

# REQUIRING THE COVID-19 VACCINATION AT WORK

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# Can Employers Require The Vaccine As A Condition Of Employment?

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- **Emergency Use Authorization – vs. FDA vaccine licensure approval.**
- **Probably Yes, with some caveats.**

# Can Employers Require The Vaccine As A Condition Of Employment?

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- **Negotiability**

- **Likely Not – leave time, co-pays, religious exemptions, medical reasons**
- **US Supreme Court – government can mandate vaccinations**
- **NJ Supreme Court – has approved vaccinations**
- **NJ has not passed a statute or regulations mandating vaccinations**
- **Negotiability – (1) intimately and directly affect the work & welfare of public employees (2) not be preempted by statute or regulations; (3) not significantly interfere with governmental policy**

# Can Employers Require The Vaccine As A Condition Of Employment?

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- **Emergency Use Authorization**
- **FDA must inform vaccine recipients of emergency use, known/unknown and potential benefits and risks, right to refuse the vaccine, and of any available alternatives to the product.**
- **This information is in a patient fact sheet provided at the time of vaccine administration - consideration for Employers who give the vaccine on-site.**
- **See FDA website.**

## Exemptions to Mandatory Vaccinations

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- Medical consequence to taking the vaccine (ADA/LAD)
- Sincerely held religious beliefs / objections (Title VII/LAD)

## Employer Mandated Vaccines

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- The Employer requires the vaccine. An Employee requests a medical exemption.
- The requirement screens out Employees with disabilities.
- 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.”

## Employer Mandated Vaccines

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- The Employer must conduct an individualized assessment of four factors to determine if a direct threat exists:
  - 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.
- Direct threat means the Employer determined that an unvaccinated Employee will expose coworkers to the virus.

## Employer Mandated Vaccines

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- The Employer cannot exclude the Employee unless no reasonable accommodation is available (absent undue hardship) to eliminate/reduce the direct threat.
- No automatic termination.
- Other accommodations? Remote work? Leave?
- Other laws? FMLA?



## Employer Mandated Vaccines

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- When considering accommodations/undue hardship, consider:
  - Prevalence in the workforce of Employees who are vaccinated
  - CDC recommendations
  - OSHA guidelines.

# Exemptions to Mandatory Vaccinations

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- Sincerely held religious beliefs – reasonable accommodation unless the accommodation would pose an undue hardship
- Undue hardship is more than a de minimis cost or burden.
- EEOC encourages Employers to “assume that an Employee’s request for religious accommodation is based on a sincerely held religious belief.”
- If the Employer has an objective basis to question the belief, can request additional supporting information.

## Exemptions to Mandatory Vaccinations

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- Accommodations
  - Remote work
  - Social Distancing
  - Masking
  - Shift Changes
  - Location Change
  - Unpaid Leave

# Medical Inquiries – Prescreening Questions

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For Employers that mandate the vaccine at work or contract with a third party vendor:

- ADA limits medical inquiries about an Employee's physical or mental impairments or health.
- The vaccine is not a medical examination.
- Prescreening vaccine questions may be disability related inquiries (questions that are likely to elicit health information).
- If the Employer administers the vaccine, it must show that the prescreening inquiry is "job-related and consistent with business necessity."

# Medical Inquiries

- To show that prescreening medical questions are job related and consistent with business necessity, then:
  - The Employer must show that it had a reasonable belief, based on objective evidence, that an employee who does not answer the questions (and, therefore, does not receive a vaccination), will pose a direct threat to the health or safety of the Employee or himself or others.

## Medical Inquiries – Prescreening Questions

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- Exceptions to showing that screening questions are job related and consistent with business necessity:
  - If the Employer offers the vaccine on a voluntary basis (employees choose whether to be vaccinated), then Employee voluntarily answers pre-screening questions. If the Employee refuses to answer, the Employer may decide not to vaccinate the Employee. No retaliation for failing to answer the prescreening questions.
  - If the employee receives an Employer required vaccination from a third party that does not have a contract with the Employer (pharmacy or other health care provider).

## Prescreening Questions - GINA

- Genetic Information Non-Discrimination prohibits Employers from making employment decisions based on the Employee's Genetic Information or obtaining genetic information.
- Vaccine prescreening questions make ask about family history and implicate GINA.
- 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.

## Prescreening Questions - GINA

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- If the prescreening questions request genetic information, then Employers may want to opt for proof of vaccination vs administering the vaccine themselves.
- Inform employees when providing proof of the vaccination not to provide any genetic information.



## Quarantine of Vaccinated Employees

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- Vaccinated individuals with exposure do not have to quarantine if:
  - Fully vaccinated – 2 weeks following second dose in 2 dose series; 2 weeks following vaccination in 1 dose vaccine
  - 3 months within last dose of series
  - Asymptomatic since current COVID-19 exposure – still must watch for symptoms and if become symptomatic, then quarantine

## Quarantine of Vaccinated Employees

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- Recent CDC Guidance

- Visit other fully vaccinated individuals without masks or social distancing
- Visit people from single household without who are at low risk for severe COVID-19 outcomes without masks
- Refrain from quarantine and testing following known exposures if asymptomatic, HOWEVER, CDC still recommends following employer guidelines

# Vaccination Documentation

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- Employers can request proof that an Employee has been vaccinated.
  - This is not a disability related inquiry; unlikely to elicit medical information.
  - Tell Employee not to supply medical information.
- Asking why an Employee did not take the vaccination may trigger an impermissible medical inquiry. This inquiry must be “job-related and consistent with business necessity.”

# Employees Who Object to Mandatory Vaccinations and Employee Education

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- Dealing with Employees who:
  - Distrust the vaccine
  - Believe they will become ill from the vaccine
  - Claim the vaccine advances a political agenda
  - Claim that the Employer is exerting control over their rights to freedom over their persons/medical decisions

# Employees Who Object to Mandatory Vaccinations and Employee Education

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- Vaccine policy?
- Incentives?
- Training / Education?
- Essential job requirement / discipline / termination?

# Incentives

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- EEOC Wellness Rules
- Beware if Employer sponsored
  - Given by the Employer or a Third Party Contracted by the Employer
  - De minimis value
  - Gift Cards ok