

**MEMO: COVID-19 VACCINE REQUIREMENTS***Updated Guidance as of January 3, 2022*

Prepared by

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The purpose of this memorandum is to provide information on whether Arizona school districts may require staff or students to obtain a vaccine to combat the spread of COVID-19.

There are a variety of measures issued by the federal and state governments that may require employers to vaccinate employees. As of the date above, the status on those matters is as follows:

On August 23, 2021, the FDA approved the Comirnaty (a.k.a. BioNTech Pfizer) vaccine for people ages 16 and older.

On November 30, 2021, the federal government published an interim final rule with comment to add Head Start Program Performance Standards that include a vaccine mandate for employees, contractors and volunteers and mandating face masks for anyone over two (2) years of age in all Head Start programs. To date, no stay has been issued for these requirements. The Texas Attorney General filed suit on December 14, 2021. The deadline for compliance with this vaccine mandate is January 31, 2022 unless a stay is granted. We advise that districts operating Head Start programs consult with legal counsel regarding their compliance obligations.

On December 15, 2021, Governor Ducey issued an Executive Order that states in part: “No person shall be required by this state, or any city, town or county to obtain a COVID-19 vaccine but a licensed health care facility . . . *may require [its] employees to be vaccinated.*” Executive Order 2021-21 Enhanced Surveillance Advisory, §3 (italics added).

School districts are not specifically listed in the above referenced section of EO 2021-21 and under applicable state law, school districts are political subdivisions. A.R.S. § 15-101(23). As well, the Arizona Supreme Court has held that the term “state” does not include political subdivisions. *Amphitheater Unified School Dist. v. Harte*, 128 Ariz. 233, 235, 624 P.2d 1281, 1283 (1981). Thus, the plain language of EO 2021-21 does not appear to prevent a school district from adopting a vaccine mandate or implementing a federal vaccine mandate.

On December 17, 2021, the Sixth Circuit Court of Appeals lifted the stay on the applicability of the Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA). This means the obligations listed in the ETS are now effective, including the obligation for employers with at least 100 employees to develop vaccine mandate policies and testing options for the unvaccinated. However ...



On December 22, 2021, the U.S. Supreme Court scheduled oral arguments on January 7, 2022 to hear the challenges to the ETS vaccine mandates.

For now, the U.S. Supreme Court is leaving the “status quo” in place. OSHA has indicated the vaccination compliance deadline is January 10, 2022, and the testing compliance deadline for is February 9, 2022.

Because Arizona has a state-approved OSHA plan, the Arizona Department of Occupational Safety (ADOSH) must amend the state plan within 30 days to adopt requirements that are “at least as effective” as the OSHA ETS. 29 CFR 1953.5(b). Thus far, ADOSH has not acted as required in federal regulation. It remains to be seen whether public employers like school districts will be included in the ADOSH plan, if such a plan is adopted.

This guidance does not address the pending challenges outlined above. The focus of this general guidance addresses whether a school district can require its own employees or students to be vaccinated. Given the ever-changing landscape relating to vaccine mandates (e.g. Executive Orders, federal and state law and regulations and litigation), we urge any school district considering the adoption of a vaccine mandate to consult with legal counsel prior to taking final action.

The federal government has issued limited guidance relative to the Americans with Disabilities Act (ADA) and other equal employment opportunity (EEO) laws as summarized below.

Since December 16, 2020, the Equal Employment Opportunity Commission (EEOC) has periodically updated its guidance document, entitled, [What You Should Know About COVID-19 and ADA, the Rehabilitation Act and Other EEO Laws](#), including October 25, 2021 updates to section K’s guidance on vaccinations in the workplace. This guidance document includes reference to the updated EEOC guidance. The full content of the updated section K is provided at the [end of this memo](#). The full document may be accessed at <https://bit.ly/34oSWow>. Employers should also note that the updated EEOC guidance now includes Section L (providing guidance on Title VII and religious objections to vaccine mandates) and Section M (guidance on Retaliation of Interference). Section M was added on November 17, 2021.

SUMMARY

Employees: School districts may require employees to be vaccinated against COVID-19 as a condition of on-site work, subject to exemptions required by state and/or federal law.

Students: The most conservative course of action is to seek guidance from ADHS prior to requiring proof of immunization from students attending school for in-person, teacher-led instruction.

In either case, it is recommended that districts consult with legal counsel on legal issues related to any vaccination requirement.



DETAIL: REQUIRING VACCINES FOR DISTRICT EMPLOYEES

Overview

Courts have long upheld mandatory vaccines in some instances; in the 1905 case *Jacobson v. Massachusetts*, the U.S. Supreme Court upheld a city fine for those who refused smallpox vaccinations. More recently in the workplace setting, the Eight Circuit Court of Appeals upheld a healthcare system's requirement that its employees immunize against rubella as a condition of employment (*Hustvet v. Allina Health Sys.*, 910 F.3d 399 [8th Cir. 2018]).

According to the updated [EEOC Guidance on Workplace Vaccination](#), while the vaccination itself is not a medical examination, pre-screening vaccination questions do implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. Therefore, if an employer administers the vaccine, it must show that such pre-screening questions are job-related, consistent with business necessity, or justified by a direct threat, and be no broader or more intrusive than necessary, for the vaccination requirement to comply with and be permissible under the ADA.

The EEOC's March 19, 2020 guidance entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* has since been revised "to incorporate updates regarding the COVID-19 pandemic" (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>). The guidance includes, in pertinent part:

13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza or COVID-19 vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as



defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).⁽³⁶⁾

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

See Section K., "Vaccinations," in "[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.](#)"

In its updated "[What You Should Know...](#)" guidance, the EEOC posed and answered the following related questions:

Mandatory Employer Vaccination Programs

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? (Updated 5/28/21)

Yes, provided certain requirements are met. 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. [29 C.F.R. 1630.2\(r\)](#). 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 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. (See also [K.12](#) recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer 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 employer, and what should the employer do? (Updated 5/28/21)

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. See 29 C.F.R. 1630.2(p). 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.

Under the ADA, it is unlawful for an employer [to disclose that an employee is receiving a reasonable accommodation](#) or [to retaliate against an employee for requesting an accommodation](#).

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K.12. 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. For more information on requests for religious accommodations related to COVID-19 vaccination requirements, see [Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates](#).

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see [question and answer K.6.](#), above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an



easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, 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, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(Updated 10/13/21)*

[CDC recommends](#) COVID-19 vaccinations for everyone aged 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or planning to become pregnant in the future. Despite these recommendations, some pregnant employees may seek job adjustments or may request exemption from a COVID-19 vaccination requirement.

If an employee seeks an exemption from a vaccination 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](#).

School districts may rely upon the above-referenced federal guidance in requiring employees to be vaccinated against COVID-19, subject to religious and ADA exemptions. If a district chooses to require vaccinations, it must create a process by which employees



may apply for an exemption. If an employee refuses to get the vaccine or apply for an exemption, the school district may have legal authority to exclude the individual from the campus. (*See also*, Ariz. Att’y Gen. Op. I88-037 [March 10, 1988].) These circumstances should be reviewed specifically with a school district’s legal counsel to determine the best course of action.

(If a district subscribes to Arizona School Boards Association [ASBA] policy services, the following policies are potentially applicable: Governing Board Policy GBGCA regarding Wellness; or Governing Board Policy GBGCB regarding Staff Health and Safety.)

Granting Exemptions for Staff

As noted in the EEOC guidance above, if a school district requires an employee to be inoculated with a COVID-19 vaccine, the district must consider granting religious exemptions and exemptions under the Americans with Disabilities Act (ADA) to remain compliant with applicable federal laws. **Districts should work with their Trust-assigned attorney to consider requests for exemption, as the recommended approach may vary from case to case, depending on the facts.** General principles are outlined below.

Title VII and religious exemption

Title VII of the Civil Rights Act requires an employee to have a “sincerely held religious belief” against vaccination before his/her employer is obligated to provide an accommodation or exemption from being vaccinated. (*See also* A.R.S. § 41-1463 [unlawful to discriminate against an individual employee due to their religion].) A sincerely held but non-religious opposition to a vaccination is legally insufficient; an employee must demonstrate that his or her objection to vaccination is based on a legitimate, genuine *religious* belief.

For instance, the Third Circuit Court of Appeals affirmed the dismissal of a hospital employee’s discrimination claim in which she was fired for not receiving a flu vaccine in violation of the hospital’s flu vaccine policy. (*Brown v. Children’s Hosp. of Phila.*, 794 Fed. Appx. 226 [3d Cir. 2020]). While the court acknowledged the employee’s “holistic health lifestyle” and her own, personal belief that the vaccine might do more harm than good, the court found that the employee’s opposition to the flu vaccine was not based upon a sincerely held religious belief. The court reiterated that “it is not sufficient merely to hold a ‘sincere opposition to vaccination’; rather, the individual must show that the ‘opposition to vaccination is a religious belief.’” *Id.* (Citing *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 [3d Cir. 2017]).



Recently, the District Court for the District of Arizona issued findings adverse to the Maricopa County Community College District related to granting religious exemptions for vaccines. *Thoms v. Maricopa County Comm. College Dist.*, CV-21-01781-PHX-SPL, issued November 5, 2021. The Court found that the College was required to process and consider a student's sincerely held religious believe adverse to vaccinations and to develop an exemption process.

To trigger Title VII's protections, an employee must tell his or her employer that a sincere religious belief conflicts with a job requirement, such as a mandatory vaccination or immunization policy. Then, the employer is obligated to make reasonable accommodations for the employee's religious beliefs and practices unless doing so would result in undue hardship to the employer.

The EEOC defines undue hardship as "more than a minimal burden on [the] operation of the business." (Please note that this "more than a minimal burden" standard is *only* related to requests for accommodations based on religion. For more information, see: <https://bit.ly/2W6Z7co>). The EEOC has stated that an "undue hardship" could be one that compromises workplace safety. For example, a request to be exempt from vaccination could pose a direct threat to other employees in certain circumstances.

An employee asking for a religious accommodation must advise the district of the nature of the conflict between their religious needs and their work environment or duties. Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief. Districts may follow up with employees to request relevant information before making a determination regarding the accommodation request.

ADA exemption

Employees may assert that they are qualified individuals with a disability whose disability prevents them from being vaccinated. In this case, the employer must engage in the ADA's "interactive process" with the employee and offer "reasonable accommodations." The employer must offer these accommodations unless it would place an "undue hardship" on the employer, or the employee poses a "direct threat" to the health and safety of others.

Thus, to trigger the ADA's protections, an employee must notify the employer of his or her disability and request a workplace accommodation, such as an exception to a vaccination policy. In response, the employer should meet with the employee to explore a mutually agreeable accommodation sufficient to allow the employee to continue working in his or her current capacity. Potential accommodations could include things like allowing the employee to work from home (if feasible), requiring a face mask in the workplace, or



adjusting the employee's duties to minimize risk of transmission. (Keep in mind, accommodation may also necessitate changing or removing an employee's essential job functions.)

School districts can evaluate whether granting the exemption places an "undue hardship," or, in other words, causes *substantial* operational difficulties or expense to the district. The ADA's undue hardship standard (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>) is complicated and more stringent than Title VII's standard.

School districts can also evaluate whether granting the accommodation of a vaccine waiver poses a "direct threat" to the employer, other employees, or the general public. Interpreted in the context of a COVID-19 vaccine, the question is whether any form or degree of accommodation would mitigate the potential harm posed by an unvaccinated employee. The district would need to evaluate such factors as whether the staff member works with vulnerable populations or in a high-risk setting.

Finally, school districts will be required to treat similarly situated employees the same with respect to granting any waiver. For example, the Third Circuit held that an employee's ADA discrimination claim was improperly dismissed due to alleged disparate treatment (*Ruggiero v. Mount Nittany Med. Ctr.*, 736 Fed. Appx. 35 [3rd Cir. 2018]). The employee provided two doctor's notes in which she asked to be exempted from a required TDAP vaccine for medical reasons, specifically, a history of allergies and other medical conditions and "severe anxiety" regarding side effects. Because she alleged her employment was terminated while other employees were permitted to forego the vaccination and remain employed, the Third Circuit revived her case, finding that her allegations raised an inference of discrimination.

(Student Vaccination on following page)



DETAIL: REQUIRING VACCINES FOR STUDENTS

Recently, the Pfizer-BioNTech COVID-19 vaccine received emergency authorization approval from the United State Food and Drug Administration for children ages five (5) to fifteen (15). This vaccine is generally distributed and available at no cost to individuals throughout the United States. The Pfizer-BioNTech COVID-19 (marketed as “Comirnaty”) vaccine has general FDA approval for people ages 16 and older.

See <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/comirnaty-and-pfizer-biontech-covid-19-vaccine#comirnaty>; <https://www.fda.gov/media/151710/download> and <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Pfizer-BioNTech.html>.

Newly enacted A.R.S. § 36-672 prohibits requiring pupils to be immunized under an FDA “emergency use authorization,” stating that such emergency-use vaccines “are not required for school attendance.” A.R.S. § 36-672[C][2]. At this time, there is no vaccine available on a non-emergency basis to combat COVID-19; accordingly, Arizona school districts cannot require students to be vaccinated at this time as a condition of attending school.

Arizona law prohibits students from attending school without proof of certain immunizations, unless the pupil is exempt by statute (A.R.S. § 15-871 et seq.; A.A.C. § R9-6-702). The Arizona Department of Health Services (ADHS) has established administrative regulations that dictate which vaccines a student must have to attend school (Ariz. Admin. Code §§ R9-6-701—R9-6-708), but these regulations do not specifically mention COVID-19 vaccines.

If any of COVID-19 vaccine later becomes authorized for administration to any pupil-aged persons on a non-emergency use basis, then the Director of ADHS could enact regulations regarding such general-use-approved COVID-19 vaccine(s). The ADHS, in conjunction with the superintendent of public instruction, would be responsible to develop documentary proof standards for evidence of vaccination. (A.R.S. § 15-872[A]). As of the date of this memorandum, however, the COVID-19 vaccine has only “emergency use authorization” and we are presently unaware of any ADHS and/or Arizona Department of Education plans to revise the regulations regarding required immunizations for students.

Further, *if any COVID-19 vaccine is later generally authorized (rather than emergency authorization) for administration to any pupil-aged persons and the ADHS and ADE provide that such vaccine is required for entry to school, then a school district would follow its standard procedures regarding any student’s request to be exempt from the general*



requirement (unless different procedures are established by state or local authorities).¹ Currently, either of the following is necessary for a student to be exempted from the requirement of providing documentary proof of a required immunization:

1. The parent or guardian of the pupil submits a signed statement to the school administrator stating that the parent or guardian has received information about immunizations provided by the Department of Health Services and understands the risks and benefits of immunizations and the potential risks of non-immunization, and that due to personal beliefs, the parent or guardian does not consent to the immunization of the pupil.
2. The school administrator receives written certification that is signed by the parent or guardian and by a physician or a registered nurse practitioner, that states that one or more of the required immunizations may be detrimental to the pupil's health and that indicates the specific nature and probable duration of the medical condition or circumstance that precludes immunization.

(A.R.S. § 15-873[A][1]-[2])

State law requires school districts to exclude students who have not received a required vaccine during an outbreak (A.R.S. § 15-873[C]; Ariz. Att'y Gen. Op. I88-037 [March 10, 1988] (“outbreaks of measles or rubella”)).

There is not any specific guidance in Arizona regarding requiring vaccinations as a condition for participation in extracurricular activities. A.R.S. §§ 15-347 and 15-705 govern the enactment of rules, policies and procedures for extracurricular activities. District governing boards are required to adopt policies and procedures “governing requirements for pupils' participation in extracurricular activities” for students in grades 6—12. A.R.S. § 15-705[A]. The board is also required to consider the contemplated policies and procedures in “consultation with parents and teachers.” *Id.* Local governing boards must “consider the cultural traditions of pupils when establishing or enforcing rules related to a pupil's participation in extracurricular school activities.” A.R.S. § 15-347[A].

The State Board of Education is also required to prescribe statewide requirements for student participation in extracurricular activities. A.R.S. § 15-705[B]. The statewide rules are found at A.A.C. § R7-2-808 and primarily address academic performance as a condition for student participation in a given extracurricular activity. The terms “vaccine” and “vaccination” are totally absent from A.R.S. § 15-347, A.R.S. § 15-705 and A.A.C. Title 7, Chapter 2 (“State Board of Education”).

¹ ASBA Governing Board Policy JLCB, Immunization of Students, and its accompanying references address pupil immunization requirements.



Disclaimer: These materials have been prepared for general informational purposes only and are not intended as legal advice or a substitute for such advice. Districts should consult their school attorney for answers to specific questions on these issues.

(Appendix I on following page)

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APPENDIX I:

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Nov. 17, 2021

Direct link: <https://bit.ly/34oSWow>

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K. Vaccinations - Overview, ADA, Title VII, and GINA

The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also [Section J, EEO rights relating to pregnancy](#) and [Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates.](#))

This section was originally issued on December 16, 2020, and was updated on October 25, 2021. Note that the Centers for Disease Control and Prevention (CDC) has [issued guidance](#) for fully vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of COVID-19 vaccines. On August 23, 2021, the FDA approved the Biologics License Application for the Pfizer-BioNTech COVID-19 vaccine for use in individuals 16 years of age and older. Previously, the FDA granted Emergency Use Authorizations (EUAs) for the two other vaccines—one made by Moderna and the other by Janssen/Johnson & Johnson—authorizing them for use in the United States for individuals 18 years of age and older. The Pfizer-BioNTech vaccine is authorized under an EUA for individuals 12 years of age and older and for the administration of a [third dose](#) in certain immunocompromised individuals. For the current status of vaccines authorized or approved by the FDA, please visit: <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>



Also of note, on July 6, 2021, the U.S. Department of Justice’s Office of Legal Counsel issued a Memorandum Opinion concluding that section 564 of the Federal Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an EUA.

Other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the website of the [Safer Federal Workforce Task Force](#) for the latest guidance on federal agency operations during the COVID-19 pandemic.

This technical assistance on vaccinations was written to help employees and employers better understand how federal laws related to workplace discrimination apply during the COVID-19 pandemic. The EEOC questions and answers provided here set forth applicable EEO legal standards consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

COVID-19 Vaccinations: EEO Overview

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 against COVID-19? (Updated 10/13/21)

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the [reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below](#). (See [Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates](#)).

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 against 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 K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccination 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+]). Employers should keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccination, 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, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? (5/28/21)

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated against COVID-19 without violating the EEO laws, especially the ADA and GINA? (Updated 10/13/21)

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Employers also may work with local public health authorities, medical providers, or pharmacies to make vaccinations available for unvaccinated workers in the workplace. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccinations, as discussed in K.16 - K.21. The federal government is providing COVID-19 vaccines at no cost to everyone 12 years of age and older.

There are many resources available to employees seeking more information about how to get vaccinated against COVID-19:



- The federal government’s online [vaccines.gov](https://www.vaccines.gov) site can identify vaccination sites anywhere in the country (or <https://www.vacunass.gov> for Spanish). Individuals also can text their ZIP code to “GETVAX” (438829)–or “VACUNA” (822862) for Spanish–to find three vaccination locations near them.
- Employees with disabilities (or employees’ family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The HHS/Administration for Community Living has launched the Disability Information and Assistance Line (DIAL) to assist individuals with disabilities in obtaining such help. DIAL can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing DIAL@n4a.org.
- CDC’s website offers a link to a listing of [local health departments](#), which can provide more information about local vaccination efforts.
- In addition, CDC provides a complete communication “tool kit” for employers to use with their workforce to educate people about getting a COVID-19 vaccine. Although originally written for essential workers and employers, it is useful for all workers and employers. See [Workplace Vaccination Program | CDC](#).
- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no English or have limited English proficiency and find it difficult to make an appointment for a vaccination over the phone. CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.
- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources serving vaccination sites available in their community and offer paid time-off for vaccination, particularly if transportation is not readily available outside regular work hours.
- Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance, or to ensure nondiscrimination for an employee who is pregnant.

The ADA and COVID-19 Vaccinations

K.4. Is information about an employee’s COVID-19 vaccination confidential medical information under the ADA? (Updated 10/13/21)



Yes. The ADA requires an employer to maintain the confidentiality of employee medical information. Although the EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

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? (Updated 5/28/21)

Yes, provided certain requirements are met. 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. [29 C.F.R. 1630.2\(r\)](#). 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 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. (See also [K.12](#) recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer 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 employer, and what should the employer do? (Updated 5/28/21)

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. See 29 C.F.R. 1630.2(p). 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.

Under the ADA, it is unlawful for an employer [to disclose that an employee is receiving a reasonable accommodation](#) or [to retaliate against an employee for requesting an accommodation](#).

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA’s restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? (Updated 5/28/21)

Yes. The ADA’s restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An [employer’s agent](#) is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual’s physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual’s disability). The act of administering the vaccine is not a “medical examination” under the ADA because it does not seek information about the employee’s physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be “job related and consistent with business necessity” when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and,



therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in [Question K.5.](#)) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the “job-related and consistent with business necessity” standard? (Updated 5/28/21)

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions [K.16 – 17.](#)) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Does the ADA prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19 vaccination? (Updated 10/13/21)

No. When an employer asks employees whether they obtained a COVID-19 vaccination, the employer is not asking the employee a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA's rules about making such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential, as discussed in K.4.



K.10. May an employer offer voluntary vaccinations only to certain groups of employees? (5/28/21)

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? (5/28/21)

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. 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. For more information



on requests for religious accommodations related to COVID-19 vaccination requirements, see [Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates](#).

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see [question and answer K.6.](#), above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, 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, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? (Updated 10/13/21)

[CDC recommends](#) COVID-19 vaccinations for everyone aged 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or planning to become pregnant in the future. Despite these recommendations, some pregnant employees may seek job adjustments or may request exemption from a COVID-19 vaccination requirement.

If an employee seeks an exemption from a vaccination 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](#).

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as “family medical history”) and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? (Updated 5/28/21)

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee’s genetic information, such as asking about the employee’s family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See [CDC’s Pre-vaccination Checklist](#) (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee’s genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a health care provider *that is not affiliated with their employer* (such as from the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? (Updated 10/13/21)

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a health care provider unaffiliated with the employer, such as the employee’s personal physician or other health care provider, a pharmacy, or a public



health department, is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Does the ADA limit the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination from a health care provider *that is not affiliated with their employer* (such as the employee's personal physician or other health care provider, a pharmacy, or a public health department)? (Updated 10/13/21)

No. The ADA does not limit the incentives an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine *is not the employer or its agent*. By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination *administered by the employer or its agent*, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive. See K.17.

As noted in K 4., the employer is required to keep vaccination information confidential under the ADA.

K.17. Under the ADA, are there limits on the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination *administered by the employer or its agent*? (Updated 10/13/21)

Yes. When the employer or its agent administers a COVID-19 vaccine, the value of the incentive (which includes both rewards and penalties) may not be so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information to their employers or their agents. As explained in K.16., however, this incentive limit does not apply if an employer offers an incentive to encourage employees to be voluntarily vaccinated by a health care provider that is not their employer or an agent of their employer.



GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Does GINA limit the value of the incentive employers may offer employees if employees or their family members get a COVID-19 vaccination from a health care provider *that is not affiliated with the employer* (such as the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? (Updated 10/13/21)

No. GINA does not limit the incentives an employer may offer to employees to encourage them or their family members to get a COVID-19 vaccine or provide confirmation of vaccination if the health care provider administering the vaccine is not the employer or its agent. If an employer asks an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as “family medical history” under GINA), nor is it any other form of genetic information. GINA’s restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? (5/28/21)

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See [K.14](#) for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee’s *family member* getting vaccinated by the employer or its agent? (5/28/21)

No. Under GINA’s Title II health and genetic services provision, 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.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? (5/28/21)

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.