



EMPLOYEE LIABILITY MANAGEMENT, INC.

## **Can I make my employees take the COVID-19 Vaccine?**

**On the surface, the simple answer is yes.** On December 16 2020, the EEOC confirmed that a COVID-19 vaccination requirement by itself would not violate the American with Disabilities Act (ADA). That law prohibits employers from conducting some types of medical examinations.

Furthermore, 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 and safety of individuals in the workplace.”

**The real problems arise when the employer tries to implement their mandatory vaccine plan.**

### **What if an employee says they can't get the vaccine due to a disability?**

If a vaccination requirement screens out a worker with a disability the employer must show this 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.”

## **What is a “direct threat?”**

The employer should evaluate 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
- The imminence of the potential harm

## **Ok, so I think this employee is a “direct threat”, can I just terminate them? No.**

“The employer cannot exclude the employee from the workplace – or take any other action – unless there is no way to provide reasonable accommodations.” These types of accommodations may include working from home, social distancing at work, wearing a mask, providing FMLA leave, ADA leave, etc.

## **The employee is a direct threat and I cannot provide reasonable accommodations, what now?**

You still cannot terminate the employee. “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 if other protected rights apply before any final decisions are made.

## **If an employee says they can’t take the vaccine due to a disability, can I make them prove it?**

While the ADA does not consider the vaccine itself a medical examination and therefore not subject to ADA guidelines. Pre-screening or inquiries likely to elicit information about a disability could very possibly be an ADA violation. You want to be extremely careful in this area. If you decide to make the vaccine mandatory, it is highly recommended that you use a 3<sup>rd</sup> party (pharmacy, health care provider, etc..) to ask any pertinent medical questions and administer the vaccine.

### **Any other reasons that an employee could not get vaccinated other than a disability?**

“If an employee cannot get vaccinated due to a 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.” Again, this does not mean termination since other rights might apply. With regard to religious beliefs, it is in the best interest of the employer to accept that the employee’s request for religious accommodations is based on sincerely held religious beliefs even if it isn’t familiar to the employer.

### **Can I request proof of vaccination without violating ADA?**

Simply requesting proof is not a violation. However, subsequent questions may elicit information about a disability that would be subject to the pertinent ADA standard that they be “job related and consistent with business necessity.” We recommend that if you do require proof, that you warn the employee not to provide any medical information.

### **Any other pitfalls or suggestions?**

If you decide to make the shot mandatory, you need to adopt a written policy. The employer needs to determine why any employees refused to be vaccinated while avoiding an ADA violation and respecting their religious choice.

One other consideration is what happens if several employees refuse to get the vaccine for reasons other than what is legally protected under “reasonable accommodation.” Will you terminate all the employees that refuse to get the shot? Some of the employees? Are you at risk of discriminating if you don’t terminate them all? You could easily find yourself in a tough spot that might require some very difficult decisions.

## **Other than making the shot mandatory, what else can I do?**

Employers might want to consider encouragement or incentives for employees to get vaccinated. It could simply be a case of fear or confusion that might just need clarification and/or education. Depending upon financial factors, the employer could choose to provide bonuses or other incentives to employees that voluntarily get vaccinated. Some companies are even considering giving their employees paid time off to get the vaccine and recover from any negative effects from it.

**There is no simple answer and unfortunately business owners have once again been put in a very uncomfortable and potentially liable position. We are hopeful that more clarity will be forthcoming and will strive to get relevant information out to you as quickly as possible. Please feel free to contact our HR department if you would like to discuss this in greater detail but please understand that this issue is both unprecedented and fluid. [HR@elminfo.com](mailto:HR@elminfo.com)**