



MEMO: COVID-19 VACCINE REQUIREMENTS

Update from December 15, 2020 Memo

Prepared by

Gust Rosenfeld, PLC **Udall Shumway, PLC**
Jennifer MacLennan, Esq. Denise Lowell-Britt, Esq.

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. To date, local and state authorities have not provided guidance on this issue.

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.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidance document, entitled, [What You Should Know About COVID-19 and ADA, the Rehabilitation Act and Other EEO Laws](#) to include a new section K, that pertains to vaccinations in the workplace. This guidance document now includes reference to the revised EEOC guidance. The full content of new section K is provided at the [end of this memo](#). The full document may be accessed at <https://bit.ly/34oSWow>.

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

According to the most recent [EEOC Guidance of December 16, 2020](#), the COVID-19 vaccination itself is not a medical examination, but pre-screening vaccination questions may 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.

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]).

The Occupational Safety and Health Administration (OSHA) has not mandated employee vaccinations. However, Section 5(a)(1) of the Occupational Safety and Health Act imposes a general duty on employers to provide a safe and healthy workplace and to protect employees against workplace hazards that could cause an accident or illness that would most likely result in death or serious physical harm. The acting secretary at OSHA issued a letter in the face of the 2009 H1N1 pandemic indicating that although OSHA does not require vaccines, an employer may do so. (See *Letter from OSHA Acting Assistant Secretary Jordan Barab to Congresswoman Marcy Kaptur* [Nov 9, 2009]: <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.)

The Equal Employment Opportunity Commission (EEOC) also issued updated guidance on March 19, 2020, entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>). The guidance is as follows:

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 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 influenza 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 influenza 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).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **As of the date this document is being issued, there is no vaccine available for COVID-19.**¹

In the new December 16, 2020 guidance, the EEOC posed and answered the following similar question:

K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has 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.

¹ *Id.* (emphasis present).



The next logical question that the December 16, 2020 EEOC guidance addresses is the following:

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

School districts may rely upon the above 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. 188-037 [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 or 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]).

Thus, 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.



DETAIL: REQUIRING VACCINES FOR STUDENTS

Currently, the COVID-19 vaccines that are scheduled to be produced and distributed are not approved for children under the age of sixteen. Accordingly, it may be some time before Arizona schools may need to consider whether to require all students to be immunized.

Arizona law prohibits students from attending school without proof of immunization unless the pupil is exempt by statute (A.R.S. § 15-871 et seq.). 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 R9-6-702). These regulations, however, do not address the newly approved COVID-19 vaccines.²

It is unclear whether a school district may require students to be vaccinated against COVID-19 without specific authorization from ADHS or a local health department. State law indicates that ADHS, in conjunction with the superintendent of public instruction, is responsible for developing documentary proof standards for evidence of vaccination. (A.R.S. § 15-872[A]). As of the date of this memorandum, however, the Arizona Department of Education has indicated that there are no plans to revise the regulations regarding required immunizations for students.

Should a school district be authorized to require students to be immunized for COVID-19, that district would follow its standard procedures regarding a student's request to be exempt from the general requirement (unless different procedures are established by state or local authorities). 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

² ASBA Governing Board Policy JLCB, Immunization of Students, and its accompanying references address pupil immunization requirements.



duration of the medical condition or circumstance that precludes immunization.

(A.R.S. § 15-873[A][1]-[2])

State law allows school districts to exclude students who have not been vaccinated during an outbreak (A.R.S. § 15-873[C]; Ariz. Att'y Gen. Op. 188-037 [March 10, 1988]).

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

Technical Assistance Questions and Answers - Updated on Dec. 16, 2020

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

K. Vaccinations

The availability of COVID-19 vaccinations may raise questions about the applicability of various equal employment opportunity (EEO) laws, including the ADA and the Rehabilitation Act, GINA, and Title VII, including the Pregnancy Discrimination Act (see [Section J, EEO rights relating to pregnancy](#)). The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.

ADA and Vaccinations

K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a “medical examination” for purposes of the ADA? (12/16/20)

No. The vaccination itself is not a medical examination. As the Commission explained in [guidance on disability-related inquiries and medical examinations](#), a medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” Examples include “vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.” If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are “job-related and consistent with business necessity.” See Question K.2.



K.2. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries? (12/16/20)

Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." 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, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. [See Question K.5](#) below for a discussion of direct threat.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. [42 U.S.C. 12112\(d\)\(4\)\(B\)](#); [29 C.F.R. 1630.14\(d\)](#). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program [confidential](#).

K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? (12/16/20)

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and,



therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

ADA and Title VII Issues Regarding Mandatory Vaccinations

K.4. Where can employers learn more about Emergency Use Authorizations (EUA) of COVID-19 vaccines? (12/16/20)

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The [FDA has an obligation](#) to:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the [FDA’s EUA page](#).

K.5. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? (12/16/20)

The ADA allows an employer to have a [qualification standard](#) that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a



determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies. See also [Section J, EEO rights relating to pregnancy](#).

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 the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org. JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm>.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in [Question K.7](#), there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational



Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: www.osha.gov/SLTC/covid-19/.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).

K.6. If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief? (12/16/20)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has 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.

K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.



Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations

K.8. Is Title II of GINA implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination? (12/16/20)

No. Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology, which will be discussed more below. As noted in Question K.9. however, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members’ medical histories, may violate GINA.

Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

Certain COVID-19 vaccines use mRNA technology. This raises questions about genetics and, specifically, about whether such vaccines modify a recipient’s genetic makeup and, therefore, whether requiring an employee to get the vaccine as a condition of employment is an unlawful use of genetic information. The CDC has explained that the mRNA COVID-19 vaccines “do not interact with our DNA in any way” and “mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept.” (See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html> for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA’s prohibitions on using, acquiring, or disclosing genetic information.

K.9. Does asking an employee the pre-vaccination screening questions before administering a COVID-19 vaccine implicate Title II of GINA? (12/16/20)

Pre-vaccination medical screening questions are likely to elicit information about disability, as discussed in Question K.2., and may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines “genetic information” to mean:



- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

29 C.F.R. § 1635.3(c). If the pre-vaccination questions do *not* include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions *do* include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA. See 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.