

COVID-19 Vaccinations and the ADA

The availability of authorized COVID-19 vaccines has been enabling America to move along the path of pandemic recovery. Employers, trying to prepare to do their part to boost this recovery by implementing strategies for safely returning employees to the workplace, are often left seeking guidance on the impact of COVID-19 vaccines on this process. There have been a wide range of questions on this topic, including whether mandatory COVID-19 vaccination may be required and how vaccination might impact the responsibility to provide reasonable accommodations for employees with disabilities or medical conditions under the Americans with Disabilities Act (ADA). COVID-19 vaccine-related workplace issues will continue to evolve, but the information below is the nation's current guidelines for employers with regard to the ADA.

Please note, Montana has passed a law prohibiting employers from asking about vaccination status of employees and applicants (See page 6 for more information). Much of the below information does not apply to Montana companies that are specifically prohibited from requiring vaccinations and/or making employment decisions based on vaccination status.

Under the ADA, can an employer require that employees get vaccinated against COVID-19?

The ADA does not prohibit employers from requiring COVID-19 vaccinations. However, if an employer requires vaccinations as a condition of employment, various ADA rules may apply.

An employer who requires employees to get vaccinations administered directly by the employer or its agent will have to ask the CDC-recommended, pre-vaccination screening questions, and these questions include disability-related inquiries. Because the ADA limits when an employer may ask disability-related inquiries, the employer would have to show that the questions are job-related and consistent with business necessity if challenged.



By contrast, if an employer instead asks employees if they have received a vaccination in the community, or requires them to provide proof of vaccination, this is not a disability-related inquiry and is allowed under the ADA. However, the ADA requires an employer to treat the answer as confidential medical information. Also, if an employee cannot get a vaccination because

of a disability, the employer must consider making accommodations.

Additional guidance from the EEOC states:

Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (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. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies

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on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.



Is asking whether an employee has received a COVID-19 vaccination a disability-related inquiry under the ADA?

No. Asking if an employee has received a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, questions about why an employee has chosen not to be vaccinated could elicit information

about a disability and would be subject to the ADA standard that disability-related inquiries of employees must be job-related and consistent with business necessity.



May an employer ask employees whether they have received a COVID-19 vaccination?

Yes. Asking if an employee has received a COVID-19 vaccination is not likely to elicit information about a disability and therefore is not a disability-related inquiry under the ADA.

How should an employer respond when an employee with a disability cannot receive the COVID-19 vaccine due to a medical reason?

An employer should recognize this as an accommodation request under the ADA and engage in an interactive process with the employee. The employer may gather information about the employee's medical condition to determine if the employee has a disability and whether there is a reasonable accommodation that will eliminate or reduce any risk associated with working while unvaccinated that does not pose an undue hardship to the employer. Reasonable accommodation solutions can be explored using information about an employee's essential job duties, the work environment, and nature of the workforce.

Can an employee who cannot comply with an employer's mandatory COVID-19 vaccination policy because of a disability be excluded from the workplace if they cannot be accommodated to work safely while unvaccinated?

According to the EEOC, if an employee cannot comply with an employer's mandatory COVID-19 vaccination policy because of a disability and they cannot be reasonably accommodated to safely work, then the employer may exclude the unvaccinated employee from the workplace. This does not necessarily mean, however, that the employee may be terminated. The employer should determine if the employee is entitled to other accommodations, such as remote work, and if protections under other federal, state, or local laws apply.

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An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer 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.”

Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee’s disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations. JAN’s materials about COVID-19 are available at <https://askjan.org/topics/COVID-19.cfm>. Employers also may consult applicable Occupational Safety and Health Administration (OSHA) COVID-specific resources. Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.



The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty

or expense.

Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated



against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship.

If an employer is allowing an employee with a disability to telework as an accommodation during the pandemic, can the employer ask the employee whether getting a COVID-19 vaccine will enable the employee to return to work?

Yes, an employer can ask questions to determine whether an accommodation continues to be needed.

If an employer doesn’t ask whether employees have received a COVID-19 vaccine, does an employee with a disability have to tell their employer that they have received the vaccine if receiving the vaccine removes their need for a previous accommodation (e.g., if they could return to the workplace because they have been vaccinated)?

In general, an employee with a disability should let their employer know when an accommodation is no longer necessary.

This would be questionable under the ADA. An employer cannot require an employee with a disability to receive a vaccination to avoid its obligation to otherwise provide that employee with a reasonable accommodation. The employer might ask whether alternative effective accommodations could enable the employee to return to the workplace. If so, the employer may then choose alternative effective accommodations to return the employee to the workplace. If there are not effective alternative accommodations and telework continues to be a reasonable accommodation where the employee is performing the essential functions of the job, then the employer might need to consider continuing the telework accommodation, unless it poses an undue hardship.