

Anticipated EEOC Guidance on COVID-19 Policies Released

By **Diana Pérez Gomez and Leslie Tan** - July 23, 2021



Last month, the Equal Employment Opportunity Commission (EEOC) provided welcome clarity to employers continuing to navigate COVID-19-related employment challenges. See U.S. Equal Opportunity Employment Commission, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” updated on May 28, 2021.

Mandatory COVID-19 Vaccination Policies

One of the most significant updates is the EEOC’s affirmative statement that federal equal employment opportunity laws “**do not prevent employers 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 (Americans with Disabilities Act) and other EEO considerations.” The EEOC’s prior guidance presumed employer implementation of mandatory vaccination policies but did not explicitly state the policies were permissible under federal EEO laws.

According to the EEOC’s updated guidance, employers who institute mandatory COVID-19 vaccination policies should continue to abide by their obligations to employees seeking accommodations based on disability or religious beliefs. The EEOC also recommends that employers notify all employees that they will consider requests for reasonable accommodations on an individualized basis. That being said, it is important to keep in mind that facially neutral, mandatory vaccination policies may have a disparate impact on, or disproportionately exclude from the workplace, certain employees based on protected characteristics, which employers should be prepared to address.

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. [Accept](#) [Read More](#)

The EEOC also provided expanded direction to employers handling accommodation requests in response to mandatory vaccination policies. In general, employers must provide reasonable accommodation to employees on the basis of disability or religious belief unless the accommodation **would pose an undue hardship to the employer.**

Based on Disability. If an employee cannot be vaccinated due to disability, an employer may not require compliance with a vaccination policy unless it can demonstrate the employee would pose a “direct threat” to the health and safety of the employee or others in the workplace, meaning a significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation. Determining if the employee poses a “direct threat” requires an individualized assessment of the employee’s ability to safely perform the essential functions of the job. The EEOC guidance provides a four-factor test for the assessment: (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. If the employer determines the employee would pose a direct threat, the employer must then assess whether a reasonable accommodation would reduce or eliminate the threat. If so, the employer must provide the accommodation unless it would require significant difficulty or expense. Further, the employer should engage in the same interactive process with a fully vaccinated employee requesting an accommodation, as an employee may still require accommodation after vaccination based on the employee’s condition, such as being immunocompromised. According to the EEOC, employers are not required to provide accommodations to employees who do not have a disability, but want to avoid exposure to a family member who is a high-risk individual.

Based on Religious Belief. A different standard applies for religious accommodations. In general, employers must provide reasonable accommodation to employees based on a religious belief unless the accommodation places **more than a minimal cost or burden on the employer.**

Reasonable Accommodation Examples. The EEOC updated guidance provides several examples of reasonable accommodations for employers to consider, including face masks, working at a social distance from coworkers or non-employees, modified/staggered shifts, periodic tests for COVID-19, changes to the work environment and offering telework or reassignment. The EEOC recommends employers use the Job Accommodation Network (JAN) and Occupational Health and Safety Administration (OSHA) as additional resources. The JAN [website](#) materials specific to COVID-19 are available at [askjan.org](#). Oil and gas industry employers are advised to review OSHA’s industry-specific guidance, including its recommendation for employers to conduct hazard assessments to determine whether work activities require close contact between workers and other people. For instance, if a hazard assessment identifies activities with higher exposure risks, and those activities are not essential, employers may consider delaying them until they can be safely performed. OSHA also recommends conducting a hazard assessment to determine appropriate personal protective equipment. OSHA’s COVID-19 guidance for Oil and Gas Industry Workers and Employers is available at [osha.gov/coronavirus/control-prevention/oil-gas](#).

Vaccination Inquiries. Per the EEOC guidance, employers may ask employees about their vaccination status or request proof of vaccination and must keep the medical information confidential. In contrast, because pre-vaccination medical screening questions are likely to elicit information regarding

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. [Accept](#) [Read More](#)

Vaccination Incentives. Employers may educate their employees regarding COVID-19 vaccines and their benefits, and provide incentives for employees to voluntarily provide confirmation of their COVID-19 vaccination received from an outside provider. However, if the employer or its agent is administering the vaccine, the incentive cannot be so substantial that it is coercive.

Recommendations. In view of the EEOC's updated guidance, employers should contact their employment attorney to discuss the following:

- Designation of a qualified workplace coordinator for COVID-19 assessment and control planning in accordance with the CDC and OSHA's recommendations for oil and gas industry employers and similar industries;
- Consideration of COVID-19 policies the employer wishes to implement, including a clear policy on mandatory or voluntary vaccination;
- Determination on what reasonable accommodations may be appropriate for the different types of operations;
- Implementation of processes for recognizing and handling employee accommodation requests on the basis of disability and religious belief;
- Confidentiality of employee medical information;
- Training of managers and Human Resource personnel on the employer's COVID-19 policies and processes; and
- Monitoring the EEOC, OSHA and CDC's guidance as the agencies continue to issue updates on COVID-19.

About the Authors: Diana Pérez Gomez is a shareholder in Chamberlain Hrdlicka's Labor & Employment practice. She can be reached at diana.gomez@chamberlainlaw.com. Leslie Tan is a senior counsel in the practice.

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. [Accept](#) [Read More](#)