



COVID-19 Vaccinations in the Workplace Frequently Asked Questions

INTRODUCTION

The purpose of this document is to provide technical assistance to West Virginia State agencies and employees regarding COVID-19 human resources (HR) management policies and practices that impact agencies, workers, and their families related to the COVID-19 vaccinations in the workplace. Agencies are encouraged to follow the guidelines issued by [State](#), [Federal](#) and [local health officials](#) to help prevent workplace exposures to COVID-19. This and additional resources may be found at [Division of Personnel Families First Coronavirus Response Act Guidance and Resources](#).

1. Can I require my employees to be vaccinated against COVID-19?

The Americans with Disabilities Act (ADA) allows employers to establish employment qualification standards that "an individual not pose a direct threat to the health or safety of others in the workplace." Under current guidance from the Equal Employment Opportunity Commission (EEOC), it is not a violation of federal law for an agency to require employees to get a COVID-19 vaccine or exclude employees from the workplace whose presence poses a direct threat.

The direct threat standard presents two threshold questions: (1) does a non-vaccinated employee pose a direct threat to the health and safety of the workplace sufficient to exclude them from returning to work; and (2) if so, would preventative measures such as social distancing, masks, etc. reduce the threat to allow the employee to return to work?

Under the ADA and Title VII, an employee may be entitled to an exemption from a mandatory vaccination requirement based on a medical condition, disability, or sincerely held religious belief. Secular or medical beliefs about vaccines are not protected under the regulations.

2. Can an employee legally refuse the COVID-19 vaccination if they do not meet an exception under the ADA or Title VII?

Yes. Under the Food, Drug, and Cosmetic (FD&C) Act, an employee may refuse vaccination if the vaccine is being distributed under the Emergency Use Authorization (EUA) Act. While there is no law requiring an agency to accommodate employees who refuse vaccination based on the EUA, agencies should proceed cautiously before considering dismissal or disciplinary action against employees who exercise their rights under the FD&C Act to decline vaccination.

3. The EEOC places restrictions on disability-related inquiries and medical exams. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

No. Many reasons not related to disability may explain why an employee has not been vaccinated. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry.

However, subsequent questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and be subject to the applicable ADA standard that they are "job-related and consistent with business necessity."

If an agency requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the agency may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

4. Does the collection and processing of vaccination information raise data privacy and compliance risks?

An employee's response regarding vaccination is considered confidential medical information. If an agency chooses to collect vaccination data, there are steps it can take to minimize compliance risk. For instance, an organization can minimize the chance of an ADA violation by (i) designing the request, so it is not likely to elicit information about a disability, (ii) not asking why an individual did not receive a vaccination, and (iii) warning the employee not to provide any medical information as part of the requested proof of receipt of a COVID-19 vaccination.

5. May an employee be permitted to telework or work from an alternate worksite because of concerns regarding their own or family members' serious health condition?

Based on the needs of the business, agencies may permit an employee to telework if the employee requests to do so due to medical concerns for themselves or a family member. Should the employee be unable to telework or telework becomes unavailable, it may be necessary for the employee to request the appropriate form of leave. Federal and state leave programs may provide an entitlement to leave under these circumstances. Certain individuals may be entitled to workplace accommodations under ADA. More information is provided regarding the employee and agency responsibilities in FAQ number seven (7) below.

6. What does an employee need to do in order to request a reasonable accommodation from the employing agency because he or she has one of the medical conditions that the Centers for Disease Control and Prevention (CDC) says may place him or her at higher risk for severe illness from COVID-19?

An employee – or a third party, such as an employee's doctor – must notify the employing agency that they need an accommodation related to a medical condition (here, the underlying condition). Employees may request accommodations orally or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA when making the request, he or she may do so. After receiving a request, the agency may ask questions or seek medical documentation to help determine the appropriate reasonable accommodation, barring undue hardship, that can be provided.

7. What responsibility does an employing agency have to provide a reasonable accommodation to an employee who may be at higher risk for developing complications associated with the COVID-19 under ADA?

According to the CDC, some employees may be at an increased risk for developing complications associated with COVID-19. This means that when an agency receives a request for accommodation to reduce the risk of exposure to COVID-19, an employing agency must consider this request under the

ADA and engage in the interactive process to provide reasonable accommodations, barring undue hardship. To be eligible to receive workplace reasonable accommodations under the ADA, an employee must have an "actual", or a "record of", a disability, as defined by the ADA Amendments Act. Also, there must be some connection between the impairment and specific need for accommodation. For example, the employee might have an underlying impairment and limitation that, if infected with COVID-19, would lead to serious complications. There is no comprehensive list of such underlying medical impairments; however, on December 23, 2020 the CDC revised a list of "individuals at an increased risk" for developing serious complications. This list includes adults of any age with the following conditions: Cancer, Chronic kidney disease, COPD (chronic obstructive pulmonary disease), Down Syndrome, Heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, Immunocompromised state (weakened immune system) from solid organ transplant, Obesity (body mass index [BMI] of 30 kg/m² or higher but < 40 kg/m²), Severe Obesity (BMI ≥ 40 kg/m²), Pregnancy, Sickle cell disease, Smoking, Type 2 diabetes mellitus, Asthma (moderate-to-severe), Cerebrovascular disease (affects blood vessels and blood supply to the brain), Cystic fibrosis, Hypertension or high blood pressure, Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines, Neurologic conditions, such as dementia, Liver disease, Overweight (BMI > 25 kg/m², but < 30 kg/m²), Pulmonary fibrosis (having damaged or scarred lung tissues), Thalassemia (a type of blood disorder), Type 1 diabetes mellitus.

Agencies receiving accommodation requests from employees in these higher risk groups will need to consider their responsibilities under W. VA. Code §5-11b-2, Pregnant Workers Fairness Act, and the federal Pregnancy Discrimination Act (PDA), which prohibit agencies from treating pregnant workers different than other temporarily disabled workers.

Caregivers of individuals with risk factors are not entitled to receive workplace reasonable accommodations under the ADA but may be entitled to leave under the Family and Medical Leave Act (FMLA). Additionally, if an employee is caring for an immediate family member whose condition rises to the level of a serious medical condition as defined by the FMLA, the employee may be eligible for the previously established FMLA. For more information, visit the Department of Labor, Wage and Hour Division guidance on COVID-19.

8. May a requested accommodation be temporarily denied because it poses an undue hardship due to circumstances resulting from the pandemic?

Yes. An agency is not required to provide a reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. It is recommended that agencies consult with legal counsel prior to denying a request for accommodation.

9. Q. Under the ADA, if an agency requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the agency?

A. An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the agency know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

10. Q. Can an agency ask an employee if he or she has already received the vaccine or, similarly, require proof that the employee has been vaccinated?

A. Yes. An agency can ask an employee if he or she has already received the vaccine or require proof that the employee has been vaccinated. The Equal Employment Opportunity Commission (EEOC) guidance provides that these questions do not constitute a “disability-related inquiry” because an employee may choose not to have the vaccine for a variety of reasons wholly unrelated to any medical condition.

However, an agency must meet more stringent requirements if it wants to find out WHY an employee has NOT received the vaccine because questioning an employee about the reasons that individual has not been vaccinated does constitute a “disability-related inquiry” because of the possibility that it will elicit information about a disability.

That inquiry can only be made, according to the EEOC, if the question is “job-related and consistent with business necessity” as provided under the Americans with Disabilities Act (ADA). To meet this job-relatedness standard, the agency will need to establish that the worker’s failure to be vaccinated would pose a “direct threat” to the well-being of that employee or others with whom the employee would have contact as part of his or her job duties. Language elsewhere in the EEOC pandemic guidance suggests that an agency should be able to establish that “direct threat” standard if the employee has significant contact with other workers or third parties as part of performing his or her job duties.

11. Q. Are employees required to quarantine following travel?

A. Employees should quarantine based on CDC guidance and/or State and local health guidance in place at the time, which may be different for those that are vaccinated as opposed to unvaccinated. Agencies have the discretion to establish policy/procedures as to whether or not employees must quarantine due to being unvaccinated.

It is permissible to ask employees if they meet the criteria to be considered fully vaccinated to determine if it is appropriate to require an employee to quarantine following vacation international or domestic travel. A simple statement and question such as, "According to health officials, an individual is considered fully vaccinated two weeks after receiving their second dose of the COVID-19 vaccination. Does your vaccination status meet the criteria for being fully vaccinated"?

Additional guidance and resources are available by visiting:

[West Virginia State Americans with Disabilities Act Office](#)

[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#)

[Certain Medical Conditions and Risk for Severe COVID-19 Illness | CDC](#)

[U.S. Department of Health and Human Services, Public Health Emergency Preparedness](#)

[Emergency Use Authorization of Medical Products \(fda.gov\)](#)

[21 U.S.C. § 360bbb-3 - U.S. Code Title 21. Food and Drugs § 360bbb-3 | FindLaw](#)