

Employer Vaccine Policies: **Accommodations in the Workplace**

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Reasonable Accommodations and Mandatory Vaccine Policies

COVID-19 created an entirely new body of guidance from regulatory agencies built on long-standing employment law principles. Vaccine requirements have been present in the workplace for more than twenty (20) years. For example, many healthcare organizations have required flu or Hepatitis vaccinations. However, until COVID-19, those requirements rarely existed in a broad range of industries and businesses. Employers that have chosen (or have been required) to implement employee vaccine requirements face a variety of federal compliance considerations (employers should check with their state and municipality to determine other vaccine requirements and/or employer policy limitations).

Employers of any size, that implement a mandatory vaccination policy will almost certainly receive accommodation requests from their employees. [The EEOC emphasized](#) that federal EEO laws do not prevent employers from mandating the vaccine if they provide their employees with a reasonable accommodation for underlying health conditions that qualify as a disability under the Americans with Disabilities Act (“ADA”) or for religious reasons under Title VII of the Civil Rights Act of 1964 (“Title VII”).

Federally Required Exceptions to Vaccination Requirements

Federal law recognizes two types of exemptions from workplace vaccination requirements:

- **A qualifying medical condition** under the ADA, which prohibits discrimination based on disability including pregnancy-related complications that constitute a disability.¹
- **A sincerely held religious belief** under Title VII of the Civil Rights Act.

The ADA and Mandatory Vaccine Programs

An employee (applicant) with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The employee may make the request for an accommodation when it becomes known to him that she/he is unable to perform the essential function of the job because of the existing disability.

Under the ADA an individual has a disability when she/he has a physical or mental impairment that substantially limits a major life activity.² Thus, an individual has a “disability” if one of the following applies:

- **“Actual” Disability:** an individual has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning, or operation of a major bodily function);
- **“Record of” a Disability:** an individual has a history or “record of” an actual disability (such as cancer that is in remission); or

¹ Not all health conditions that contradict receiving the vaccine qualify as a disability under the ADA. Employers must be careful not to “regard” someone as disabled who is not. For example, allergies are rarely a disabling condition under the ADA but may be a legitimate obstacle to being vaccinated.

² In the Technical Assistance Questions and Answers “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, the Other EEO Laws](#),” the EEOC explains that the ADA term of disability applies to COVID-19 in the same way as to any other medical condition.

- **“Regarded as” an Individual with a Disability:** the person is subject to adverse action because of an individual’s impairment or impairment the employer believes the individual has, whether the impairment limits or is perceived to limit a major life activity unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

Employers should assess every situation separately to determine whether a particular individual has a disability. Only individuals, who meet the first two elements (“Actual” or “Regarded of”) of the definition under the ADA may qualify for a reasonable accommodation.³

Title VII and Mandatory Vaccine Programs

Under Title VII employees can make requests to be exempted from the vaccination mandate for religious reasons. To request a religious accommodation, an employee must notify the employer that they have a sincerely held religious belief, practice, or observance (sincerely held religious belief), which prevents the employee from complying with the vaccine mandate. [As the EEOC explains](#), sincerely held religious beliefs may not necessarily be regarded as “traditional” religions. They can be nontraditional and unknown to the employer.

Employees must explain to their employer how receiving the vaccination conflicts with their sincerely held religious beliefs. At the same time, when reviewing religious accommodation requests, the employer is entitled to make only a limited inquiry and seek supporting documentation about:

- the religious nature of the belief
- how the individual’s religious belief conflicts with the receiving COVID-19 vaccine

[The EEOC emphasizes](#) that the employer should assume that a religious belief is sincerely held, but identifies factors that may undermine an employee’s credibility such as:

- whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance);
- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
- whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons);
- whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

In its [“Questions and Answers: Religious Discrimination in the Workplace”](#) the EEOC also recognizes that religious beliefs may change over time and that an individual may sincerely hold a belief, even if only recently adopted. Sincerely held beliefs, observance or practice may even deviate from commonly followed religious doctrines.

³ Individuals diagnosed with COVID-19 or those who have a condition caused or worsened by COVID-19 may also qualify as having a disability. For more information, see the [EEOC Technical Assistance Questions and Answers](#).

If one request for a religious exemption from vaccination is granted it does not mean that the employer must grant all other religious accommodation requests. The employer should assess each request individually. Under Title VII employers may deny a request for an accommodation if they conclude that the religious belief as a ground for the objection to the vaccine requirement is not held sincerely. Employers may review the [religious accommodation request form](#) created for the EEOC workforce and published by the Commission as general guidance.

Interactive Process (ADA and Title VII)

A request for a reasonable accommodation starts with the individual's written or verbal notification to the employer that he/she requires an accommodation because of a disability or a sincerely held religious belief. Employers may invite their employees to make such requests. The [EEOC clarifies](#) that fully vaccinated employees may also request a reasonable accommodation if they are concerned about the increased risk of getting a severe illness. Employers must consider such requests in the same manner as any other requests for accommodation under the ADA.

After receiving a request for an accommodation an employer must engage in an informal, flexible, interactive process. There are no specifically defined rules on how to engage in the process, except that both the employer and the employee must be active participants. The ultimate goals during the interactive process are to determine:

1. the accommodation the employer can provide and
2. whether satisfying such a request will constitute undue hardship on an employer.

An employee may request a reasonable accommodation in any form. There is no need for an employee to mention either the ADA or Title VII – [there are “no magic words”](#) to notify the employer of the need for an accommodation. Generally, a brief conversation with an employer about the need for an accommodation is sufficient to start an interactive process, which should include:

- **Doing more than remaining passive.** The employer may ask relevant questions about the accommodation needed. Simply answering specific questions to the employee is not enough;
- **Taking the initiative and clarifying preferences of the employee regarding the accommodation.** However, the ultimate accommodation does not have to be the employee's preferred or requested accommodation;
- **Engaging in a meaningful and direct conversation.** The exact nature of the conversation may vary because employers must assess each request individually;
- **No breakdown in the process by any of the parties.** The employer should consider accommodation requests as soon as possible and employees should respond to the employer's inquiries in a timely manner. At the same time, in the [“Pandemic Preparedness in the Workplace and the American with Disabilities Act”](#) guidance the EEOC recognized that such extraordinary circumstances as the COVID-19 pandemic may cause delays during the interactive process.

- **Seeking reasonable documentation to establish the need for accommodation.**⁴ The employer is prohibited from asking for information unrelated to the request.
- **Keeping records and documents which were collected during the process confidential.**

When the disability or the need for the accommodation is not known or observable, an employer may ask the individual for reasonable documentation in support of the accommodation request during the interactive process. [The EEOC explains](#), that the employer may deny the request for an accommodation if the individual does not cooperate with the employer during the interactive process.

ADA Document Requests

- The employer may request medical documentation either from the employee or from the healthcare provider directly. The employer may only seek information from the healthcare provider after the employee signs the appropriate HIPAA release forms.
- The disability-related limitations are often sufficient for the employer to determine the appropriate accommodation (see [EEOC Guidance](#)).
- If the documentation is insufficient: it does not specify the existence of a disability (as defined by the ADA) and does not explain the need for a reasonable accommodation, the employer may ask the individual to provide additional documentation in a timely manner.
- The employer may also ask the individual to go to a health care professional of the employer's choice to document the need for an accommodation, but only [under limited circumstances](#) such as:
 - The employee provided insufficient documentation after the employer instructed the individual on what documentation is needed, and
 - The employer provided enough time for the employee to request additional documentation from his/her doctor; or
 - The employer reasonably believes the employee will pose a direct threat relying on the "[most current medical knowledge and/or best objective evidence](#)."
- All the medical information regarding a disability must be kept confidential and stored in a secure file separately from the regular personnel files. Employers should ensure that only those have access to such documentation, who need to know ("need to know" is construed very narrowly").

Title VII (Sincerely Held Religious Belief) Document Requests

- For a religious accommodation, an employer may request supporting documentation about the nature of the sincerely held religious belief to determine how it contradicts with the vaccination or testing policies.

⁴ An employer cannot ask for documentation when the disability and the need for reasonable accommodation is obvious, or the individual has already provided the employer with sufficient information.

- Employers may only request the documentation when there is an objective and legitimate basis for questioning the sincerity of the religious belief.
- Examples of documentation include general materials, describing the religion or practice; written statements explaining the conflict between the sincerely held religious belief and vaccine requirements or other policy; oral or written statements by potential witnesses.

The EEOC emphasizes that employers should educate their managers and supervisors to recognize an accommodation request from an employee. Likewise, managers should know the internal process to promptly escalate the employee's request for an accommodation.

[An employer may not disclose](#) that an individual is receiving a reasonable accommodation, except to those who need to know, or retaliate against for making such a request.

Additionally, employers should be mindful of utilizing reasonable *accommodation software* solutions while considering accommodation requests. The limitation of software solutions may inhibit both parties from engaging in the legally required interactive process. The courts and the EEOC agree that depriving an employee from participating in the flexible interactive process may give rise to liability on the part of the employer.

Undue Hardship under the ADA

Under the ADA an employer may grant the accommodation request absent undue hardship. [Undue hardship](#) is defined as significant difficulty or expense caused to a particular employer. It is determined on a case-by-case basis and refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

[According to the EEOC](#), when reviewing accommodation requests employers may consider:

- the nature and cost of the accommodation needed
- the facility's overall financial resources and number of employees, as well as the effect on the facility's expenses and resources
- the employer's overall financial resources, size, employee headcount, and type and location of facilities (if the facility that is evaluating the request is part of a larger entity)
- the employer's type of operations, including the structure and functions of the workforce, as well as the geographic separateness and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer
- the impact of the accommodation on the facility's operations
- The proportion of employees that are partially or fully vaccinated
- The extent of employee contact with non-employees, who may be ineligible for vaccination or whose vaccination status may be unknown

Undue Hardship under Title VII

Under Title VII the employer needs to show that the requested accommodation bears “more than a [“de minimis”](#) cost.” In considering undue hardship, the employer may take into account

both direct monetary costs and “the burden on the conduct of the employer’s business.” For example, a religious accommodation, which impairs workplace safety, diminishes efficiency in other jobs, or sharing of potentially hazardous or burdensome work by other employees is an undue hardship according to the EEOC. An undue hardship may also include the risk of the spread of COVID-19 among the workforce or to the public.⁵

The fact that there is a possibility that many more employees will request religious accommodations does not count in the evaluation of the undue hardship. At the same time, the employer may consider the cumulative cost or burden of granting accommodations to employees.

Determining a Reasonable Accommodation

The EEOC defines [reasonable accommodations](#) as follows: “In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” While seeking a reasonable accommodation, the employer may consider:

- the preference of the employee
- whether the accommodation sought is appropriate for both the employee and the employer
- whether the accommodation gives an employee an opportunity to attain an equal level of achievement, opportunity, and participation
- whether there are available alternatives if the request is too burdensome
- why the request for a specific accommodation may not be satisfied
- reassignment to a vacant position for which the individual is qualified only as the last resort
- all the options available before denying an accommodation request

[The EEOC explains](#), that it is in the employers’ discretion to determine the accommodation they will provide. More specifically, the employer is not obligated to provide the specific accommodation requested by the employee. The employer may offer an alternative accommodation or may provide a [temporarily accommodation](#) in the event of urgency or if there is limited time to engage in the interactive process. [The EEOC advises](#) that in seeking a reasonable accommodation both employees and employers should be creative and flexible.

Employers should review their existing policies and procedures for handling accommodation requests.

⁵ [The additional facts](#) which employers may examine during the COVID-19 pandemic to evaluate the undue hardship for business include:

- whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors
- whether the employee works in a solitary or group work setting
- whether the employee works in close contact with other employees or members of the public (especially medically vulnerable individuals)
- the number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).

The [Job Accommodation Network \(JAN\)](#) is a free and helpful resource for both employers and employees in the search for types of accommodations and for the determination of essential functions of a job. Examples of reasonable accommodations in the circumstances of vaccination and testing mandates include:

- modifying the job to remove marginal functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position);
- allowing the employee to telework;
- additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others;
- temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting);
- granting leave to give the individual time to recover;
- reassignment.

Penalties for Failure to Engage in Interactive Process

The provisions of the ADA and Title VII are enforced by the EEOC. Failure to engage in the interactive process may be considered as a violation of federal regulation and result in litigation/penalties. Any individual, who believes that she or he was discriminated against, may file a complaint with the EEOC at any of its offices throughout the U.S. [The EEOC instructed](#) their investigators to carefully consider the employer’s response to requests for a reasonable accommodation (i.e., did the employer engage in an interactive process with the employee requesting accommodation and if so, what actions/statements were made during this process).

Resources

The EEOC provides vast resources to assist employers with compliance including whitepapers, manuals, and FAQs. The following are some of our favorites:

- [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)
- [Questions and Answers: Religious Discrimination in the Workplace](#)
- [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA](#)
- [Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA](#)
- [Questions and Answers: Enforcement Guidance on Disability Related Inquiries and Medical Examinations Under the Americans with Disabilities Act](#)
- [Job Accommodation Network \(JAN\)](#)

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