

Can I Ask My Employees If They Have Been Vaccinated?

Labor & Employment Law Update

By Heather Bailey on April 6, 2021



The short answer is: Be careful what you wish for! During this COVID-19 pandemic, vaccinations have been at the front of everyone's mind. Now, with the mass rollout of vaccinations across the country, employers' main questions have been: i) Can we mandate vaccinations for our workforce or,

alternatively, ii) can we ask employees whether they have been vaccinated or not (and to show proof of vaccination)? Our Labor & Employment blog has been at the forefront for the first question and provides more information on COVID-19 vaccination developments and what legal risks come into play for employers when mandating the vaccine in the workplace.

Whether you've chosen to mandate COVID-19 vaccinations or not, you still may be interested in asking your employees to show proof of their vaccination status. This simple question comes with its own set of risks. The U.S. Equal Employment Opportunity Commission (EEOC) has given additional guidance in this area in Section K.3 of "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws."

The good news is that generally asking your employees for proof of their vaccination status is not considered a medical exam for reasons that include the fact that there are many reasons that are not disability-related that may explain why an employee may or may not have gotten a vaccination. For example, they may not have one yet because they have been unable to secure an appointment, or they simply do not believe in the vaccination because they think COVID is a hoax. This is different from someone not getting vaccinated due to a disability or religious belief. Moreover, this general practice is not a HIPAA violation and HIPAA does not apply in this context. The rub and risk come if you ask follow-up questions that may elicit whether the employee may have a disability. Simply following-up with "why do you not have the vaccination yet?" could be treading into that risky territory that touches on whether an employee's disability is the

reason why the employee has not been vaccinated.

If you find yourself in that territory, you will have to evaluate the employee's response within the framework of the Americans with Disabilities Act (ADA) (or Title VII, if the employee's response implicates religious beliefs) requirement to justify proof of vaccination being "job-related and consistent with business necessity." This is the same analysis an employer must undertake when mandating vaccinations, and it can be a tedious and high standard to meet. View the Labor and Employment Blog for more information on the ADA and employers' efforts to require mandatory vaccinations and health screenings for employees.

The same is true of follow-up questions that may elicit genetic information (*e.g., I cannot get the vaccination due to my family's history of being immuno-compromised*). (See Sections K.8 and K.9 of the EEOC guidance described above). Once again, simply asking for vaccination proof does not run afoul of the Genetic Information Nondiscrimination Act (GINA) so long as you stop there in your inquiries.

Practice Tips:

- Again, be careful what you wish for. It's one thing to ask the employee whether they were vaccinated and to show proof, and it's another to ask why they were not vaccinated. Once you start eliciting disability, religious or genetic information with follow-up questions, you are placing your company at risk of knowing more information than you may have bargained for.
- You need to ask yourself, first, why do I want to know information regarding why my employees have been vaccinated or not? What are you going to do with this information? Having a need and plan for this information will help ensure you have a business justification for why this information is necessary. If you don't have a plan or a need, you may determine that knowing this information is not really necessary after all.
- When asking employees to show proof of vaccination, it is good to remind them that you do not want them to include any other medical information that may be listed on their vaccination-related documents.
- If you determine this is the route you want to take, always work with competent labor & employment counsel to help guide you through the process so you do not step on any landmines (even if it's just a simple follow-up question).

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