

Labor and Employment Issues Related to COVID-19 Vaccines

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, NECA General Counsel

As the availability of the COVID-19 vaccines broadens, so will the workplace and safety issues related to the actual administration and usage of these measures by individual employees. NECA members are well-advised to develop internal protocols on how the use (and non-use) of the vaccines will be handled in the workplace.

The Equal Employment Opportunity (EEOC) has put out guidance concerning civil rights laws such as Title VII and the Americans with Disabilities Act (ADA) during the pandemic. Most recently, the EEOC updated this guidance—[found here](#)—to address discrimination laws as they relate to COVID-19 vaccinations. There are important provisions and concepts in this guidance, which are summarized below.

Summary of EEOC Vaccination Guidance

- Employers can require that employees receive an FDA approved COVID-19 vaccine as a condition of returning to, or remaining in, the workplace.
- Employers must attempt to accommodate employees who, due to medical disabilities or sincere religious beliefs, decline or refuse to receive the vaccine. Such accommodations may include isolation or daily testing.
- If an employer determines, based on objective evidence, that the presence of an unvaccinated employee presents a direct threat to the health and safety of persons in the workplace that cannot be reduced or eliminated through a reasonable accommodation, the employer can exclude the employee from the workplace. Employers must assess four factors in making this determination:
 - 1) the duration of the risk presented by the unvaccinated employee;
 - 2) the nature and severity of the potential harm presented by the unvaccinated employee's presence in the workplace;
 - 3) the likelihood that harm will occur; and
 - 4) how imminent that harm is to others in the workplace. Only after conducting this analysis and concluding that the disabled employee cannot be reasonably accommodated can the employer exclude the employee from the workplace.
- When the employer excludes an unvaccinated employee from the workplace due to the perceived direct threat presented by his or her presence in the workplace, the employer may not automatically terminate the employee, but instead must assess whether other accommodations, such as remote work, can be provided.
- Administration of a COVID-19 vaccine *by an employer*, or by an outside health care clinic or similar provider *hired by the employer*, is *not* a medical examination for purposes of the ADA as the employer is not seeking information about the employee's current health status. However, the guidance notes that pre-administration questions may constitute a medical examination because they could inquire into a person's disability status. Accordingly, an employer must be able to demonstrate that such questions are job-related and consistent with business necessity. Again, this is only if the employer is administering or directing the administration of the vaccine.

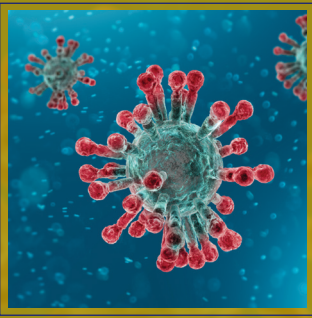


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- Asking or even requiring employees to show proof they received a COVID-19 vaccine is not a prohibited inquiry under the ADA because it is not likely to elicit information about an employee's disability status.

The new guidance essentially synthesizes two concepts from existing law:

- 1) disability and religious based vaccination objections will receive some level of protection and
- 2) COVID-19 can be a direct threat to the workplace from a safety perspective.

Bargaining Issues Related to COVID-19

There is no doubt that the development of policies and procedures related to COVID-19 impacts traditional mandatory subjects of bargaining. Whether an employer has a duty to bargain over COVID-19 vaccination protocols and procedures given the designation of COVID-19 as a direct threat to the workplace is an unsettled area of the law. Importantly, there has been no agreement on these matters at the national level between NECA and the IBEW; therefore, members should work with their local chapters on setting work rules related to COVID-19 and the forthcoming vaccines. NECA has published a resource on bargaining issues and COVID-19, which may be [found here](#).

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will update its resources as necessary. Please seek competent legal advice for assistance with any specific factual scenarios.

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