

### **E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? (6/11/20)**

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be **instructed** (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#E.2>) to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

### **E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? (6/11/20)**

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

## **F. Furloughs and Layoffs**

### **F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? (4/9/20)**

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's **[technical assistance document on severance agreements \(https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements\)](https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements)**.

## **F.2. What are additional EEO considerations in planning furloughs or layoffs?**

*(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

# **G. Return to the Workplace**

## **G.1. As government restrictions are lifted or modified, how will employers know what steps they can take consistent with the ADA to screen employees for the virus that causes COVID-19 when entering the workplace? (Updated 7/12/22)**

The ADA permits employers to make disability-related inquiries and conduct medical exams to screen employees for COVID-19 when entering the workplace if such screening is “job-related and consistent with business necessity.” For more information on disability-related inquiries and medical examinations, see **Section A**. For information on reasonable accommodation requests related to screening protocols, see **G.7**.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

## **G.2. An employer requires workers to wear personal protective equipment and engage in other infection control practices. Some employees ask for accommodations due to a disability or a sincerely held religious belief, practice, or observance that affects the ability to wear personal protective equipment and/or engage in other infection control practices. How should an employer respond? (Updated 7/12/22)**

In most instances, federal EEO laws permit an employer to require employees to wear personal protective equipment (PPE) (for example, **masks** (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>), and/or gloves) and observe other infection control practices (for example, regular hand washing or physical distancing protocols). Some employers may need to comply with regulations issued by the Occupational Safety and Health Administration (OSHA) that require the use of PPE. OSHA regulations do not prohibit the use of reasonable accommodations under the EEO laws as long as those accommodations do not violate OSHA requirements. Employers also may follow current CDC guidance about who should wear **masks** (<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>).

Regardless of the reason an employer requires PPE (or other infection control measures), when an employee with a disability needs a reasonable accommodation under the ADA to comply with an employer's requirement to wear PPE (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or when an employee requires a religious accommodation under Title VII (such as modified or alternative equipment due to religious attire or grooming practices), the employer should discuss the request and provide accommodation (either what is requested by the employee or an alternative that is effective in meeting the employee's needs) if it does not cause an undue hardship on the operation of the employer's business under the ADA or Title VII. For general information on reasonable accommodation under the ADA, see **Section D**.

**G.3. What does an employee need to do in order to request reasonable accommodation from an employer because the employee has one of the medical conditions (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that CDC says may put a person at higher risk for severe illness from COVID-19? (Updated 7/12/22)**

An employee—or a third party, such as an employee's doctor—must **let the employer know** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) that the employee needs a change for a reason related to a medical condition. Individuals may request accommodation orally or in writing. While the employee

(or third party) does not need to use the term “reasonable accommodation” or reference the ADA, the employee may do so.

The employee or the employee’s representative should communicate that the employee has a medical condition necessitating a change to meet a medical need.

After receiving a request, the employer may **ask questions or seek medical documentation** (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.6>) to help decide if the individual has a disability—not all medical conditions meet the ADA’s definition of “disability”—and if there is a reasonable accommodation, barring **undue hardship** (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D>), that can be provided. For additional information on reasonable accommodation under the ADA, see **Section D**. For information on pregnancy-related disabilities covered under the ADA, see **J.2**. For general information on reasonable accommodation requests related to a sincerely held religious belief, practice, or observance, see **K.12**.

**G.4. CDC identifies a number of medical conditions** (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that are more likely to cause people to get severely ill if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that the employee’s health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(Updated 7/12/22)*

The ADA does not mandate that the employer take action in this situation if the employee has not requested reasonable accommodation. Also, an employer’s duty to provide reasonable accommodation applies only if an employee has an actual disability or a record of a disability, as defined in the ADA; this means not every individual with one of the medical conditions that might place them at higher risk of COVID-19 complications will automatically satisfy these ADA definitions of **disability**.

Assuming the employee has a “disability” as discussed above, if the employer is concerned that the health of an employee with a disability may be jeopardized upon returning to the workplace, the ADA generally does not allow the employer to exclude the employee—or take any other adverse action—because the employee has a disability that CDC identifies as potentially placing the employee at higher risk

for severe illness if the employee gets COVID-19. Under the ADA, such an adverse action is not allowed unless the employee's disability poses a "direct threat" to the employee's health or safety that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense for the employer, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to the employee's own health or safety, or that of others in the workplace under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the disability being identified in CDC's guidance; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. Thus, an employer analyzing a potential direct threat must consider 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. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and the employee's particular job duties. A determination of direct threat also would include whether the employee is **up to date on vaccinations (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>)** and the likelihood that an individual may be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory physical distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a "significant risk of substantial harm" to the employee's own health or safety, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or sufficiently reduce the risk so that it would be safe for the employee to return to the workplace, while still permitting the employee to perform the essential functions of the job.

An employer's consideration of a possible reasonable accommodation should involve an interactive process with the employee. If there are no accommodations

in an employee's current position that sufficiently reduce or eliminate direct threat in the workplace, then an employer must consider accommodations such as telework, leave, or—as a last resort—reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework).

An employer may only bar an employee from working based on the direct threat analysis if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to the employee's own health or safety that cannot be reduced or eliminated by reasonable accommodation. For general information on reasonable accommodation under the ADA (i.e., where an individual's request for reasonable accommodation has nothing to do with potential direct threat concerns), see **Section D**.

**G.5. What are examples of reasonable accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self or others?** *(Updated 7/12/22)*

**Reasonable accommodations** that may eliminate (or reduce to an acceptable level) a direct threat to self or others may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to, or require from, employees returning to its workplace. Reasonable accommodations also may include additional or enhanced protective measures, such as High Efficiency Particulate Air (HEPA) filtration systems/units or other enhanced air filtration measures, erecting a barrier that provides separation between an employee with a disability and coworkers/the public, or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include telework, modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting), or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more physical distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (**[www.askjan.org](http://www.askjan.org)** (**<http://www.askjan.org/>**)) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable

accommodation during this pandemic, employers and employees are encouraged to be creative and flexible. For general information on reasonable accommodation under the ADA, see **Section D**.

**G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements?** *(Updated 7/12/22)*

Yes. The ADA, the Rehabilitation Act, and Title VII of the Civil Rights Act do not prohibit employers from making information available in advance to **all** employees about whom to contact—if they wish—to request reasonable accommodation that they may need for a disability or a sincerely held religious belief, practice or observance upon return to the workplace. Once requests are received, the employer may begin the interactive process. An employer may choose to include in such a notice all medical conditions identified in **CDC guidance** (**<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>**) that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about whom to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions which may qualify as disabilities.

Alternatively, an employer may send a general notice explaining that the employer is willing to consider employee requests for reasonable accommodation for employees with a disability or a sincerely held religious belief, practice, or observance, or to consider flexibility on an individualized basis for employees not eligible for reasonable accommodation (e.g., employees who request flexibility due to age). The employer should specify if the point of contact is different depending on whether the request is based on disability, sincerely held religious beliefs, pregnancy, age, or child-care responsibilities.

Either approach is consistent with the Age Discrimination in Employment Act (ADEA), the ADA, the Rehabilitation Act, and Title VII.

Regardless of the approach, employers should ensure that those employees who receive, review, or process these requests are sufficiently trained in how to handle them in accordance with the federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a disability or a sincerely held religious belief, observance, or practice; or a request related to

pregnancy. For additional information on reasonable accommodation under the ADA/Rehabilitation Act, see **Section D**.

### **G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? (6/11/20)**

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if a disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a **disability** (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.5>) and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is **available under Title VII** (<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>).

## **H. Age**

### **H.1. CDC has explained (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>) that the risk for severe illness with COVID-19 increases with age, with older adults at the highest risk. Do older adults have protections under the federal employment discrimination laws? (Updated 7/12/22)**

Yes. The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from excluding an individual involuntarily from the workplace based on being older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19. For



more information on postponing a start date or withdrawing a job offer due to older age, see **C.5**.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for workers due to age. However, employers are free to provide flexibility to older workers; the ADEA does not prohibit this, even if it results in younger workers being treated less favorably based on age in comparison.

Older workers also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable **accommodation for their disability** (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1>).

**H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age?** (9/8/20; adapted from 3/27/20 Webinar Question 12)

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

## **I. Caregivers/Family Responsibilities**

*For additional information about pandemic-related caregiver discrimination under the laws enforced by the EEOC, see the EEOC's technical assistance document, **The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws.** (<https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>)*

**I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?** (3/14/22)

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have **caregiving**

**responsibilities (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>)** for children.

## **I.2. How might unlawful caregiver discrimination related to the COVID-19 pandemic arise under the laws enforced by the EEOC? (3/14/22)**

Caregiver discrimination violates the laws enforced by the EEOC if it is based on an applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, national origin, disability, age (40 or older), or another **characteristic covered by federal employment discrimination laws** (<https://www.eeoc.gov/discrimination-type>). Caregiver discrimination also is unlawful if it is based on the caregiver's association with an individual with a disability, or on the race, ethnicity, or other protected characteristic of the individual receiving care.

Caregiver discrimination related to the pandemic may arise in a variety of ways. For instance, under Title VII, employers may not discriminate against employees with pandemic-related caregiving responsibilities based on their sex, including gender stereotypes associated with caregiving responsibilities or roles. For example, employers may not decline to assign female employees with caregiving responsibilities demanding or high-profile projects that increase employees' advancement potential but require significant overtime or travel. Likewise, employers may not reassign such projects to other employees based on assumptions that female caregivers cannot, should not, or would not want to work extra hours or be away from their families if a family member is infected with or exposed to COVID-19. Employers also may not deny male employees permission to telework or to adjust their schedules to enable them to perform pandemic-related caregiving obligations, such as caring for young children or parents, while granting such requests when made by similarly situated female employees.

Title VII also prohibits employers from discriminating against employees with pandemic-related caregiving duties based on their race or national origin. For example, employers may not require more burdensome processes for employees of a certain race or national origin who are requesting schedule changes or leave related to COVID-19 caregiving. Employers also may not deny such requests more frequently, or penalize employees for requesting or receiving schedule changes or leave for caregiving purposes, based on employees' race or national origin. Discrimination based on citizenship or immigration status against workers with caregiving responsibilities also can be unlawful under a law enforced by the

**Department of Justice (<https://www.justice.gov/crt/immigrant-and-employee-rights-section>)**.

Under the ADA, employers may not discriminate against workers based on stereotypes or assumptions about workers' caregiving responsibilities for an individual with a disability, such as a child, spouse, or parent with a disability. For example, if an applicant is the primary caregiver of an individual with a disability who is at higher risk of complications from COVID-19, an employer may not refuse to hire the applicant out of fear that the care recipient will increase the employer's healthcare costs. If the applicant is hired, the employer may not refuse to allow the care recipient to be added as a dependent on the employer's health insurance because of that individual's disability. An employer also may not refuse to promote employees with caregiving responsibilities for an individual with a disability based on the assumption that they will take a significant amount of leave for caregiving purposes.

**I.3. Are these legal protections available only to workers caring for children, or are they also available to workers with other caregiving obligations? (3/14/22)**

*This response includes hyperlinks to non-governmental sources. The EEOC includes these resources solely for informational purposes. The EEOC does not endorse these resources or the entities responsible for them, and it does not vouch for the accuracy of the information provided by referencing the non-governmental sources in this response.*

Employers may not discriminate against applicants or employees with caregiving responsibilities based on characteristics protected by the laws enforced by the EEOC, including caregivers' sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, association with an individual with a disability, or genetic information (including family medical history). These protections are available to workers with any type of caregiving responsibilities, including care for children, spouses, partners, relatives, individuals with disabilities, or others.

State or local laws may provide additional protections for workers with caregiving responsibilities. Employees with caregiving responsibilities also may have rights under other laws, including the **Family and Medical Leave Act** (<https://www.dol.gov/agencies/whd/fmla>) or similar **state**

<https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>) or local laws.

#### **I.4. Should employers and employees be aware of any other pandemic-related caregiver discrimination issues? (3/14/22)**

Yes. In this What You Should Know document, the EEOC addresses several different types of potential pandemic-related caregiver discrimination. For example:

- **A.10** addresses employer inquiries about family members with COVID-19 or related symptoms.
- **C.5** addresses employer-imposed start date postponements or offer withdrawals for pregnant applicants.
- **D.13** addresses whether employees are entitled to accommodations to avoid exposing family members at high risk of complications from COVID-19.
- **J.1** and **J.2** address excluding employees from the workplace based on pregnancy and accommodating pregnancy.
- **K.2** addresses pregnancy accommodation requests related to vaccination.
- **K.3** addresses employer encouragement of vaccination of family members.
- **K.13** addresses decisions not to be vaccinated due to pregnancy.
- **K.18** addresses GINA and incentives for non-employer-provided family member vaccinations or employer requests for documentation of family member vaccinations.
- **K.20** addresses GINA and incentives for employer-provided family member vaccinations.
- **K.21** addresses GINA and family member vaccinations without incentives.

For general information about caregiver discrimination and federal employment discrimination laws, see the EEOC's **policy guidance**

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>), associated **fact sheet**

<https://www.eeoc.gov/questions-and-answers-about-eeocs-enforcement-guidance-unlawful-disparate-treatment-workers>), and **best practices**

<https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities>)\_document.

## J. Pregnancy

**J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy**

**[https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html#anchor\\_161496684697](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html#anchor_161496684697)**? (6/11/20)

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough. For more information on postponing a start date or withdrawing a job offer due to pregnancy, see **C.5**.

**J.2. Is there a right to accommodation based on pregnancy during the pandemic?** (6/11/20)

There are **two federal employment discrimination laws** (<https://www.eeoc.gov/pregnancy-discrimination>)\_that may trigger **accommodation for employees based on pregnancy**. (<https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law>)\_.

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the 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. For information on pregnancy and COVID-19 vaccination, see **K.13**.

## **K. Vaccinations – Overview, ADA, Title VII, and GINA**

**Note: Court decisions upholding or rejecting federal vaccination requirements do not affect any statements made in this publication regarding employer and employee rights and responsibilities under the equal employment opportunity laws with respect to employers that require COVID-19 vaccinations.**

*The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also **Section J, EEO rights relating to pregnancy** and **Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements.**)*

*This section was originally issued on December 16, 2020, and was updated on October 25, 2021 and July 12, 2022. Note that the Centers for Disease Control and Prevention (CDC) has **issued guidance (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>)** for vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

*The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of COVID-19 vaccines. On August 23, 2021, the FDA approved the Biologics License Application for the Pfizer-BioNTech COVID-19 vaccine for use in individuals 16 years of age and older.*

*Previously, the FDA granted Emergency Use Authorizations (EUAs) for the two other vaccines—one made by Moderna and the other by Janssen/Johnson & Johnson—authorizing them for use in the United States for individuals 18 years of age and older. The Pfizer-BioNTech vaccine is authorized under an EUA for individuals 12 years of age and older and for the administration of a **third dose** (**<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>**) in*

certain immunocompromised individuals. For the current status of vaccines authorized or approved by the FDA, please visit:

**<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>** (**<https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>**)

*Also of note, on July 6, 2021, the U.S. Department of Justice’s Office of Legal Counsel issued a Memorandum Opinion concluding that section 564 of the Federal Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an EUA.*

*Other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the website of the **[Safer Federal Workforce Task Force](https://www.saferfederalworkforce.gov/)** (**<https://www.saferfederalworkforce.gov/>**) for the latest guidance on federal agency operations during the COVID-19 pandemic.*

*This technical assistance on vaccinations was written to help employees and employers better understand how federal laws related to workplace discrimination apply during the COVID-19 pandemic. The EEOC questions and answers provided here set forth applicable EEO legal standards consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.*

## **COVID-19 Vaccinations: EEO Overview**

**K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees to be vaccinated against COVID-19? (Updated 7/12/22)**

The federal EEO laws do not prevent an employer from requiring all employees to be vaccinated against COVID-19, subject to the **[reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.5)** (**<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.5>**). (See also **[Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements](#)**)

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>). If there is such an employer requirement, the EEO laws do not prevent employers from requiring documentation or other confirmation that employees are **up to date** (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>) on their vaccinations (**see K.9.**), but the EEO laws may require employers to make exceptions to a vaccination requirement for some employees.

The ADA and Title VII require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (**see K.6.**) or for religion (**see K.12.**).

As with any employment policy, employers that have a vaccination requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act [40+]). Employers should keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccination, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees 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.

**K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy?**

*(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable



accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

### **K.3. How can employers encourage employees and their family members to be vaccinated against COVID-19 without violating the EEO laws, especially the ADA and GINA?** *(Updated 10/13/21)*

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. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccinations, as discussed in K.16 - K.21. The federal government is providing COVID-19 vaccines at no cost to everyone 5 years of age and older.

There are many resources available to employees seeking more information about how to get vaccinated against COVID-19:

- The federal government's online **[vaccines.gov \(https://www.vaccines.gov/\)](https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **[https://www.vacunass.gov \(https://www.vacunass.gov\)](https://www.vacunass.gov/)** for Spanish). Individuals also can text their ZIP code to "GETVAX" (438829)–or "VACUNA" (822862) for Spanish–to find three vaccination locations near them.
- Employees with disabilities (or employees' family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The HHS/Administration for Community Living has launched the Disability Information and Assistance Line (DIAL) to assist individuals with disabilities in obtaining such help. DIAL can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing **[DIAL@n4a.org](mailto:DIAL@n4a.org)**.

- CDC’s website offers a link to a listing of **local health departments** (<https://www.cdc.gov/publichealthgateway/healthdirectories/index.html>), which can provide more information about local vaccination efforts.
- In addition, CDC provides a complete communication “tool kit” for employers to use with their workforce to educate people about getting a COVID-19 vaccine. Although originally written for essential workers and employers, it is useful for all workers and employers. See **Workplace Vaccination Program | CDC** (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>).
- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no English or have limited English proficiency and find it difficult to make an appointment for a vaccination over the phone. CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.
- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources serving vaccination sites available in their community and offer paid time-off for vaccination, particularly if transportation is not readily available outside regular work hours.
- Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance, or to ensure nondiscrimination for an employee who is pregnant.

## **The ADA and COVID-19 Vaccinations**

### **K.4. Is information about an employee’s COVID-19 vaccination confidential medical information under the ADA? (Updated 7/12/22)**

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.

An employer may share confidential medical information, such as confirmation of employee vaccinations (or COVID-19 test results), with employees who need it to perform their job duties. However, such employees also must keep the information confidential. Some possible scenarios include:

- An administrative employee assigned to perform recordkeeping of employees' documentation of vaccination may receive needed access to the information for this purpose but must keep this information confidential.
- An employee assigned to permit building entry only by employees who are in compliance with a work restriction, such as COVID-19 vaccinations, testing, and/or masking, should only receive a list of the individuals who may (or may not) enter, but not any confidential medical information about why they are on (or not on) the list.
- An employee tasked to ensure compliance with a testing requirement for employees would need to review testing documentation submitted by those employees but must keep that testing information confidential.

### ***Mandatory Employer Vaccination Programs***

#### **K.5. May an employer require an employee to comply with a COVID-19 vaccination requirement applicable to all employees entering the workplace if that employee has sought an exemption based on disability? (Updated 7/12/22)**

Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee. An employer does not have to show that a qualification standard in general (i.e., as applied to all employees) meets the "business necessity" standard. Under the ADA it must satisfy this standard only as applied to an employee who informs the employer that a disability prevents compliance. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others while performing their job. A "direct threat" is a "significant risk of substantial harm" that

cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r)** (<https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml>). This determination can be broken down into two steps: determining if there is a “significant risk of substantial harm” and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

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. The factors that make up this assessment are: (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. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee’s health care provider, with the employee’s consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of 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 other employees and/or non-employees; 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.

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. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

**K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do?** *(Updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that the employee needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation.”

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** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting>) and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify **workplace accommodation options** that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee’s disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website** (<https://www.askjan.org>) as a resource for different types of accommodations. JAN’s materials about COVID-19 are available at <https://askjan.org/topics/COVID-19.cfm> (<https://askjan.org/topics/COVID-19.cfm>).

Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources** (<https://www.osha.gov/SLTC/covid-19/>). Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform the employee's current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations** (<https://www.cdc.gov/coronavirus/2019-ncov/>) when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42>) or **to retaliate against an employee for requesting an accommodation** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19>).

**K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? (Updated 5/28/21)**

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent** (<https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2>) is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. 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, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5.**) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

### *Voluntary Employer Vaccination Programs*

**K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? (Updated 5/28/21)**

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity.

However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 - 17.**) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

**K.9. Does the ADA prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19 vaccination?** *(Updated 10/13/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccination, the employer is not asking the employee a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA's rules about making such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential, as discussed in K.4.

**K.10. May an employer offer voluntary vaccinations only to certain groups of employees?** *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

**K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that the employee faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated?** *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.



For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

## **Title VII and COVID-19 Vaccinations**

**K.12. Under Title VII, how should an employer respond to employees who communicate that they are unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance?** *(Updated 5/28/21)*

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, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests. For more information on requests for religious accommodations related to COVID-19 vaccination requirements, see **Section L, Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements.**

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an 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. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and**