

# ADA & COVID Vaccines in the Workplace

Presented by:  
Rachel M. Weisberg  
Hannah R. Walsh





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- ▶ For job seekers and employees with disabilities
- ▶ Helpline staff can:
  - ▶ **Discuss** employee rights under the ADA
  - ▶ **Answer** employment rights questions
  - ▶ Assist with **reasonable accommodations**
  - ▶ Help callers understand their **options**
  - ▶ Share **fact sheets, sample letters** and **forms**
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# Employment Rights Helpline: Contact Information

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# Today's Discussion: What We Are Not Covering



- ▶ Legal implications of the COVID-19 vaccines per the Emergency Use Authorizations (EUA) or the FDA approach
  - ▶ Questions? See the [FDA's Emergency Use Authorization Page](#)
- ▶ Legal implications beyond Americans with Disabilities Act (ADA)

# Today's Discussion

What we are covering:

- ▶ Mandatory vaccine requirements
- ▶ Disability-related exceptions & reasonable accommodations
- ▶ Employer questions about vaccines
- ▶ Employer incentives for vaccines
- ▶ Resources
- ▶ Your questions
  - ▶ Facebook feed
  - ▶ [employment@equipforequality.org](mailto:employment@equipforequality.org)



# Where Our Information is Coming From



- ▶ **Important:** We do not have all the answers!
  - ▶ This is an evolving area of law
- ▶ Most of today's information comes from an EEOC guidance document
  - ▶ [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
  - ▶ Specific references to question number (Ex: K.17)
- ▶ We will highlight the two recent court cases on this topic (though neither are about disability)

# Employer Mandated Vaccinations



Jessica works in a warehouse. She has been hesitant to return to work because, even though she is vaccinated, she has Type 1 Diabetes, which places her at increased risk of severe complications if she contracts COVID.

Her employer sends out a memo saying: “***All employees must be vaccinated by September 1.***”

# Employer Mandated Vaccinations (slide 2)



Jessica feels more comfortable returning to work. But two of Jessica's colleagues are not vaccinated.

- ▶ **Peter:** Peter is not vaccinated as his family has made the decision not to get vaccinated at this point.
- ▶ **Jacob:** Jacob is not vaccinated as he has a severe allergy to a component of the vaccine.

# Question: Can the warehouse employer require vaccinations? (K.1, K.5)



- ▶ **Generally, yes.** Employers may require all employees physically entering the workplace to be vaccinated for COVID-19.
- ▶ Employers may need to provide **reasonable accommodations** for employees who cannot be vaccinated due to a disability or a sincerely held religious belief.

# Question: Does the warehouse employer need to make an exception for Peter? Jacob?

- ▶ **Peter:** An employer has no legal obligation to make an exception to its mandatory vaccination policy if his request is not due to a disability or religious reason.
- ▶ **Jacob:** An employer *may* need to make an exception as a reasonable accommodation under the ADA.
  - ▶ What should Jacob do?



## Reasonable Accommodations (K.2)

### Consider possible reasonable accommodations:

- ▶ Exception to the vaccination requirement with different safeguards, such as:
  - ▶ Wearing a face mask
  - ▶ Social distance from coworkers or non-employees
  - ▶ Work a modified shift
  - ▶ Get periodic tests for COVID-19
  - ▶ Telework or reassignment

# Interactive Process: Employee Request (K.6)



## Employee generally initiates the request

- ▶ Disclose disability or medical need for the accommodation
- ▶ Say “reasonable accommodation under the ADA”
  - ▶ NOT legally required but helpful
- ▶ Put request in writing
- ▶ Keep copy of request

# Interactive Process: Employer Response (K.6)



## Employer then initiates the interactive process

- ▶ Can request reasonable medical documentation
- ▶ No need to provide an accommodation that would pose an “undue hardship” or “direct threat”
  - ▶ Considerations: Proportion of employees in the workplace who are already vaccinated and the extent of employee contact with non-employees; [CDC recommendations](#)

# Interactive Process: Employer Response Continued



- ▶ Preferred v. effective accommodations
- ▶ Use available resources
  - ▶ [JAN materials re: COVID-19](#)
  - ▶ [OSHA COVID-specific resources](#)
- ▶ The interactive process is ongoing – needs can change
- ▶ [JAN Fact Sheet re: short-term/trial accommodations](#)
- ▶ [EFE Helpline fact sheet about reasonable accommodations](#)

# Question: Can Jacob be excluded from the workplace because he cannot be vaccinated? (K.5)

- ▶ Only if he poses a **direct threat** to the health or safety of himself or others
- ▶ Requires individualized assessment of employee's present ability to safely perform the essential functions of the job
- ▶ **Considerations:** Duration of risk; Nature/severity of potential harm; likelihood that harm will occur; imminence of harm
- ▶ Based on reasonable medical judgment that relies on the most current medical knowledge about COVID-19



## Direct Threat (K.5)

- ▶ Employers can rely on statements from the CDC and statements from the employee's healthcare provider
- ▶ Should consider type of work environment
  - ▶ Ex: Does employee work alone or with others? Does employee work inside or outside? What is the available ventilation? Space available for social distancing?
- ▶ Direct threat requires considering reasonable accommodations



# Question: Jessica learns that other employees are not vaccinated and is worried about catching COVID. What can/should she do? (K.11)

Some individuals (including those who are immunocompromised) might still need reasonable accommodations because their conditions may mean that the vaccine may not offer them the same measure of protections.

- ▶ Request reasonable accommodations and engage in the interactive process
- ▶ Watch [Facebook Live re: ADA, COVID & Return to Work Issues](#)

# Employer Encouragement

Benjamin works at a coffee shop. His employer is encouraging everyone to get vaccinated. Benjamin wonders if this is OK?



# Employer Encouragement re: Vaccines (K.3)



Employers may:

- ▶ Provide employees and their family members with information to educate them about COVID-19 vaccines
- ▶ Raise awareness about the benefits of vaccination
- ▶ Address common questions and concerns
- ▶ Offer incentives in certain situations (stay tuned...)

# Proof of Vaccinations

- ▶ Lily's office told all employees that they must send proof of vaccination to Human Resources. Lily's employer is not providing vaccines itself.
- ▶ Lily wonders if her employer can require this documentation.





# Medical Exams & Inquiries

- ▶ **General rule:** Employers can only ask employees for **disability information** or perform **medical tests** that are **job-related** and **consistent with business necessity**

# Question: Are vaccine-related questions disability-related inquiries? (K.9)

Disability-related inquiries are questions that are likely to disclose the existence of a disability

- ▶ Ex: What medications are you on?

Are you vaccinated?

- ▶ Not a disability-related inquiry

Provide proof of vaccination?

- ▶ Not a disability-related request





## Confidentiality Requirements (K.4)

But the answers and documentation are considered medical documentation and must be kept confidential, stored separately from the employee's personnel file.

# Vaccine Incentives (Off-Site Vaccines)

Sally works for a small family-owned restaurant. Her employer is offering incentives (free meals) to employees who voluntarily provide documentation that they received a vaccine.

- ▶ Sally wonders if this is permissible.





## Vaccine-Related Incentives (K.16)

**Yes.** Employers may offer incentives to employees to voluntarily provide confirmation of a vaccine received in the community.

- ▶ Remember, vaccine-related questions are not considered disability-related inquiries.
- ▶ Also remember, vaccination information is confidential and must be kept confidential under the ADA.

# Vaccine Incentives (On-Site Vaccines)

Sarah works for a large restaurant chain. Her employer is hosting a vaccination clinic and is requiring vaccines for all employees.

- ▶ Sarah questions whether this is a disability-related inquiry or medical exam.



# Employer-Provided Vaccinations (K.7)



**Remember:** Administering the vaccine is NOT a medical inquiry because it does not seek information about an employee's health

**But:** Pre-vaccination screening questions ARE likely to elicit information about a disability

- ▶ Therefore, must either be (1) job-related and consistent with business necessity or (2) voluntary.



# Employer-Provided Vaccinations Continued (K.7)

If on-site vaccines (and required pre-screening questions) are required, they must be job-related and consistent with business necessity.

- ▶ Employers who require employees to be vaccinated by an employer (and therefore, require employees to answer pre-screening questions) would have to show that it had a reasonable belief, based on objective evidence, that the employee would pose a direct threat to the health or safety of others in the workplace.



## TRUE or FALSE

Charlie's employer **requires** him to provide proof of vaccination. Charlie brings in a copy of the vaccine card he got when getting the vaccine at CVS. This is a medical inquiry and his employer must show that it is job-related and consistent with business necessity?



## TRUE or FALSE (slide 2)

Lisa's employer **requires** her to be vaccinated by their own vaccine site. She has to answer various pre-screening questions before getting vaccinated. This is a medical inquiry and Lisa's employer must show that it is job-related and consistent with business necessity?



# Voluntary Employer Vaccination Programs (K.8)

Employers may offer to vaccinate its employees on a voluntary basis.

- ▶ If the vaccination is voluntary, employers do not need to show that the pre-vaccination screening questions are **job-related and consistent with business necessity**.
- ▶ The ADA prohibits employers from disciplining or harassing employees who choose not to participate in a voluntary vaccination program.



# Incentives for Employer-Provided Vaccinations (K.17)

- ▶ Employers may offer incentives to encourage employees to get on-site vaccines
- ▶ But remember, incentives cannot be so substantial as to be considered “coerced” to share disability-related information
- ▶ If so, they are not “voluntary” (and would need to be job-related and consistent with business necessity)



# Limited Court Cases (Employment)

## \* Not about disability

*Bridges v. Houston Methodist Hospital*, 2021 WL 2399994 (S.D. Tex. June 12, 2021)

- ▶ Hospital announced a policy requiring employees to be vaccinated against COVID-19
- ▶ 117 employees sued to block the vaccine requirement
- ▶ Plaintiffs brought various claims (none under the ADA)
- ▶ Court dismissed case – case now on appeal



# Limited Court Cases (Higher Ed)

## \* Not about disability

*Klaassen v. Trustees of Indiana University*, 2021 WL 3073926  
(N.D. Ind. July 18, 2021)

- ▶ University required students to be vaccinated or to apply for a medical or religious exemption (which requires them to wear masks, obtain tests, and social distance)
- ▶ Students challenged (none under the ADA)
- ▶ Court denied motion for preliminary injunction
  - ▶ While not under the ADA, court acknowledges that the University has a medical exemption



# Resources

- ▶ **EEOC:** [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- ▶ **JAN:** [Job Accommodation Network page with resources on COVID-19](#)
- ▶ **ADA National Network:** [Disability & Covid-19/Employment Website](#)
- ▶ **CDC:** [Guidance for Businesses and Employers Responding to Coronavirus Disease](#)
- ▶ **EFE Employment Rights Helpline:** [COVID-19 & Return to Work Issues](#)

# Questions?

**Employment Rights Helpline**

**(844) RIGHTS-9**

**(844) 744-4879**

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