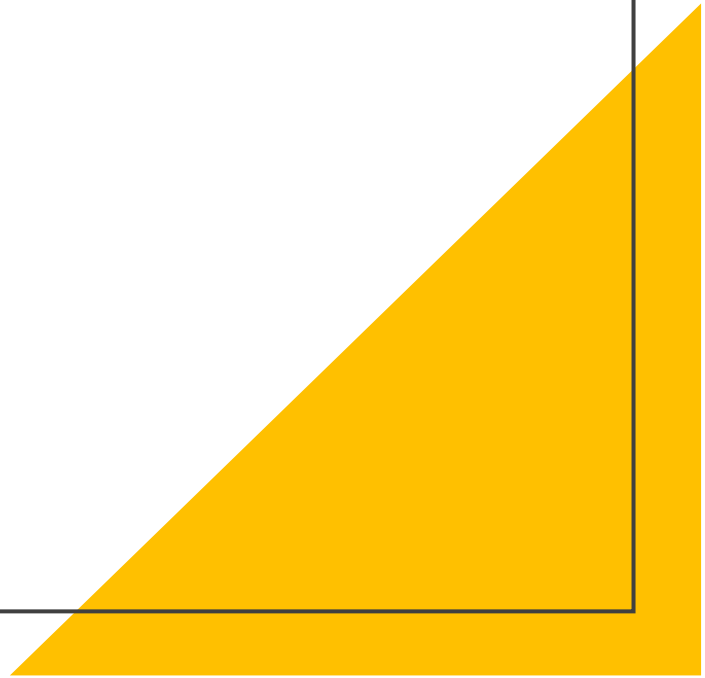


WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS

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U.S Equal Employment Opportunity Commission (EEOC)

- EEOC enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age (40 or older), disability or genetic information.
- Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.
- More information: www.eeoc.gov

Laws Enforced by the EEOC


- [Title VII of the Civil Rights Act of 1964 \(Title VII\)](#)
- [The Pregnancy Discrimination Act](#)
- [The Equal Pay Act of 1963 \(EPA\)](#)
- [The Age Discrimination in Employment Act of 1967 \(ADEA\)](#)
- [Title I of the Americans with Disabilities Act of 1990 \(ADA\)](#)
- [Sections 501 and 505 of the Rehabilitation Act of 1973](#)
- [The Genetic Information Nondiscrimination Act of 2008 \(GINA\)](#)
- **More information:**
- <https://www.eeoc.gov/statutes/laws-enforced-eeoc>

FY 2020 Snapshot: EEOC Annual Report

- <https://www.eeoc.gov/sites/default/files/2021-01/FY%202020%20APR.pdf>
- In FY 2020, EEOC:
 - secured a record amount (more than \$535 million) for victims of workplace discrimination
 - reduced private sector charge inventory by nearly 4% to lowest level in 14 years
 - charges resolved with outcome favorable to charging party increased to 17.4%
 - quickly adapted to provide live virtual outreach and trainings when that was the only way to do so, reaching nearly 300,000 people
 - conducted 6,272 successful mediations
- resolved 165 lawsuits, with direct benefits to more than 25,000 workers, with highest litigation recovery amount since 2004
- achieved favorable results in approx. 96% of all district court resolutions
- filed 93 new lawsuits (individual suits plus systemic suits challenging discriminatory policies)

EEOC Resources on COVID-19

- Everything EEOC has issued related to COVID-19 can be found at www.eeoc.gov/coronavirus, including:
 - What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (regularly updated)
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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- **EEOC's What You Should Know About COVID-19** publication addresses frequently-asked pandemic-related questions arising under statutes the Commission enforces, including the Rehabilitation Act/ADA, GINA, Title VII, and the ADEA.
 - **Today's presentation will focus on the most frequently asked EEO questions relating to the pandemic.**



EEO Laws & COVID-19

**NOTE
REGARDING
UPDATED
CDC
GUIDANCE**

- **CDC issued interim guidance for fully vaccinated individuals issued on 5/13/21, and has updated it periodically. EEOC continues to consider any impact of these developments on COVID-19 technical assistance provided to date.**
- **CDC Interim Public Health Recommendations for Fully Vaccinated People**
- **<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>**

Federal EEO Laws & CDC Guidance

- **EEO laws continue to apply during the time of the COVID-19 pandemic.**
- **But EEO laws do not interfere with or prevent employers from following the guidelines and suggestions made by Centers for Disease Control and Prevention (CDC) or other public health authorities about steps employers should take regarding COVID-19.**

COVID-19 Screening for Employees Physically Entering the Workplace

- **Based on guidance of CDC/public health authorities, EEOC took position in March 2020 that someone entering workplace with COVID-19 posed a “direct threat” to health of others as defined under ADA.**
- **This meant the ADA allows employers who choose to do so to screen all employees for COVID-19 if they are physically entering worksite.**



COVID-19 Screening for Employees Physically Entering the Workplace (cont'd)



- **Examples:**
 - **Take temperature.**
 - **Ask about COVID-19 symptoms, diagnosis, testing.**
 - **Ask if exposed to anyone who has COVID-19 (rather than asking about family members – due to restrictions on requesting family medical history under Genetic Information Nondiscrimination Act).**
 - **Note: CDC Guidance states “fully vaccinated” individuals may “refrain from quarantine following a known exposure if asymptomatic.”**
 - **Administer COVID testing for current COVID-19 infection consistent with current CDC recommendations (but antibody testing not permitted).**
 - **Note: CDC Guidance states excuse “fully vaccinated” individuals from “routine screening testing, if feasible.”**

COVID-19 Screening (continued)

Employers may instruct employees to stay home or send them home if they have COVID-19 or symptoms.

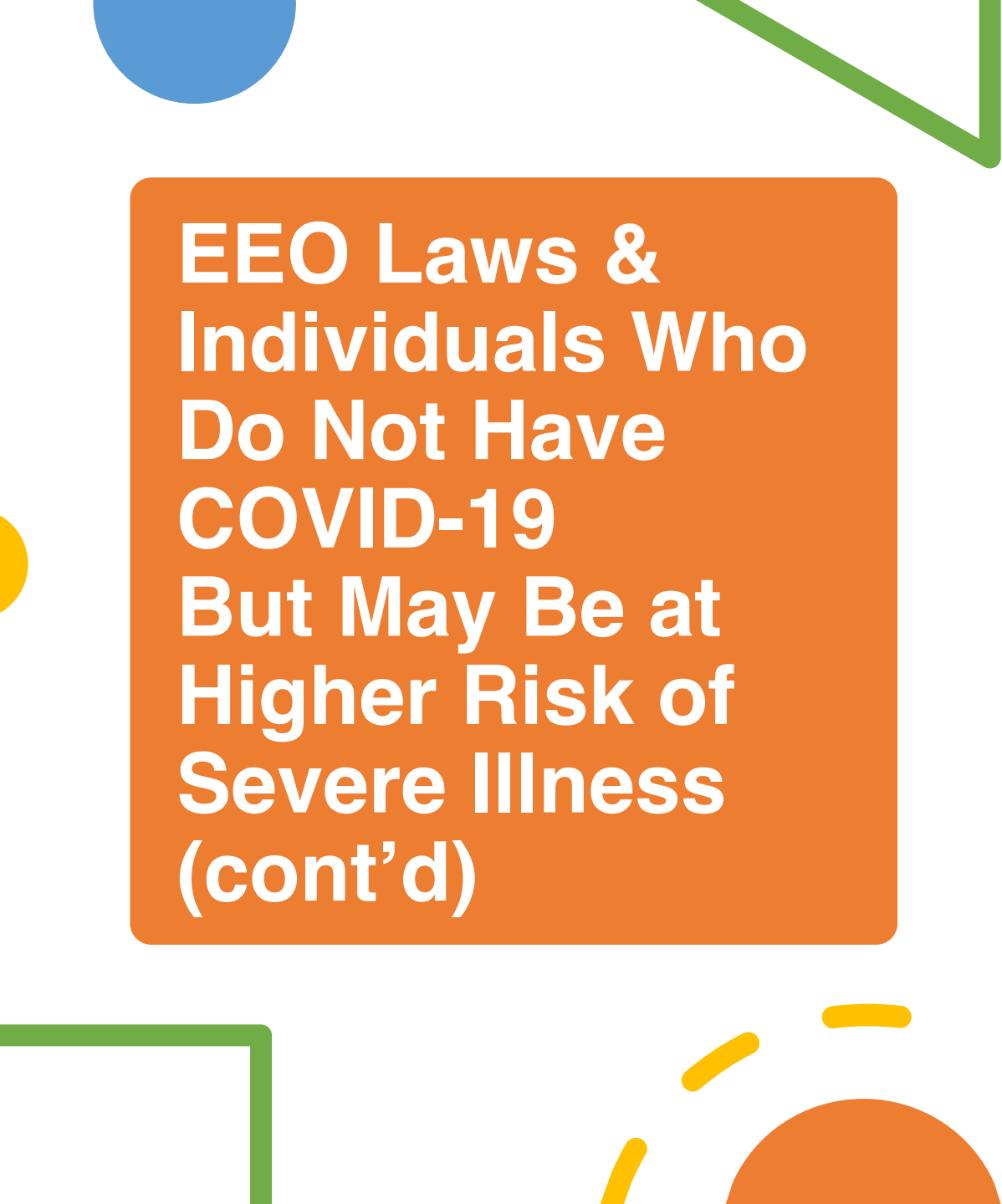
May exclude employees from workplace if they refuse to undergo screening measures, but:

- to gain cooperation, employers may wish to ask reasons for refusal, remind about confidentiality.
- address disability & religious accommodation requests related to screening measures.



**EEO Laws &
Individuals
Who Do Not
Have COVID-19
But May Be at
Higher Risk of
Severe Illness**

- **CDC has identified medical conditions placing individuals at higher risk of severe illness from COVID-19 (e.g., cancer, kidney disease, chronic lung disease, hypertension, diabetes, heart conditions, immunocompromised).**
- **ADA accommodation requests from employees with such conditions analyzed according to usual ADA rules.**



**EEO Laws &
Individuals Who
Do Not Have
COVID-19
But May Be at
Higher Risk of
Severe Illness
(cont'd)**

- **However, an employer is not allowed to involuntarily exclude an employee from the workplace due to such a condition unless the employer can show the employee poses “direct threat to self.” This is a high standard to meet.**
- **Even then, exclusion only allowed if no accommodation possible to reduce threat to an acceptable level.**

Pandemic- Related ADA Accommodation Requests

- **Employers may receive and need to evaluate requests to accommodate, for example:**
 - **a person with a disability that places individual at higher risk of severe illness if COVID-19 contracted;**
 - **a person with a disability exacerbated by pandemic situation (e.g., anxiety disorder); or**
 - **a person with COVID-19.**
- **Employee not entitled to ADA accommodation based on living with or being otherwise associated with an individual with a disability.**

COVID-19 as a Disability

EEOC has not addressed in WYSK when COVID-19 itself may render someone an “individual with a disability” under the ADA.

EEOC agrees with analysis of “long COVID” by Departments of Health and Human Services and Justice in their [Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557](https://www.ada.gov/long_covid_joint_guidance.pdf), https://www.ada.gov/long_covid_joint_guidance.pdf

Examples of Pandemic- Related ADA Accommodation Requests

Accommodations to allow being in workplace.

Accommodations for those who cannot be in workplace.

Accommodations relating to employer's screening process.

Accommodations relating to employer's infection control rules.

Accommodation requests relating to employer's COVID-19 vaccination requirement.

**Employer
Permitted to Use
Usual Process
to Handle
Pandemic-
Related ADA
Accommodation
Requests**

ADA/Rehab Act permits employer to request medical documentation if disability or need for accommodation not obvious or already known.

Employer has discretion to choose among effective accommodations.

Where requested accommodation would result in undue hardship, employer must offer an alternative reasonable accommodation if available absent undue hardship.

May be helpful to consult Job Accommodation Network (JAN), www.askjan.org, COVID-19 resources for types of accommodations.

Transitioning from Mandatory Telework: Accommodation Requests for Continued Telework

- **If employer recalls employee to work, request for continued telework as disability accommodation need not be granted unless ADA requirements met.**
 - **Employer can restore essential functions if they were temporarily altered due to mandatory telework.**
 - **Employer never has to eliminate an essential function of the job as an accommodation.**
 - **Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace reopens.**





Information/ Inviting Advance Requests

Employer is free to provide information to entire workforce about who to contact to request accommodation or other flexibilities.

Employer also may invite advance requests even before workplace reopens from those employees who may choose to make early request.

If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

Medical Confidentiality

- **With limited exceptions, ADA requires employers to keep confidential any applicant/employee medical information.**
- **Includes not only diagnosis or treatments, but also that individual has requested or is receiving accommodation.**
- **Must keep medical records separate from personnel file.**
- **Restricts who employer can inform of an employee's COVID-19 diagnosis or symptoms**
 - **May inform official(s) designated to handle response, and public health authorities.**
 - **If informing other employees or customers, cannot disclose employee's name. Instead need to use a generic description (e.g., "someone who works on 4th floor").**




Pregnancy

- **Under the ADA:**
- **Pregnancy itself is not a disability.**
- **Pregnancy-related medical conditions may be disabilities.**
- **Reasonable accommodation absent undue hardship is available for a pregnancy-related medical condition if it is a disability and other ADA requirements met.**



Pregnancy (continued)

- **Under Title VII as amended by Pregnancy Discrimination Act (PDA):**
- **Pregnancy discrimination is sex discrimination prohibited by Title VII.**
- **Employer may not involuntarily exclude employee from workplace based on pregnancy, notwithstanding possibility of any greater risk from COVID-19.**
- **Pregnant employee may be entitled to job modifications to the same extent 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.**

- 
- Legal Rights for Pregnant Workers Under Federal Law:
 - <https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law>

Workplace Infection Control Policies


What if an employer has policies requiring employees to wear face masks or adhere to other infection control practices?

Employer may need to accommodate employees who need modification or can't comply due to disability (ADA) or religious belief/practice (Title VII of the Civil Rights Act), subject to undue hardship under each statute.

Examples:

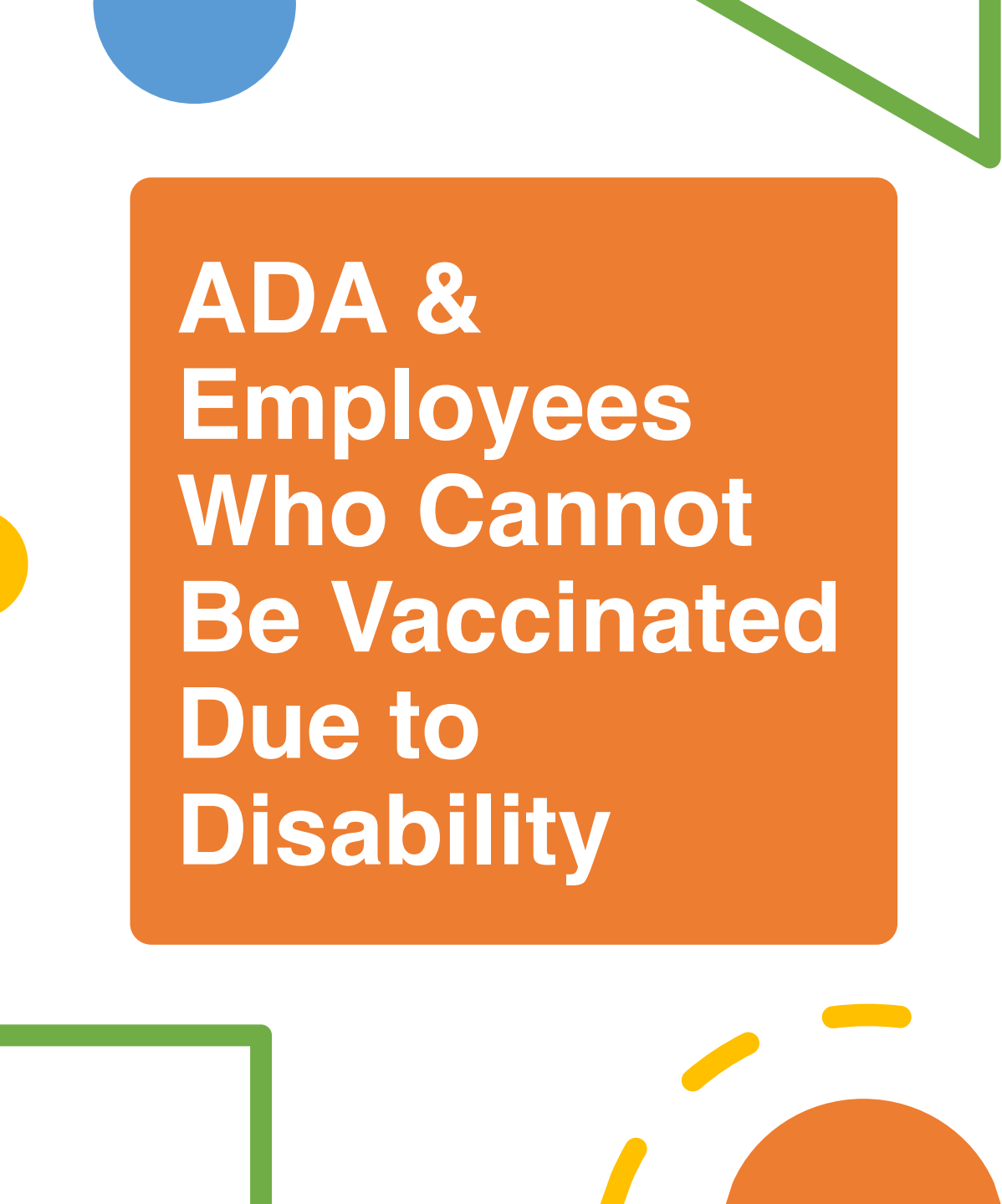
- non-latex gloves
- modified face masks for interpreters or others who communicate with an employee who uses lip reading
- gowns designed for individuals who use wheelchairs
- modified equipment due to religious garb

EEO Laws and COVID-19 Vaccination

- **Federal EEO laws do not prevent employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA, and other EEO considerations.**
 - **EEOC's role in addressing vaccination is limited to application of the federal EEO laws.**
 - **Mandatory vaccination still subject to EEO statutory requirements, such as disability and religious accommodation.**
- 

ADA/Rehab Act & Employer Vaccination Policies Requiring Vaccination

- **If employees are required to bring in proof of vaccination:**
 - ADA/Rehab Act do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination. The requirement is neither a disability-related inquiry nor a medical exam by the employer.
- **If employees are required to have a vaccination administered directly by employer (or its agent):**
 - Employer would be asking the CDC-recommended, pre-vaccination screening questions, which include disability-related inquiries, so ADA “direct threat” standard would have to be met.



ADA & Employees Who Cannot Be Vaccinated Due to Disability

- If a particular employee cannot meet the employer's vaccination requirement because of a disability, the employer may not require compliance for that employee unless it can demonstrate:
 - the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace; and
 - there is no reasonable accommodation that would reduce or eliminate the threat.

Title VII and Religious Accommodation Requests to Be Excused from a COVID-19 Vaccination Requirement

- **Once on notice a sincerely held religious belief, practice, or observance prevents employee from complying with employer vaccination requirement, Title VII requires employer to provide reasonable accommodation unless it would pose undue hardship.**
- **Undue hardship under Title VII is defined by courts as more than minimal cost or burden on employer.**
 - **This is an easier standard for employer to meet than the statutory ADA standard for disability accommodation, which is “significant difficulty or expense.”**

Title VII and Religious Accommodation Requests to Be Excused from a COVID-19 Vaccination Requirement (cont'd)

- **Because Title VII's definition of religion is broad and protects beliefs, practices, and observances with which employer may be unfamiliar, employer should ordinarily assume request is based on sincerely held belief.**
- **If 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.**
- **WYSK Section L, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>**
- **EEOC Compliance Manual on Religious Discrimination, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (1/15/21)**

Requests to Be Excused from COVID-19 Vaccination

- **Where applicable, employer determines whether reasonable accommodation absent undue hardship could be provided with step(s) such as:**
 - face mask
 - physical distancing from coworkers/non-employees
 - periodic tests for COVID-19
 - modified shift/hours
 - telework
 - transfer/reassignment
 - other



Examples of Relevant Facts:

Determining Whether Undue Hardship to Exempt Employee from Vaccination Requirement

- **Consider specific factual context, such as:**
- **type of workplace**
- **whether employee works indoors or outdoors**
- **whether employee works in a solitary or group setting, and whether the employee could work alone away from others or whether job performance requires working in close proximity to others (e.g., coworkers, clients, customers)**
- **nature of employee's duties**

Examples of Relevant Facts:

Determining Whether Undue Hardship to Exempt Employee from Vaccination Requirement (cont'd)

- **number of employees who are fully vaccinated**
- **how many employees and nonemployees physically enter the workplace**
- **risk of the spread of COVID-19 to other employees or others the employee could come into contact with, e.g., medically vulnerable individuals, children under 5, or people whose vaccination status is unknown**
- **number of employees who are seeking a similar accommodation (i.e., cumulative cost or burden on employer of granting the accommodation)**
 - **note: a mere assumption that many more employees might seek accommodation is not evidence of undue hardship**



Encouraging Vaccination

- **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.**
- **Under certain circumstances, employers may offer incentives to employees who receive COVID-19 vaccinations.**

Requests for Accommodation by Those Who are Fully Vaccinated

- **Employees may ask for disability accommodation relating to underlying medical conditions even if they are fully vaccinated.**
- **Employer may seek information from employee's health care provider to explain why an accommodation is needed.**
- **Example: Some individuals who are immunocompromised might still need reasonable accommodations because COVID-19 vaccine may not offer them same measure of protection as others.**

Medical Confidentiality and Vaccination

Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?

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.



Incentives for Vaccination

- 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.

Older Age

ADEA prohibits adverse employment decisions based on individual's older age (40 or above).

ADEA *permits* favorable treatment based on older age.

No ADEA right to accommodation based on age/age-related risks from COVID-19.

- Older workers, however, may request ADA/Rehab Act accommodation for disabilities.

No disparate treatment based on older age if offering flexibilities to comparable workers.

Caregivers

- **Employers may offer flexibilities such as telework, modified schedules, or other benefits to employees with caregiver/family responsibilities, but cannot engage in EEO disparate treatment.**
- **Example: Prohibited for employer to offer female employees more preferable benefits because of sex-based assumptions about who in the workforce has caregiver responsibilities.**



Harassment

- Harassment related to COVID-19 based on national origin, race, or any other protected characteristic is prohibited.
- 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.
- Harassment may originate with contractors, customers and clients.



Harassment (continued)

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

Retaliation

- Job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the federal EEO laws.
- EEO retaliation protections apply to:
 - current employees, whether they are full-time, part-time, probationary, seasonal, or temporary
 - job applicants
 - former employees (such as when an employer provides a job reference)
 - regardless of an applicant's or employee's citizenship or work authorization status

Examples of Employee EEO Activities Protected from Retaliation

- **Filing a charge, complaint, or lawsuit, regardless of whether the underlying discrimination allegation is successful or timely.**
 - Protected activity for employee to file EEOC charge alleging that supervisor unlawfully disclosed confidential medical information (such as a COVID-19 diagnosis), even if the EEOC later decides there is no merit to the underlying charges.
 - Supervisor may not give a false negative job reference to punish a former employee for making an EEO complaint, or refuse to hire an applicant because of the applicant's EEO complaint against a prior employer.

Examples of Employee EEO Activities Protected from Retaliation (cont'd)

- **Reporting alleged EEO violations to a supervisor or answering questions during an employer investigation of the alleged harassment is protected activity.**
- Examples:
 - Asian American employee tells manager or human resources official that coworker made abusive comments accusing Asian people of spreading COVID-19
 - employees for reports harassing workplace comments about their religious reasons for not being vaccinated
 - employee reports sexually harassing comments made during a work video conference meeting

Examples of Employee EEO Activities Protected from Retaliation (cont'd)

- **Resisting harassment, intervening to protect coworkers from harassment, or refusing to follow orders that would result in discrimination is protected activity.**
 - Example: workplace discrimination laws protect a supervisor who refuses to carry out management's instruction not to hire certain applicants based on the sex-based presumption that they might use parental leave or have childcare needs, or to steer them to particular types of jobs.

Examples of Employee EEO Activities Protected from Retaliation (cont'd)

- **Requesting accommodation of a disability (potentially including a pregnancy-related medical condition) or a religious belief, practice, or observance (regardless of whether the request is granted or denied) is protected activity.**
 - Example: EEO laws prohibit retaliating against an employee for requesting continued telework as a disability accommodation after a workplace reopens, or for requesting religious accommodation, such as modified protective gear that can be worn with religious garb.
 - Accommodation requests are protected activity even if the individual is not legally entitled to accommodation (e.g., where employee's medical condition is not ultimately deemed a disability under ADA, or where accommodation would pose an undue hardship).

Employee Protected Activity Does Not Bar Legitimate Employer Actions

- Engaging in protected EEO activity does not prevent discipline of an employee for legitimate reasons.
- Employers are permitted to act based on *non-retaliatory and non-discriminatory* reasons that would otherwise result in discipline.
- Examples: if an employee performs poorly, has low productivity, or engages in misconduct, an employer may respond as it normally would, even if the employee has engaged in protected activity.
- Similarly, an employer may take non-retaliatory, non-discriminatory action to enforce COVID-19 health and safety protocols, even if such actions follow EEO activity (e.g., an accommodation request).

Additional ADA Right Against Interference

- **ADA prohibits not only retaliation for protected EEO activity, but also “interference” with an individual’s exercise of ADA rights. ADA also prohibits employers from interfering with employees helping others to exercise their ADA rights.**
- **Employers may not coerce, intimidate, threaten, or otherwise interfere with the exercise of ADA rights by job applicants or current or former employees.**
- **Examples:**
- **unlawful for employer to use threats to discourage someone from asking for a reasonable accommodation**
- **unlawful for employer to pressure an employee not to file a disability discrimination complaint**
- **ADA’s interference provision can be violated even if employer does not actually carry out a threat, and even if the employee is not deterred from exercising ADA rights.**

Three EEOC COVID- related lawsuits filed in September

- *EEOC v. ISS Facility Services*, No. 1:21-CV-3708-SCJ-RDC (N.D. Ga.)
- CP was health and safety manager at workplace experience and facility management company in Georgia w/pulmonary condition (so greater risk of severe illness if contracted COVID).
- Early in pandemic, Def. had required all employees to work remotely 4 days/week.
- After return to workplace in June, '20, CP wanted to continue to work at home 2 days/week as a RA => Not allowed (although allowed for others in her position).
- Request denied & CP fired.

Two employers took different approaches to addressing virus, but EEOC alleges both ran afoul of the ADA:

EEOC v. U.S. Drug Mart d/b/a Fabens Pharmacy, No. 3:21-cv-00232 (W.D. TX) -- Pharmacy tech w/asthma requested to wear mask. Was not allowed, harassed - taunted and humiliated when questioned no-mask policy. Sent home twice when asked to wear mask; forced to quit.

EEOC v. 151 Coffee, LLC, No. 4:21-cv-01081 (N.D. TX) – 2 coffee shop employees with disabilities prohibited from returning to work until vaccine available. They were ready and willing to work. Def. terminated them.

Trending Issue: Opioid Use and the ADA

Use of Codeine, Oxycodone, and Other Opioids: Information for Employees

<https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees>

How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed

<https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids>

Opioids & the ADA

- **EEOC v. Professional Transportation, Inc.**, Civil Action No. 1:20-cv-00745 (S.D. W. Va. consent decree entered Aug. 2020), <https://www.eeoc.gov/newsroom/professional-transportation-inc-pay-60000-settle-eeoc-disability-discrimination-suit>.
- **EEOC v. Lonza America, Inc., f/d/b/a Arch Chemicals, Inc.**, Civil Action No. 1:20-cv-00311 (E.D. Tenn. consent decree entered July 2020), <https://www.eeoc.gov/newsroom/lonza-america-pay-150000-settle-eeoc-disability-lawsuit>.

Selected ADA Resources

Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

Applying Performance and Conduct Standards to Employees with Disabilities

<https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities>

Employer-Provided Leave and the ADA <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>

Job Accommodation Network: www.askjan.org

Questions?

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