

June 7, 2021

COVID-19 Update: EEOC Issues Further Guidance on Workplace COVID-19 Vaccine Policies and New York State Adopts the CDC Guidance for Fully Vaccinated People

The Equal Employment Opportunity Commission recently issued updated guidance on workplace COVID-19 vaccination policies (the “EEOC Guidance.”).¹ In addition to clarifying that federal workplace anti-discrimination laws do not prevent employers from requiring employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodation provisions, the EEOC Guidance addressed a number of new issues related to COVID-19 vaccination, including requesting documentation of vaccination and employer incentives for voluntary vaccinations. New York State employers may choose to implement recent State guidance (the “New York Reopening Guidance”) that fully vaccinated individuals can resume activities without wearing masks or physically distancing.²

Key Takeaways

- Employers may require employees physically entering the workplace to be vaccinated for COVID-19 so long as they provide a reasonable accommodation for individuals who cannot be vaccinated due to a disability, a sincerely held religious belief, practice or observance, or pregnancy and pregnancy-related conditions, unless the accommodation would pose an undue hardship to the employer’s business.
- Employers may request documentation or other confirmation of COVID-19 vaccination. Employers are required to keep information about an employee’s COVID-19 vaccination confidential.
- Employers are permitted to offer incentives to encourage COVID-19 vaccination among employees and their family members from community medical providers.

¹ EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, (May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

² New York State, *Implementation Guidance* (effective May 19, 2021), https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf.

- New York employers may choose to follow the State and CDC Guidance that fully vaccinated individuals do not need to wear masks or be socially distanced. Employers who do not congregate patrons or operate below the State's social gathering limit may rely upon self-reporting of vaccination status. Other employers may require proof of full vaccination status.

EEOC Guidance

Mandatory Employer COVID-19 Vaccination Policies

The EEOC Guidance reaffirmed that federal workplace anti-discrimination laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19, including the Americans with Disabilities Act (the "ADA"), the Rehabilitation Act, Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act (the "ADEA") and the Genetic Information Nondiscrimination Act (the "GINA").³ Title VII and the ADA require employers mandating COVID-19 vaccination to provide reasonable accommodations for employees who cannot be vaccinated due to a disability, pregnancy or pregnancy-related conditions that constitute a disability, or a sincerely held religious belief, practice or observance, absent an undue hardship on the operation of the employer's business.⁴

Employers may not apply a vaccination requirement 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. The EEOC Guidance also cautioned employers to be mindful of the fact that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a mandatory vaccination requirement.⁵

An employer who requires employees to get a COVID-19 vaccination from the employer or its agent may, if challenged, have to justify pre-vaccination screening questions as "job related and consistent with business necessity" under the ADA.⁶

Accommodations Process

Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance, 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.⁷ 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.⁸ 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.⁹ In order to start the process for identifying potential reasonable accommodations, an employee who does not get vaccinated for COVID-19 because of a disability must let the employer know

³ See EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁴ "Undue hardship" is defined differently depending on whether the employee is seeking an accommodation based on a disability under the ADA (a significant difficulty or expense) or based on a religious belief, practice or observance under Title VII (imposing more than minimal cost or burden on the employer). EEOC Guidance at K.1, K.6, K.12.

⁵ *Id.* at K.1.

⁶ *Id.* at K.7.

⁷ *Id.* at K.5.

⁸ Several factors make up this assessment: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 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. Additionally, the assessment of direct threat should take into account 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 others; 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. *Id.* at K.5.

⁹ *Id.* at K.5.

that they need an exemption from the employer's vaccination requirement.¹⁰ To request an accommodation, an employee does not need to use the phrase "reasonable accommodation" or reference the ADA.¹¹ 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.¹²

Under Title VII, 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 (or a specific version or brand of vaccine), the employer must provide a reasonable accommodation unless it would pose an undue hardship. The employer should ordinarily assume that an employee's request for a religious accommodation is based on a sincerely held religious belief, practice or observance; however, if the employer is aware of facts that provide an objective basis for questioning this assumption, the employer would be justified in requesting additional supporting information. If an employee requests an exemption from a COVID-19 vaccination requirement due to pregnancy, under Title VII, the employer must ensure that the employee is not being discriminated against compared to other similarly situated employees. For example, a pregnant employee may be entitled to job modifications (*e.g.*, telework, changes to work schedules or leave) to the extent such job modifications are provided to similarly situated employees.

According to the EEOC Guidance, employers may, as a reasonable accommodation, allow unvaccinated employees seeking an exemption from a mandatory vaccination requirement to: (i) wear a face mask; (ii) work at a social distance from coworkers or non-employees; (iii) work a modified or staggered shift; (iv) get periodic tests for COVID-19; (v) telework, if feasible; or (vi) as a last resort, accept a reassignment.¹³ Potential reasonable accommodations could also include making changes in the work environment such as improving ventilation systems or limiting contact with others. Employers are advised to consider all the options and whether other rights may apply under federal, state or local laws before denying an accommodation request or taking adverse employment action against an unvaccinated employee.¹⁴ The proportion of employees in the workplace who are already vaccinated and the extent of employee contact with non-employees whose vaccination status is unknown can impact the undue hardship consideration. Nevertheless, employers need not permanently excuse employees from performing essential functions of their jobs.¹⁵ The fact that an employer allowed employees to work remotely during the pandemic may not mean that remote work "is always a feasible accommodation, or that it does not pose an undue hardship."¹⁶

As a best practice, an employer introducing a mandatory COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination would notify all employees that the employer will consider requests for reasonable accommodation on an individualized basis and provide those responsible for implementing the policy with clear information about how to recognize and handle an accommodation request.¹⁷

Additionally, an employer's obligation to provide a reasonable accommodation extends not only to unvaccinated employees but also, in certain circumstances, to fully vaccinated employees.¹⁸ For example, COVID-19 vaccination may not offer immunocompromised individuals the same measure of protection as other vaccinated individuals. Under such circumstances, an

¹⁰ *Id.* at K.6.

¹¹ *See id.*

¹² *See id.*

¹³ Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform their current job without posing a direct threat, the EEOC Guidance states that the employer must consider if telework is an option for that particular job and, as a last resort, whether reassignment to another position is possible. *Id.* at K.6.

¹⁴ *Id.* at K.6, K.12.

¹⁵ *Id.* at D.15.

¹⁶ *Id.*

¹⁷ *Id.* at K.5, K.6.

¹⁸ *Id.* at K.11.

employer may be required to engage in an interactive process to determine if there is a disability-related need for a reasonable accommodation, absent undue hardship.¹⁹

Documentation of Vaccination Status

Employers may request documentation or other confirmation of COVID-19 vaccination. The ADA requires employers to keep information about an employee's COVID-19 vaccination confidential and stored separately from the employee's personnel files.²⁰

Voluntary Employer COVID-19 Vaccination Programs

Employers may opt for a voluntary COVID-19 vaccination policy as an alternative to a mandatory vaccination requirement. The ADA prohibits taking an adverse action against an employee for refusing to participate in a voluntary employer-administered vaccination program.²¹

Encouraging Vaccination Through Incentives

Under the EEOC Guidance, employers are permitted to offer incentives to encourage employees and their family members to receive COVID-19 vaccinations on their own from outside sources, such as pharmacies, doctors, public health departments or other health care providers in the community.²² If an incentive is offered to employees to receive a vaccination administered by the employer or its agent, however, under the ADA, the incentive must not be "so substantial as to be coercive" because otherwise employees could feel pressured to disclose protected medical information in response to the pre-vaccination disability-related screening questions.²³ Employers may not offer incentives for employees' family members to receive the vaccine from the employer or its agent, but may provide vaccines to employees' family members without offering any incentives, provided that steps are taken to ensure compliance with GINA.²⁴ Employers may not require employees to have their family members get vaccinated or penalize employees if their family members decide not to get vaccinated.²⁵

New York Reopening Guidance

Effective May 19, 2021, New York State announced that fully vaccinated individuals do not need to wear masks or be socially distanced in most settings, including offices, adopting the CDC's Interim Public Health Recommendations for Fully Vaccinated People (the "CDC Guidance").²⁶ This development is in line with the Occupational Safety and Health Administration (OSHA)'s directive to businesses to "refer to the CDC guidance" for fully vaccinated individuals until further notice.²⁷ Note that the CDC Guidance acknowledged that "federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance" may still require individuals to continue to wear masks or to be socially distanced.²⁸ The New York Reopening Guidance provides that businesses can choose whether to require masks or social distancing for fully vaccinated employees or patrons throughout or in designated parts of the workplace.²⁹

¹⁹ This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed. *Id.*

²⁰ *Id.* at K.7.

²¹ *Id.* at K.8.

²² *Id.* at K.16, K.17, K.18.

²³ *See id.* at K.17.

²⁴ *Id.* at K.20, K.21.

²⁵ *Id.* at K.21.

²⁶ Governor Andrew M. Cuomo's Office, *Governor Cuomo Announces New York State to Adopt New CDC Guidance on Mask Use and Social Distancing for Fully Vaccinated Individuals* (May 17, 2021), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-adopt-new-cdc-guidance-mask-use-and-social-distancing>. *See also* CDC, *Interim Public Health Recommendations for Fully Vaccinated People*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (updated May 28, 2021).

²⁷ OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*,

<https://www.osha.gov/coronavirus/safework>.

²⁸ *See* CDC Guidance.

²⁹ New York Reopening Guidance at 1.

Businesses who opt to implement the CDC Guidance for fully vaccinated individuals that operate below the New York State social gathering limit³⁰ or do not congregate patrons may either require proof of full vaccination status or rely upon self-reporting of vaccination status (*e.g.*, an honor system).³¹ Businesses who operate above the social gathering limit and congregate patrons (*e.g.*, event venues), however, may not rely on self-reporting of vaccination status.³²

Implications for Employers

- While employers are permitted to implement a mandatory COVID-19 vaccination policy, they are required to provide reasonable accommodations for employees who, because of a disability, a sincerely held religious belief, practice or observance, or pregnancy or pregnancy-related conditions, do not get vaccinated, absent undue hardship to the operation of their business. An employer's obligation to provide a reasonable accommodation extends not only to unvaccinated employees but also, in certain circumstances, to fully vaccinated employees for whom COVID-19 vaccination does not offer the same measure of protection as other vaccinated individuals.
- Employers are advised to consider all options, including telework and reassignment, and whether other federal, state and local laws apply, before denying an accommodation request or taking adverse employment action against an unvaccinated employee.
- Before instituting a mandatory vaccination policy, employers are advised to provide managers, supervisors and those responsible for implementing the policy with clear information about how to recognize and handle accommodation requests.
- Employers may request documentation or confirmation from employees that they have obtained a COVID-19 vaccine; however, this information must be treated as employee medical information, kept confidential and stored separately from the employees' personnel files.
- Employers are permitted to offer incentives to employees to provide proof that they or their family members received a vaccination from an outside provider. However, incentives must not be "so substantial as to be coercive" if offered to employees for receiving a vaccination administered by the employer or its agent and are prohibited if offered to employees in return for a family member's receipt of a vaccination by the employer or its agent.
- New York employers may choose to implement the CDC Guidance that fully vaccinated individuals need not wear masks or be socially distanced. If they choose to implement the CDC Guidance, employers who do not congregate patrons or that operate below the State's social gathering limit may require proof of full vaccination status or rely upon self-reporting. Employers that congregate patrons and operate above the social gathering limit may not rely upon self-reporting.
- Employers who are developing or implementing a COVID-19 vaccination policy should stay abreast of any further guidance from the EEOC on COVID-19 vaccination. According to the EEOC, the agency is currently "considering the impact of" the CDC Guidance, signaling that it may issue additional guidance on this topic.

The EEOC Guidance can be found [here](#).

³⁰ The current social gathering limit in New York is 250 people for indoor settings and 500 people for outdoor settings. Effective May 19, business capacity rules—previously based upon percentage of maximum occupancy—have been updated such that businesses are now only limited by the space available for individuals to maintain the required social distance of six feet. See Governor Andrew M. Cuomo's Office, *Governor Cuomo, Governor Murphy and Governor Lamont Announce Significant Easing Of COVID-19 Pandemic Restrictions on Businesses, Gatherings and Venues* (May 3, 2021), https://www.governor.ny.gov/news/governor-cuomo-governor-murphy-and-governor-lamont-announce-significant-easing-covid-line-break_close_up_hyphen19.

³¹ New York Reopening Guidance at 1.

³² *Id.*

The New York Reopening Guidance can be found [here](#).

The CDC Guidance can be found [here](#).

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jeh Charles Johnson
+1-212-373-3093
jjohnson@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Loretta E. Lynch
+1-212-373-3000

Jean M. McLoughlin
+1-212-373-3135
jmcloughlin@paulweiss.com

Liza M. Velazquez
1-212-373-3096
lvelazquez@paulweiss.com

Lawrence I. Witdorhich
+1-212-373-3237
lwitdorhich@paulweiss.com

Maria Helen Keane
1-212-373-3202
mkeane@paulweiss.com

Associate Leah J. Park contributed to this Client Memorandum.