

Returning to the Workplace: COVID-19, the ADA and Rehabilitation Act

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1

1

EEOC Resources

All EEOC resources on COVID-19: www.eeoc.gov/coronavirus. Including:

❖ **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (WYSK)**

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (check here for updates)

*Note that all the guidance in this document was issued *before* the CDC's 05/13/21 publication that states that, with limited exceptions, those who are fully vaccinated no longer need to observe infection control protocols, such as wearing a mask or staying physically distant. But, CDC acknowledges that workplaces may still implement such protocols for all employees. And CDC doesn't overrule Federal, state, local, territorial, or tribal laws/regulations requiring mask usage. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>

2

2

Communication, Flexibility, Creativity

- Always important but never more so than in continuing to help your employees perform their jobs effectively while getting through the COVID-19 pandemic
- And these skills may be critical to ensuring compliance with various requirements of the Equal Employment Opportunity (EEO) Laws

3

3

May Employers Ask if Employees are *Fully Vaccinated*?

- Employers may ask for proof that employees have received a COVID-19 vaccination: *WYSK question K.9.* **
- Asking for proof of vaccination is not a disability-related question under the ADA (but asking why not vaccinated may be legally problematic)
- Verbal confirmation/documentation of vaccination status is confidential medical information: *WYSK questions K.4. and K.9.*
- **** Federal agencies ONLY: See OMB/OPM/GSA 6/10/21 Memorandum (M-21-25): Planning for A Safe Increased Return of Federal Employees and Contractors to Physical Workplaces” which states that agencies should generally not require employees (or contractors) to be vaccinated or to disclose if vaccinated in order to return to the workplace**

4

4

ADA/Rehabilitation Act and COVID-19 Vaccinations

- EEOC's role in addressing vaccines is limited to certain specific issues
- If employers **require** employees to be vaccinated (a qualification standard), AND an employee says **cannot be vaccinated because of a disability**, then under ADA employer must show that this requirement is *job-related and consistent with business necessity*.
- Since health/safety concerns behind this requirement (i.e., slowing or eliminating spread of coronavirus; preventing serious illness, hospitalization, death), employer must show that this employee's disability would pose **direct threat** if remains unvaccinated: **WYSK question K.5**

5

5

ADA Reasonable Accommodation and COVID-19 Vaccinations

- Direct threat is an individualized assessment – so for each employee who says can't be vaccinated due to a disability, employer must assess that employee's situation to determine if remaining unvaccinated meets direct threat standard (significant risk of substantial harm)
- If employee remaining unvaccinated meets direct threat standard, then employer must consider whether it can eliminate or sufficiently lower high level of risk with reasonable accommodation (absent undue hardship): **WYSK questions K.2. and K.11.**

6

6

ADA: Offering Incentives for Employees to be Voluntarily Vaccinated by Employer or Its Agent

- Permissible as long as the incentive is not so substantial as to be coercive: *WYSK question K.17*
- ADA regulates the ability of employers to require employees to answer disability-related questions
- Certain pre-vaccination screening questions are disability-related questions
 - To avoid having to show the questions are “job-related and consistent with business necessity” requires employees **voluntarily** agree to answer questions and **to achieve voluntary participation means the incentive cannot be coercive**

7

7

ADA: Offering Incentives to Employees To Provide Documentation of Voluntary Community Vaccination

- Permissible because does not involve employer asking disability-related questions: *WYSK question K. 16*
 - Independent Third Party Provides Vaccination: For example, personal physician, medical clinic, pharmacy, local public health or health department
 - **Employer does not get access to the answers to the pre-vaccination screening questions: This is what makes the legal difference**
- Employer only asking for proof (or verbal confirmation) of vaccination which is not a disability-related question (See Slide 4)
- Since no disability-related information is requested, incentive limitation (i.e., cannot be so substantial as to be coercive) does not apply in this situation: *WYSK question K. 17*

8

8

GINA and Vaccinations/Issue is Whether Employer Is Seeking Genetic Information (in this case, family medical history): No GINA Problems in These Scenarios

- No GINA issues if employer requires employees to be vaccinated by the employer/its agent or requires employee to arrange for own vaccination (no genetic information being requested): *WYSK questions K.14 and K.15*
- No GINA issue if employer offers incentives to employees to provide documentation/confirmation that they or their family members have been vaccinated in community (no genetic information being requested): *WYSK question K.18*
- No GINA issue if employer offers incentive for employee to be vaccinated by employer (no genetic information being requested): *WYSK question K.19*

9

9

GINA and Vaccinations/ Issue is Whether Employer Is Seeking Genetic Information (in this case, family medical history): GINA Problem

- GINA issue if employer offers incentive to employee if family member is **vaccinated by employer/its agent**: *WYSK question K.20*
 - Employer or its agent must ask pre-vaccination medical questions about the family member and that medical information about the employee's family member constitutes genetic information about the employee
 - GINA prohibits employers from offering *any* incentives to employees to obtain genetic information, including family medical history

10

10

Other Vaccination Issues

- Examples of reasonable accommodations for disability and religious objections/modifications for pregnancy: *WYSK question K.2*
- If employer requires employees to be vaccinated, *best practices* related to ensuring reasonable accommodation requests are properly considered:
 - Notify employees that employer will consider requests for reasonable accommodation based on disability (and religion) on an individualized basis: *WYSK question K.5*
 - Before implementing mandatory vaccination policy, provide clear information to managers/supervisors/those implementing the policy about reasonable accommodation obligations: *WYSK question K.6*
- Actions employers may take to encourage employees (and their family members) to be vaccinated without violating any Federal EEO laws: *WYSK question K.3*

11

11

Disability-Related Inquiries and Medical Exams: What May Employers Ask/Do ** (** But now must account for 5/13/21 CDC Guidance)

- **Must be job-related and consistent with business necessity**
- **Examples of employer worksite screening for COVID-19 that ADA allows “at this time”:**
 - questions about COVID-19 symptoms, diagnosis, or if employee has been tested: *WYSK questions A. 2 and A.8*
 - questions about exposure to *anyone* with COVID -- but Genetic Information Nondiscrimination Act (GINA) violation to ask about family members: *WYSK question A.10*
 - questions if call in sick or feel ill at work: *WYSK question A.12*
 - taking temperature: *WYSK question A.3*
 - administering COVID-19 viral tests ** (but not antibody tests); **continue to check for updated recommendations from CDC** and state/local public health authorities: *WYSK questions A.6-A.7*
- **Employers may instruct employees to stay home or send them home if they have COVID-19 or symptoms:** *WYSK question A.4* (CDC Guidance does not change this)

12

12

Disability-Related Inquiries and Medical Exams Continued ** (Again must take into account 5/13/21 CDC Guidance)

- May **screen all employees** ** (Impact of 5/13/21 CDC Guidance on testing all employees?) for COVID-19 as long as consistent with best available objective medical evidence, e.g., recommendations from CDC and state/local public health authorities: *WYSK question G.1*
- Employees may request alternative methods of screening based on disability or religious beliefs: *WYSK question G.7*
- Employer may bar employee from workplace for refusal to be screened: *WYSK question A.11*
 - To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal or remind the employee about confidentiality: *WYSK question A.11*
- No disparate treatment on protected basis in selecting who is screened: *WYSK question G.1*
- ADA allows screening **job applicants** for COVID-19/symptoms if post-offer for all applicants entering same job, but not pre-offer: *WYSK questions C.1 and C.2*

13

13

Confidentiality of Medical Information

- COVID diagnosis, symptoms of COVID-19, vaccination status all subject to ADA/Rehabilitation Act confidentiality: *WYSK questions B.1 and B.5; K.4*
- Supervisor/Manager may only share name of someone with COVID-19 or symptoms with other supervisors/managers who have **need to know, not all supervisors/managers generally**. Need to know based on specific reason for sharing information (e.g., recipient of info responsible for notifying employees of possible COVID-19 exposure): *WYSK question B.5*
- Employer cannot disclose name of employee with COVID-19 to workforce, but may say "someone at this location," "someone on the 4th Floor," or similar geographic or temporal description to notify potentially exposed coworkers: *WYSK question B.5*

14

14

Reasonable Accommodation: Who May/May Not Be Entitled to Accommodation

- Employee may be entitled to accommodation for pre-existing disability that places employee at higher risk of serious illness from COVID-19 (e.g., those who are immunocompromised), or that is exacerbated by current situation created by pandemic (particularly certain mental illnesses or disorders, e.g., including anxiety disorders, obsessive-compulsive disorders, and PTSD): *WYSK questions D.1., D.2., G.5, and K.11.*
- “Critical infrastructure workers” and “essential critical workers” have the same accommodation rights as other employees: *WYSK question D.12*
- ADA does not require accommodation of employee for association with an individual with a disability: *WYSK question D.13*

NOTE: EEOC has not addressed whether someone with COVID-19 is an “individual with a disability” under the ADA/Rehabilitation Act

15

15

Reasonable Accommodation: Interactive Process and Undue Hardship

- Possible approaches for **inviting** employees – if they wish – to request disability accommodations, or flexibilities to meet other needs, due to pandemic: *WYSK question G.6*
- Employee still required to request accommodation: *WYSK question G.3*
- Employer still may conduct an interactive process, including requesting medical documentation, to determine if employee has disability and needs accommodation: *WYSK questions D.5. and D.6.*
- Circumstances created by pandemic and workplace shutdown may be relevant to undue hardship: *WYSK questions D.9-D.11*

16

16

Types of Possible Reasonable Accommodations

- Examples of accommodations for disabilities to allow employees to remain in the workplace: *WYSK questions D.1, G.5, and K.2*
 - *Think creatively and broadly: e.g., converting unused conference or break room into employee's office space; don't forget to consult Job Accommodation Network*
- Telework, reassignment, and leave may be reasonable accommodations for disabilities that require staying out of workplace: *WYSK question G.4*
- If employer recalls employee to work, continued telework need not be granted as accommodation unless ADA requirements met
 - Employer can restore essential functions if they were temporarily altered due to mandatory telework: *WYSK question D.15*
 - Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace re-opens: *WYSK question D.16*

17

17

Infection Control/Personal Protective Gear and Reasonable Accommodation

- Reasonable accommodation does not include infection control measures **generally** undertaken throughout workplace; employer may have to go beyond such measures to provide reasonable accommodation
- Various forms of personal protective gear (e.g., masks, gloves) may in certain circumstances be considered reasonable accommodations
- Employer may require infection control measures (e.g., frequent handwashing) and wearing protective gear, but employees may be entitled to disability/religious accommodation: *WYSK question G.2*

18

18

Age (But Possible ADA Connection)

- There is no ADEA right to accommodation based on age/age-related risks from COVID-19.
 - Older workers, however, may request ADA/Rehabilitation Act accommodation for medical conditions: *WYSK question H.1*

19

19

Pregnancy and ADA/Rehabilitation Act

- Pregnancy not a disability under ADA, but ADA accommodation for pregnancy-related medical condition if: (1) it is a disability and (2) other ADA requirements met (e.g., shows need for accommodation, no undue hardship): *WYSK question J.2*

20

20

Harassment: National Origin/Race/Other Bases

- Harassment related to COVID-19 based on national origin, race, or any other protected characteristic is prohibited:
WYSK question E.1
- Managers should be alert to harassment involving COVID-19, including its origins, against those who are or are perceived to be of Chinese or other Asian national origin:
WYSK question E.3
- Harassment may originate with contractors, customers and clients: *WYSK question E.3*

21

21

Harassment: National Origin/Race/ Other Bases

- Harassment may occur whether employees are in the workplace, teleworking, or on leave, including via emails, phone calls, platforms for video or chat communication: *WYSK questions E.3 and E.4*
- Recommended steps to prevent harassment as workplaces reopen:
WYSK question E.2
- Managers should know their legal obligations and employers may remind workforce of harassment prohibition and consequences:
WYSK question E.3
- EEOC resources/tools for employers: *WYSK question E.1*

22

22