

## QUICK VIEW OF EEOC GUIDELINES ON COVID-19 VACCINATIONS

The very brief version:

The EEOC issued guidance on December 16, 2020 clarifying that employers may require employees to take a COVID-19 vaccine once it is available. However, employees who refuse due to disability or a sincerely held religious belief are entitled to engage in the accommodation process with the employer to determine if a reasonable accommodation is possible. If it is not possible, the employer may hold the employee out of work, but it is not clear the employee may be fired as other laws (or the CBA) may protect them. Here is a link to the EEOC's guidelines. [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov/what-you-should-know-about-covid-19-and-the-ada-the-rehabilitation-act-and-other-eo-laws)

The one thing that is still not clear is what, if any, impact the fact that the vaccine is an emergency use vaccine has on these guidelines. The FDA is required to advise everyone that they have the option to refuse to take the vaccine because it is emergency use. This issue continues to develop and we are monitoring it closely.

Of course, as a term and condition of work, this remains a mandatory subject of bargaining and we should be prepared to protect that right.

### **1. Can an employer require employees be vaccinated?**

Answer: Yes. However, the employer must attempt to accommodate those who cannot take the vaccine due to a disability or based on religious objections.

### **2. Can an employer mandate that employees take the vaccine at work?**

Answer: Yes. However, when administering the vaccine, the health care provider must ask certain questions that are considered confidential medical information. Therefore, employers can only ask those questions if they are "job related and consistent with business necessity." Instead, employers are encouraged to have employees receive the vaccine by their own health care providers and simply submit proof of vaccination.

### **3. Can an employer ask if an employee has been vaccinated or submit proof of vaccination?**

Answer: Yes.

### **4. Aren't these vaccines only authorized on an emergency basis?**

Answer: Yes, so far the COVID-19 vaccines which the FDA has authorized are on an emergency basis which means that when the individual goes to take the vaccine they will be told about the known and unknown benefits and risks of the vaccine and that they have an option to refuse the vaccine.

### **5. What if an employee is unable to take the vaccine due to a disability?**

Answer: The employer must establish 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\(r\)](https://www.eeoc.gov/what-you-should-know-about-covid-19-and-the-ada-the-rehabilitation-act-and-other-eo-laws) The employer must then determine whether there is any way to provide a reasonable accommodation (absent [undue hardship](https://www.eeoc.gov/what-you-should-know-about-covid-19-and-the-ada-the-rehabilitation-act-and-other-eo-laws)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

Whether the employee can telework, or how many other employees are already vaccinated and the amount of contact the employee would have with others should all be considered when contemplating reasonable accommodations and whether the employee poses a direct threat.

**6. What if an employee is unable to take the vaccine due to a sincerely held religious belief?**

Answer: The answer is the same as above for employees with disabilities.

**7. What if an employee cannot take the vaccine due to a disability or a sincerely held religious belief and the employer cannot make any reasonable accommodations?**

Answer: The EEOC says in this circumstance the employer is allowed to exclude the employee from work. It goes on to say that 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.” The CBA, of course, would also be relevant to these considerations.

**8. If an employee is held out of work, are they entitled to pay?**

Answer: No federal law would require paid leave if the employee were excluded from work. The employee might be eligible for FMLA or leave pursuant to the CBA.