

HR Toolkit

Returning Workforces and COVID-19 Vaccines

Provided by: **Johnson Financial Group**



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Introduction

The COVID-19 pandemic has been raging for months. In that time, many businesses have ceased operations out of safety concerns and have waited for the right opportunity to resume. Now, with COVID-19 vaccines becoming available, employers can finally start planning for their immediate futures.

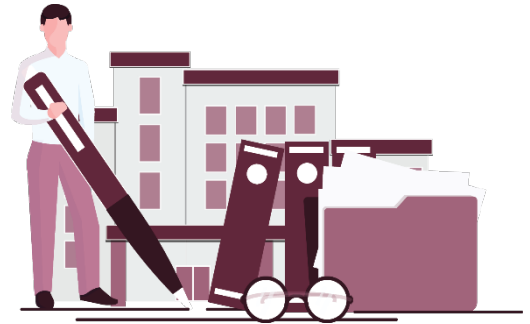
There are still many unknowns related to the COVID-19 vaccines, but there is at least one agreed-upon factor: Vaccinating employees is the best way to reopen a business safely. However, while it may be the best tool in the arsenal, it is not the only one. Employers will still need to continue using safeguards such as masks and social distancing to ensure the safety of their workers and customers.

With that in mind, this toolkit explores the COVID-19 vaccines and other workplace safeguards, and helps employers decide whether a vaccination policy is right for their organizations. Included at the end is a robust appendix with printable resources that employers can use right now, including policies, communications and more.

As always, Johnson Financial Group will be here to answer any questions related to this toolkit and other workplace matters.

Return-to-Work at a Glance

There are many benefits of return-to-work plans for both employers and employees. Employers can enjoy increased employee engagement, proactive cost containment, reduced turnover, increased communication and improved morale with an established return-to-work plan. And it's been proven that employees who go through return-to-work plans are able to get back to work quicker than those who don't, meaning that employers will see increased productivity following an employee's return to work.



Employees also benefit from return-to-work plans, as they feel supported by their employer, which increases their engagement and loyalty to the company. Utilizing a return-to-work plan also helps them get back to work faster and increases the likelihood that they feel secure and stable in their role.

The benefits of return-to-work plans are undeniable. While these plans are typically customized on an individual basis, employers can use the basics of a return-to-work plan to build their company's methodology for getting employees to return to work following the COVID-19 pandemic.

COVID-19 Return-to-Work Plans

COVID-19 has caused many businesses to shut down or transition their employees to work from home, disrupting daily work life for many. As stay-at-home regulations are scaled back and all businesses are allowed to resume as normal, employees will be asked to come back to work. While they may not be coming back from an injury or leave, employers still need to have a plan in place for all employees to safely and successfully return to work. This will be true even after employees are vaccinated against COVID-19, as return-to-work plans will still need to include safeguards such as social distancing and mask-wearing, even if some or all of a workforce is vaccinated.

While employers may need to tailor their COVID-19 return-to-work plans to employees' specific needs (e.g., child care arrangements, caregiving responsibilities and health issues), having a generalized plan in place can help them safely reopen their businesses.

Employers' COVID-19 return-to-work plans should consider the following:

- **Anticipated return-to-work date**—With the uncertainty that COVID-19 has brought, it's important to give clear information and dates when employees are to return to work whenever possible. Employers should ensure they are flexible with dates, since state and federal guidance can quickly change.
- **Disinfecting and cleaning measures**—Because COVID-19 can remain on surfaces long after they've been touched, it's important that a business frequently cleans and disinfects its facility. Some best practices include:
 - Cleaning and disinfecting all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails and doorknobs.

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- Discouraging workers from using other workers' phones, desks, offices, or other tools and equipment, when possible. If necessary, clean and disinfect them before and after use.
 - Providing disposable wipes so that commonly used surfaces can be wiped down by employees before each use.
- **Social distancing protocol**—Social distancing is the practice of deliberately increasing the physical space between people to avoid spreading illness. In terms of COVID-19, social distancing best practices for businesses can include:
 - Avoiding gatherings of 10 or more people
 - Instructing workers to maintain at least 6 feet of distance from other people
 - Hosting meetings virtually when possible
 - Limiting the number of people on the job site to essential personnel only
 - Discouraging people from shaking hands
- **Employee screening procedures**—To keep employees safe, employers should consider conducting screening procedures to identify potentially ill employees before they enter the office. The Equal Employment Opportunity Commission (EEOC) permits employers to measure employees' body temperatures before allowing them to enter the worksite. Any employee screening should be implemented on a nondiscriminatory basis, and all information gleaned should be treated as confidential medical information under the Americans with Disabilities Act (ADA)—specifically, the identity of workers exhibiting a fever or other COVID-19 symptoms should only be shared with members of company management with a true need to know. Employers should also notify employees that they will be screening them, to avoid any surprises.
- **Employee safety training**—An employer's return-to-work plan should include detailed safety training guidance to ensure that all employees understand how they can prevent the spread of COVID-19. A plan should discuss the following safety training topics:
 - Respiratory etiquette and hand hygiene—Businesses should encourage good hygiene to prevent the spread of COVID-19. This can involve:
 - Providing tissues and no-touch disposal receptacles
 - Providing soap and water in the workplace
 - Placing hand sanitizers in multiple locations to encourage hand hygiene
 - Reminding employees to not touch their eyes, nose or mouth
 - Personal protective equipment (PPE)—PPE is equipment worn by individuals to reduce exposure to a hazard, in this case, COVID-19. Businesses should focus on training workers on proper PPE best practices. Employees should understand how to properly put on, take off and care for PPE. Training material should be easy to understand and must be available in the appropriate language and literacy level for all workers.

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- **Staying home when sick**—Employers should encourage employees to err on the side of caution if they're not feeling well and stay home when they're sick or are exhibiting common symptoms of COVID-19 (e.g., fever, cough or shortness of breath).
- **Mental health considerations**—The COVID-19 pandemic has increased stress levels of employees across the country. It's important that employers' return-to-work plans include guidance for managing employee mental health concerns when employees return to work.
- **Process for individualized requests**—An employer's return-to-work plan should include information about how employees can go about making individualized requests for changes to the plan. Some employees may have underlying health conditions that put them at greater risk of severe illness with COVID-19, meaning they may not be able to fully return to work. Others may be facing unique child care arrangements due to schools and day cares being closed. Employers should be flexible and compassionate in their responses to individualized requests.

Any return-to-work plan should be tailored to the business's unique needs and should follow local and state regulations.

Other Return-to-Work Considerations

Returning to work after the COVID-19 pandemic is likely to bring challenges to any organization. Some of the most common challenges that should be prepared for include the following:



Changing worker priorities—If an organization asked its employees to work from home during the COVID-19 pandemic, employees may want to still enjoy work-from-home arrangements even after the office is reopened. Employers should be prepared for an increased demand in work-from-home requests, and may need to expand their pre-COVID-19 policies to meet this demand.



Updating the office layout—Due to social distancing protocols, organizations may need to reconfigure office layouts. Per official guidelines, employee workstations should be **6 feet** apart to help prevent the spread of COVID-19.



Adapting to changing rules and regulations—Due to the nature of the COVID-19 pandemic, rules and regulations are constantly changing. Employers should be prepared to change their business practices if needed to maintain critical operations. This could involve identifying alternative suppliers, prioritizing existing customers or suspending portions of their operations.

Remember, reopening a business after the COVID-19 pandemic isn't as simple as opening the doors. Employers will need to carefully evaluate each step of the reopening and gradually ask employees to return to work.

COVID-19 Vaccine Overview

The COVID-19 pandemic has been wreaking havoc in the United States for over a year at this point. Now, vaccines are finally here. There is a lot of information on the internet regarding the vaccines, some of which is misleading. It's important for employers to learn the facts about the COVID-19 vaccines so they can better protect their employees and customers.

This section provides an overview of the COVID-19 vaccines and answers some common questions relevant to employers. Information comes primarily from the Centers for Disease Control and Prevention (CDC).

Are There Multiple Vaccines?

There are three vaccines that have been given emergency use authorization by the Food and Drug Administration (FDA) at the time of this writing: the Pfizer-BioNTech vaccine, the Moderna vaccine and the Johnson & Johnson vaccine. The vaccines differ in some ways (namely, how they must be shipped and stored), but they are fundamentally the same.

While short of full approval, the emergency use authorization allows the COVID-19 vaccines to be distributed in the United States for individuals age 18 and older for the Moderna and Johnson & Johnson vaccines, and individuals age 16 and older for the Pfizer-BioNTech vaccine.

Are the Vaccines Worth Getting?

The vaccines have gone through rigorous vetting procedures and clinical trials, attesting to their safety and effectiveness. The vaccines not only protect the individual, but also anyone they might come into contact with. This can dramatically help curb the spread of COVID-19.

Are There Side Effects?

Like most other vaccines, these ones may come with mild side effects. These include:

- Pain, redness or swelling near where the shot was administered
- Fatigue
- Joint pain
- Chills
- Headache
- Fever

Employees experiencing these or other symptoms for more than three days should contact their primary care physician.

How Will They Be Administered?

The Pfizer-BioNTech vaccine and Moderna vaccines must be administered in two doses—one initial shot and another three to four weeks later. Getting both shots will provide the most protection, though a

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single dose should still offer some protective benefits, according to experts. The Johnson & Johnson vaccine only needs one shot.

Who Should Receive the Vaccines?

Individuals age 16 and up can receive a vaccine (depending on which one). However, there are some caveats to this, particularly if the individual has certain health conditions. While experts are encouraging as many people as possible to get vaccinated, anyone considering getting the vaccines should first consult their doctor.

Who Should Not Receive the Vaccines?

There has yet to be a vaccine produced for children under the age of 16, although one is expected eventually. Beyond young children, other people that should not receive the vaccines include:

- Anyone with severe allergies to any ingredients contained within the vaccines
- Anyone who experienced an allergic reaction—severe or not—after receiving their first dose of the vaccines
- Anyone with underlying medical conditions that may not respond well to the vaccines

Employees should talk to their doctors to learn whether the vaccines are safe for them to receive.

Do Employees Need the Vaccines if They Recovered From COVID-19 Already?

If someone previously contracted and recovered from COVID-19, they should still receive the vaccines if they can, according to the CDC.

When Will the Vaccines Be Available?

The vaccines are currently available only to select individuals who are at high risk of contracting COVID-19. This list includes frontline medical workers, long-term care facility staff and patients in nursing homes. Ultimately, as more doses are produced and distributed, it will be up to individual state governments to decide the order in which people can receive the vaccines.

Individuals should monitor their state's local news to learn more about when and how the vaccines may be made available to them.

Will Employees Need to Pay for the Vaccines?

In most cases, the COVID-19 vaccines must be made available to employees without cost sharing.

Non-grandfathered group health plans, and health insurance issuers offering group or individual health insurance coverage, must cover coronavirus preventive services, including recommended COVID-19 immunizations, without cost sharing. During the COVID-19 public health emergency, covered services may be provided by in-network or out-of-network providers.

Employers interested in learning more about this rule can click [here](#).

Can the Vaccines Be Mandatory for Employees?

In short, yes—employers may generally make receiving a vaccine a mandatory condition of employment. But that may not always be the best option for every organization. As such, employers should seek legal counsel to discuss which course of action is best for their specific circumstances.

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In the meantime, the Equal Employment Opportunity Commission (EEOC) published an exhaustive list of [frequently asked questions](#) to help employers navigate this sensitive issue.

Can COVID-19 Precautions End if All Employees Are Vaccinated?

The vaccines are only one of several tools in the arsenal used to fight COVID-19. So even after receiving both doses of the vaccines, other workplace safeguards should remain in effect, including:

- Washing hands frequently
- Wearing masks
- Social distancing
- Self-quarantining if sick

There is still much unknown about the vaccines. Maintaining these precautions will help ensure a higher level of safety for employees, their families and the community at large.

Click [here](#) for more answers to COVID-19-related questions from the CDC.

COVID-19 Vaccines and the Workplace

COVID-19 vaccines have been, and will continue to be a major topic of discussion amongst employers looking to bring employees back to the office. Specifically, employers may be considering whether vaccination should be encouraged or mandated among their employees.

Employers must navigate the inherent legal risks and logistics of mandating or encouraging employees to receive the COVID-19 vaccines. To do so, employers should seek legal counsel to discuss which course of action is best for their organization. This section provides a general informational overview of considerations for employers.

Government Guidance Related to COVID-19 Vaccines and Workplaces

Government agencies, notably the Occupational Safety and Health Administration (OSHA) and the EEOC, have released guidance regarding the COVID-19 vaccines and workplace laws. Guidance from these and other authorities are likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

This section includes some of the most recent information available at the time of publication.

OSHA Perspective

Per OSHA, employers can require employees to receive vaccinations for influenza, providing they properly inform employees of “the benefits of vaccinations.” In addition, OSHA [states](#) that employees can refuse a vaccination due to a reasonable belief that they have an underlying medical condition that creates a real danger of serious illness or death, and that they “may be protected under Section 11(c) of the Occupational Health and Safety Act of 1970 pertaining to whistleblower rights.” Of course, employees may also refuse to receive the vaccination due to a disability or due to a sincerely held religious belief as discussed below.

EEOC Perspective

The EEOC, which enforces the ADA and Title VII of the Civil Rights Act of 1964 (Title VII), has also issued guidance regarding vaccines in the employment context. Specifically, the EEOC [addressed](#) whether employers covered by the ADA and Title VII can compel employees to receive the influenza vaccine. The commission has since made [additional updates](#) to their guidance regarding the COVID-19 vaccines, specifically.

The highlights of those updates generally clarify that:

- Employers may require employees to receive COVID-19 vaccinations;
- Employers that require vaccinations may need to provide accommodations or show that an unvaccinated employee would pose a direct threat;
- Vaccination-related questions from employers must be job-related and consistent with business necessity; and

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- Any medical information obtained in the course of a vaccination program must be kept confidential.

Additionally, the EEOC explained that an employee may be entitled to an exemption from a mandatory vaccine based on a disability that prevents the employee from taking the vaccine. This would be considered a reasonable accommodation, and the employer would be required to grant the accommodation, unless it creates an undue hardship for the employer. The ADA defines an undue hardship as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

The EEOC also states that, under Title VII, employees with sincerely held religious beliefs may be entitled to an exemption from a mandatory vaccination, which is considered a reasonable accommodation, unless it creates an undue hardship for the employer. Note that undue hardship under Title VII is defined as a "request that results in more than a *de minimis* cost to the operation of the employer's business." This is a much lower standard than under the ADA.



Because of these exemptions and the discrimination risk posed by mandating employees to receive any vaccine—including the COVID-19 vaccines—**it is strongly advised that employers simply encourage vaccination rather than mandating it.**

These and other workplace considerations are discussed in a [following section](#).

Deciding Between a Mandatory or Voluntary Vaccination Policy

A mandatory vaccination policy (or even a voluntary policy, for that matter) may not be best for every organization. Employers will need to consider a number of factors before deciding which direction to head. This section includes considerations for employers who are weighing their policy options.

General Employer Considerations

There are a host of considerations employers need to review before coming to a decision on whether to encourage or require employees to receive a COVID-19 vaccination.

Employers should consider the following when reviewing their options:

- **Evaluating undue safety burdens**—Employers will face the challenge of determining whether an employee poses an undue safety burden on co-workers by choosing not to get vaccinated (if the employer is simply encouraging receiving the vaccines) or being exempt from a mandated vaccination. When evaluating this consideration, employers will need to decide whether there are other precautions that can be put into place to protect employees, which may include:



Social distancing protocols



Requiring employees to wear masks at work



Leveraging telecommuting arrangements

- **Assessing and granting exemptions**—If employers decide to require employees to get a COVID-19 vaccine, they will need to be prepared to determine whether an individual worker qualifies for a reasonable accommodation in the form of an exemption from receiving the vaccine under the ADA or Title VII. This assessment would need to be done on a case-by-case basis and could potentially leave an employer open to legal action should there be missteps at any point in the process. In addition, the employer will also have to navigate protecting the rest of the workforce should an employee be exempt from being vaccinated.
- **Evaluating legal risks of requiring vaccines**—Employers need to consider the possibility that they may be sued if they require employees to be vaccinated and an employee experiences an adverse reaction to the vaccines or develops subsequent health problems. There will likely be many pending cases on this subject in the future, but currently, there is no definitive answer as to how these situations will be handled in court.
- **Sorting out the logistics of requiring or recommending vaccination**—Regardless of whether employers require or mandate COVID-19 vaccination, there are logistical elements to consider, including:
 - Will employers hold on-site vaccination clinics?
 - What vaccine, as more than one is available on the market, will be used?
 - Who will pay for the vaccine?
 - Will the company require or cover the costs of vaccination for the employee's family?

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- How long after the vaccine becomes available must workers receive the vaccine, if vaccination is mandated?

In addition to the considerations explained above, employers should consult legal counsel to determine whether there are unique risks to consider for their specific organization.

The Case for Mandatory Workplace Vaccination

Below are some of the arguments in favor of requiring that employees be vaccinated against COVID-19:

- **Offers greater level of protection to employees, customers and all other workplace stakeholders**—Vaccines are the most significant way to help prevent the spread of COVID-19 by far.
- **Ensures that employees will actually be vaccinated**—Instead of hoping that employees protect themselves (and the organization at large) against COVID-19, a mandatory vaccination program would force them to do so. Given the current state of affairs, there is much misinformation regarding vaccinations on the whole. A mandatory program could educate employees on its importance and increase opt-in rates.
- **Saves the organization's bottom line**—Even if an employee quickly recovers from COVID-19, that won't prevent other organizational costs, such as absenteeism, lost productivity and potentially higher health plan expenses. Moreover, experts still don't understand the long-term effects COVID-19 can have on an individual. As such, it's possible someone who recovered from the disease may still experience long-term health complications and, subsequently, greater medical costs.
- **Keeps the organization running**—Depending on the organization, a single COVID-19 infection in the workplace may be enough to cease all operations. If all workers were vaccinated, this would be much less of a concern.
- **May provide some protection against civil liability.** Employers are generally responsible for their employees' well-being in the workplace. That means, if an employee contracts COVID-19 (or is exposed to it) during the course of their job duties, they may have grounds to sue their employer. Having a mandatory vaccination policy in place may help mitigate this potential.

Of course, there is still potential for legal liability down the line due to adverse vaccine reactions or, for example, missteps in the accommodation process.

The Case for Voluntary Workplace Vaccination

Below are some of the arguments in favor of a voluntary vaccination program.

- **Maintains good employee relations**—Employees may hold strong convictions about vaccines, preferring to quit over getting vaccinated. A voluntary vaccination policy could circumvent these negative reactions by allowing employees to act in accordance with their beliefs.

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- **Simplifies the policy administration**—There are several [workplace laws](#) relevant to vaccination policies. In particular, the EEOC has made it clear that reasonable accommodations must be provided to employees in certain circumstances, which come with specific steps that must be taken on a case-by-case basis. This can create more administrative trouble than an employer deems worthwhile. A voluntary program would avoid these legal pitfalls.
- **Provides some protection against discrimination claims**—Similar to the previous point, employees may seek an accommodation from a mandatory COVID-19 vaccination policy. If they are denied, they may seek legal recourse, regardless of whether the employer is at fault. A voluntary vaccination program would not cause these concerns.
- **Makes sense for some industries**—Certain employers may not need all their workers vaccinated for a number of reasons. For instance, if employees can work remotely, if the staff size is small or if employees can adequately avoid close contact, it may not make sense to mandate vaccinations.

Developing a Workplace Vaccination Plan

Employers will need to carefully weigh whether a mandatory vaccine program is right for their organizations. While that decision will depend on a variety of factors, this section outlines generally how to begin that evaluation process, breaking it into six steps.

Step 1: Gauge the Situation

Employers should always consider their employees prior to making any large workplace policy decisions. In the case of a vaccine policy, employers should reach out to employees and gauge how they feel about their safety. How many feel unsafe at work? Would a mandatory vaccine policy make them feel safer than a voluntary policy? What would it take to get them to receive the vaccination? These are important questions for employers to know the answers to.

Similarly, employers should look to others in their industries to determine how vaccinations are being handled. If similar organizations aren't adopting vaccine policies, it's critical to understand why. While each workforce is unique, following industry trends can help employers with decision-making.

Lastly, employers must consider the potential for legal liability stemming from their decision. Both mandatory and voluntary vaccination policies come with inherent legal risks, [discussed earlier](#). Employers are encouraged to seek legal counsel while evaluating the best course of action for their organizations.

Step 2: Make the Choice

After considering industry trends and surveying employees, employers will need to decide whether to adopt a mandatory vaccine policy, a voluntary policy or no policy at all. Each decision will come with consequences, so it's important for employers to think carefully before this step and confer with all stakeholders, particularly legal counsel.

Step 3: Consider Incentives

Once a policy is decided upon, employers should consider ways to incentivize employees. Regardless of whether vaccination is mandatory or merely encouraged, incentives could go a long way to getting employees on board. Some organizations are using perks such as extra paid time off to increase vaccinations. That being said, employers must be cautious when choosing to offer incentives. Offering certain incentives could potentially put employers at risk of violating the ADA, which prohibits employers from "coercing" employees to participate in wellness activities.

Step 4: Ensure Resources Are in Place

Employees will undoubtedly have questions, especially if a vaccination policy is mandatory. HR should be prepared to answer these questions and provide applicable resources. Particularly, HR should know how to handle accommodation-related inquiries if employees seek exemption from the policy.

Step 5: Communicate Everything to Employees

A workplace policy of any sort can only succeed with thorough communication. Employers must make employees aware of the policy and its requirements well ahead of implementation. Employers should consider a variety of communication methods to accomplish this goal. Examples include sending mail-home flyers, posting videos on an intranet site or hosting kickoff meetings.

Step 6: Implement the Plan

Finally, employers will need to implement the plan. Details like the rollout timeline and how to handle employee accommodation requests should be decided upon prior to this step.

COVID-19 Vaccines and Workplace Laws

The availability of COVID-19 vaccinations may raise questions about the applicability of various equal employment opportunity (EEO) laws, including the ADA and the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA) and Title VII (which includes the Pregnancy Discrimination Act). The EEO laws do not interfere with or prevent employers from following CDC or other federal, state and local public health authorities' guidelines and suggestions.

This section provides guidance related to these key laws.

Medical Examinations and Vaccine Administration

The administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) is not considered a "medical examination" for purposes of the ADA.

The vaccination itself is not a medical examination. As the EEOC explained in [guidance on disability-related inquiries and medical examinations](#), a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health."

Examples include "vision tests; blood, urine and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans and MRIs." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

Although the administration of a vaccination is not a medical examination, prescreening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such prescreening questions it asks employees are "job-related and consistent with business necessity."

Prescreening Vaccination Questions

If an employer requires an employee to receive the vaccination from the employer (or a third party) and asks screening questions (to ensure that there is no medical reason that would prevent the person from receiving the vaccination), these questions are subject to the ADA standards for disability-related inquiries.

This is because pre-vaccination medical screening questions are likely to elicit information about a disability. Therefore, such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. If the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." 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

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questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of themselves or others.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement:

1. If an employer has offered a vaccination to employees on a voluntary basis (that is, employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer prescreening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate or threaten the employee for refusing to answer any questions.
2. If an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program [confidential](#).

Additionally, pre-vaccination medical screening questions may elicit information about genetic information, such as questions regarding the immune systems of family members. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations.

GINA defines “genetic information” to mean:

1. Information about an individual’s genetic tests;
2. Information about the genetic tests of a family member;
3. Information about the manifestation of disease or disorder in a family member (family medical history);
4. Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and
5. Genetic information about a fetus carried by an individual or family member, or of an embryo legally held by an individual or family member using assisted reproductive technology.

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If the pre-vaccination questions do not include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions do include questions about genetic information, then employers that want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

GINA does not prohibit an individual employee's own health care provider from asking questions about genetic information, but it does prohibit an employer or a doctor working for the employer from asking questions about genetic information. If an employer requires an employee to provide proof that they have received a COVID-19 vaccination from their own health care provider, the employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.

COVID-19 Vaccination Verification and Disability-related Inquiries

Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry.

There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employees not to provide any medical information as part of the proof in order to avoid implicating the ADA.

Emergency Use Authorization (EUA) and the COVID-19 Vaccine

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The [FDA has an obligation](#) to ensure that recipients of the vaccines under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccines, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccines, and of any available alternatives to the product.

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the [FDA's EUA page](#).

Employees with Disabilities Preventing Vaccination

If an employer requires vaccinations (when they are available), they must respond carefully to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability.

The ADA allows an employer to have a [qualification standard](#) that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However,

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if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show 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.”

Employers should conduct an individualized assessment of the following four factors in determining whether a direct threat exists:

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.

A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus that causes COVID-19 at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine whether any other rights apply under the EEO laws or other federal, state and local authorities.

For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms.

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 and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense).

This process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability and considering the possible options for accommodation given the nature of the workforce and the employee’s position. The prevalence in the workplace of employees who

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already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) [website](#) as a resource for different types of accommodations. JAN's materials specific to COVID-19 are available [here](#).

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in [Question K.7](#), there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable OSHA standards and guidance. Employers can find OSHA COVID-specific resources [here](#).

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for [requesting an accommodation](#).

Sincere Religious Beliefs Preventing Vaccination

If an employer requires vaccinations (when they are available), they must respond carefully to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief.

Once an employer is on notice that an employee's sincerely held religious belief, practice or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.

Courts have defined "undue hardship" under [Title VII](#) as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has 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.

No Reasonable Accommodation Available

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine whether any other rights apply under the EEO laws or other federal, state and local authorities.

Genetic Information, Employment Decision-making and Vaccinations

Title II of GINA is not implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination.

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 because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute. This includes vaccinations that use messenger RNA (mRNA) technology. However, if administration of the vaccine requires prescreening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, may violate GINA.

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Under Title II of GINA, employers may not:

1. Use genetic information to make decisions related to the terms, conditions and privileges of employment;
2. Acquire genetic information except in six narrow circumstances; or
3. Disclose genetic information except in six narrow circumstances.

CDC has explained that the mRNA COVID-19 vaccines “do not interact with our DNA in any way” and “mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept.” (See [this link](#) for a detailed discussion about how mRNA vaccines work). Thus, requiring employees to get the vaccine, whether it uses mRNA technology or not, does not violate GINA’s prohibitions on using, acquiring or disclosing genetic information.

Sample Policies

If you would like to obtain a sample policy for your reference, please contact your Johnson Insurance advisor.