

Vaccine Accommodations, Retaliation, & Interference

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Disclaimer

This guidance is for informational purposes only, does not establish substantive policy or rights, and does not constitute legal advice.

This guidance was shared on 12/15/21. Information on this subject is constantly changing and being updated – please visit our website and the CDC’s website to stay abreast of changing guidance.

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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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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* can be accessed at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>

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COVID-19 Screening for Employees Physically Entering the Workplace

▶ Based on guidance of CDC/public health authorities, someone entering workplace with COVID-19 poses a “direct threat” to the health of others as defined under ADA/Rehab Act, and therefore employers could, if they choose, screen all employees for COVID-19 if physically entering worksite. 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 prohibitions under Genetic Information Nondiscrimination Act).
- Administer viral testing for current COVID-19 infection consistent with current CDC recommendations (but antibody testing not permitted).

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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.

No disparate treatment on protected basis in selecting who is screened.

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Pandemic-Related ADA/Rehab Act Accommodation Requests

- ▶ Requests may be to accommodate a disability that places individual at higher risk of severe illness if COVID-19 contracted (e.g., immunocompromised, diabetes, heart condition, etc.), or a disability exacerbated by pandemic situation (e.g., anxiety disorder), or COVID-19 itself.
- ▶ As of 12/14/21, EEOC updated the WYSK with an additional section: "COVID-19 and the Definition of 'Disability' Under the ADA/Rehab Act" (Section N).
- ▶ Those designated "essential" or "critical" workers still retain ADA/Rehab Act rights, and therefore may be entitled to accommodation for disability.
- ▶ Employee not entitled to ADA/Rehab Act accommodation based on living with or being otherwise associated with an individual with a disability.

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Examples of Pandemic-Related ADA/Rehab Act Accommodation Requests



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Employer Permitted to Use Usual Process to Handle Pandemic-Related ADA/Rehab Act 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 \(JAN\)](#) COVID-19 resources for types of accommodations.

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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/Rehab Act requirements met.
- ▶ Employer can restore essential functions if they were temporarily altered due to mandatory telework.
- ▶ Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace reopens.

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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.

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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/Rehab Act) 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

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EEO Laws & COVID-19 Vaccinations

- 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/Rehab Act, and other EEO considerations.
- These principles apply whether employee gets vaccinated in the community or by the employer.
- EEOC's role in addressing vaccination is limited to application of the federal EEO laws.
- Note: new requirements for mandatory vaccination applicable to certain employers- still subject to EEO requirements such as disability and religious accommodation requests).

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ADA/Rehab Act & Employer Vaccination Policies Requiring Vaccination

- ▶ If employees are required to bring in proof of community vaccination:
 - ▶ It is not an ADA/Rehab Act disability-related inquiry or 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/Rehab Act "direct threat" standard will have to be met.

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ADA/Rehab Act & 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.

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Title VII and Employees Who Cannot Be Vaccinated Due to Religion

- Employees must tell their employer if they are requesting an exception to a COVID-19 vaccination requirement because of a conflict between that requirement and their sincerely held religious beliefs, practices, or observances.
- Use of "magic words" not necessary.
- Best practice: employer should provide employees and applicants with information about whom to contact, and the procedures (if any), to request a religious accommodation.

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Does an employer have to accept an employee's assertion of a religious objection to a COVID-19 vaccination at face value?

Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs.

However, if an employer has an objective basis for questioning either the religious nature or sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information.

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Note on the Definition of Religion

- ▶ Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith. The definition of "religion" under Title VII protects nontraditional religious beliefs that may be unfamiliar to employers.
- ▶ The sincerity of an employee's stated religious beliefs is not usually in dispute.
- ▶ Title VII does not protect social, political, economic views, or personal preferences. Thus, objections to COVID-19 vaccination that is based on social, political, or personal preference, or on nonreligious concern about the possible effects of the vaccine, do not qualify as "religious beliefs" under Title VII.

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Title VII and Employees Who Cannot Be Vaccinated Due to Religion

- Once on notice that a sincerely held religious belief, practice, or observance prevents employee from complying with employer vaccine requirement, Title VII requires an employer to provide reasonable accommodation unless there is an undue hardship (note that this may include requests to wait until alternative version or specific brand of COVID-19 vaccine is available to employee).
- Undue hardship under Title VII is defined by courts as more than minimal cost or burden on employer, an easier standard for employer to meet than ADA/Rehab Act standard for disability accommodation.

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Must an employer provide the preferred accommodation?

- No- if there is more than one reasonable accommodation that would resolve the conflict between the vaccination requirement and the sincerely held religious beliefs without causing an undue hardship, the employer may choose which accommodation to offer.
- If there is more than one effective accommodation, the employer should consider the employee's preference but is not obligated to provide the preferred accommodation.
- If the accommodation is denied, the employer should explain to the employee why the preferred accommodation is not being granted.

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Requests to Be Excused from COVID-19 Vaccination

► Where applicable, determine 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

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Requests to Be Excused From Vaccination Requirement Due to Pregnancy

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If employee seeks exemption from vaccine requirement due to pregnancy, employer must ensure not discriminating compared to other employees similar in their ability or inability to work.

Pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work.

Ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

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Requests for Accommodation by Those Who are Fully Vaccinated

- ▶ When an employee asks for disability accommodation, whether the employee is fully vaccinated or not, employer should engage in the interactive process.
- ▶ May include seeking information from employee's health care provider with employee's consent explaining 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.

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ADA/Rehab Act Confidentiality & Vaccination

ADA/Rehab Act requires employer to maintain confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination.

ADA/Rehab Act confidentiality requirement applies regardless of where the employee gets the vaccination.

Under ADA/Rehab Act, this information, like all employee medical information, must be kept confidential and stored separately from the employee's personnel files.

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Genetic Information Nondiscrimination Act (GINA) and Employer Vaccination Policies

- ▶ Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA.
 - ▶ It does not involve use of genetic information to make employment decisions, or acquisition or disclosure of genetic information as defined by GINA. This includes vaccinations that use messenger RNA (mRNA) technology.
- ▶ If providing vaccination for employees' family members, see WYSK discussion of GINA rules on incentives.

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Retaliation & Interference

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▶ It is illegal to retaliate against an employee who engages in a protected EEO activity – some examples:

- ▶ Complaining that a supervisor disclosed a COVID-19 diagnosis
- ▶ Reporting harassment
- ▶ Requesting an accommodation for either a disability or a religious belief (even if the accommodation is denied)



It is also illegal to interfere with an employee exercising their right to request an accommodation under the ADA.

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Questions?

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