkbox"/> Brain <input type="checkbox"/> Genitourinary <input type="checkbox"/> Neurological <input type="checkbox"/> Special Sense Organs & Skin <input type="checkbox"/> Cardiovascular <input type="checkbox"/> Hemic <input type="checkbox"/> Normal Cell Growth <input type="checkbox"/> Other: (describe) <input type="checkbox"/> Circulatory <input type="checkbox"/> Immune <input type="checkbox"/> Operation of an Organ | |

¹⁰ At the state level this form may be different. It is recommended you check with counsel before utilizing any sample form.

B. Questions to help determine whether an accommodation is needed.

An employee with a disability is entitled to an accommodation only when the accommodation is needed because of the disability. The following questions may help determine whether the requested accommodation is needed because of the disability:

What limitation(s) is interfering with job performance or accessing a benefit of employment?

What job function(s) or benefits of employment is the employee having trouble performing or accessing because of the limitation(s)?

How does the employee's limitation(s) interfere with his/her ability to perform the job function(s) or access a benefit of employment?

C. Questions to help determine effective accommodation options.

If an employee has a disability and needs an accommodation because of the disability, the employer must provide a reasonable accommodation, unless the accommodation poses an undue hardship. The following questions may help determine effective accommodations:

Do you have any suggestions regarding possible accommodations to improve job performance?

If so, what are they?

How would your suggestions improve the employee's job performance?

D. Other questions or comments.

Medical Professional's Signature

Date

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.

TEMPORARY/TRIAL ACCOMMODATION APPROVAL FORM

| | | |
|--|------------------------------|-----------------------------|
| Employee Name: | Date of Approval: | |
| Description of approved temporary or trial accommodation(s): | | |
| Reason (if applicable) accommodation(s) is being provided temporarily or on a trial basis: | | |
| Date to implement: _____ Date to discontinue or reassess: _____ | | |
| Date to extend, or implement long-term: _____ | | |
| Comments: | | |
| | | |
| Does equipment need to be ordered or a service purchased? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| If yes, who will do it? | | |
| Will training be required? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| If yes, who will do the training? | | |
| Who needs to be notified of the accommodation(s)? | | |
| What other steps need to be taken? | | |
| Who will monitor the accommodation(s)? | | |
| What action will be taken at the end of the temporary or trial period? | | |
| SIGNATURES | | |
| Employer Representative: | Date: | |
| Employee: | Date: | |

ACCOMMODATION DENIAL FORM

| | |
|---|---------------------------------|
| Employee Name: | Date of Denial: |
| Accommodation(s) Denied: | |
| REASON(S) FOR DENIAL (may check more than one box) | |
| <input type="checkbox"/> Accommodation Ineffective <input type="checkbox"/> Accommodation Would Cause Undue Hardship <input type="checkbox"/> Medical Documentation Inadequate <input type="checkbox"/> Accommodation Would Require Removal of an Essential Function <input type="checkbox"/> Accommodation Would Require Lowering of Performance or Production Standard <input type="checkbox"/> Other: | |
| DETAILED REASON(S) FOR THE DENIAL OF ACCOMMODATION | |
| NEXT STEPS | |
| <input type="checkbox"/> Provide Additional Information <input type="checkbox"/> Meet to Discuss Other Accommodation Options <input type="checkbox"/> Explore Reassignment <input type="checkbox"/> Terminate Employment | <input type="checkbox"/> Other: |
| COMMENTS | |
| SIGNATURES | |
| Employer Representative: | Date: |
| Employee: | Date: |

ACCOMMODATION APPROVAL FORM

| | | |
|---|------------------------------|-----------------------------|
| Employee Name: | Date of Approval: | |
| Accommodation(s) Approved: | | |
| STEPS NEEDED TO IMPLEMENT | | |
| Does equipment need to be ordered or a service purchased? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| If yes, who will do it? | | |
| Will training be required? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| If yes, who will do the training? | | |
| Who needs to be notified of the accommodation? | | |
| What other steps need to be taken? | | |
| TIMEFRAMES | | |
| When will the accommodation be fully implemented? | Date: | |
| If maintenance is needed, when will it be done? | Date: | |
| Is the accommodation being provided on a trial basis? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| If yes, when will the trial period end? | Date: | |
| Comments: | | |
| SIGNATURES | | |
| Employer Representative: | Date: | |
| Employee: | Date: | |