



## **Is Your Workplace Ready for the COVID-19 Vaccine?**

**April 13, 2021**



## About the Center

**The Center's mission is to create a healthy future for West Virginia by improving the health of our residents and the strength of West Virginia's health care delivery system, especially in rural and underserved communities.**

**Institute for Health Care Governance is driven by a strong commitment to impact organizational performance. We focus our work in the Boardroom, along with the CEO and senior leaders, to strengthen governance functions and implement governance best practices – so everyone benefits - - - board members, staff leadership and most of all your patients.**





## WEBINAR INFORMATION

This webinar is being recorded and the recording will be available on the Center's website by April 14, 2021.

To view the archived webinar, visit [www.wvruralhealth.org](http://www.wvruralhealth.org).

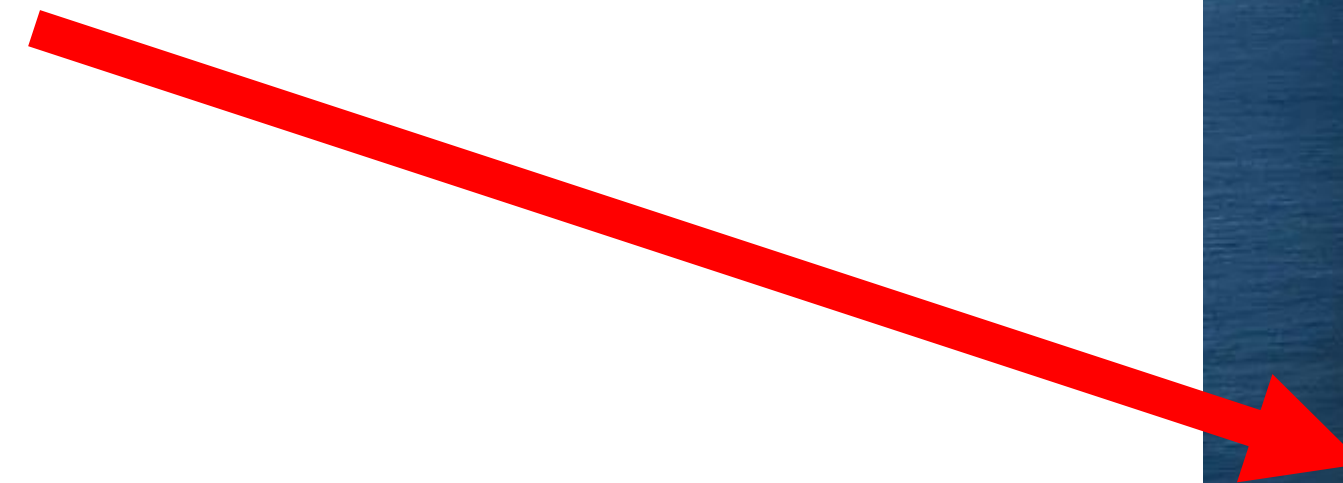
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**The CHAT function is not viewable during the webinar**

## QUESTIONS?

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# COVID-19

- The World Health Organization declared COVID-19 to be an international pandemic on or about March 11, 2020.
- U.S. Department of Health and Human Services made a declaration that a nationwide public health emergency exists and has existed since January 27, 2020 due to COVID-19.
- Based on guidance of the CDC and public health authorities as of March 2020, the EEOC determined that COVID-19 pandemic currently meets the **direct threat** definition under the Americans with Disabilities Act (ADA). To date, the EEOC has not changed that determination.
- In comparison, the EEOC has not determined that seasonal influenza or even the H1N1 influenza poses a direct threat to the health of others in the workplace.



## Americans with Disabilities Act/Direct Threat

- The ADA allows an employer to have a safety-based qualification standard that include “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- If a safety-based qualification standard screens out or tends to screen out individuals with disabilities, the employer must show that the individual 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.”
- The direct threat analysis is typically an individualized assessment: (1) duration of risk; (2) the nature and severity of potential harm; (3) the likelihood the potential harm will occur; and (4) the imminence of potential harm.
- Because the EEOC determined COVID-19 poses a direct threat to the health of others in workplace, the ADA does not interfere with or prevent employers from following the guidelines and suggestions made by the CDC and state or local public health authorities about steps employers should take to prevent the spread of COVID-19.



# Direct Threat Determination Provides A Hefty COVID-19 Toolbox

Because COVID-19 is a currently direct threat in the workplace, an employer's COVID-19 toolbox may include:

- Daily Wellness Screenings:

Ask employees in the workplace whether they are experiencing symptoms of COVID-19, have been tested for COVID-19, or have been diagnosed with COVID-19.

Ask employees in the workplace whether they have been in contact with any individual who has been diagnosed with COVID-19, has been tested for COVID-19, or is experiencing symptoms of COVID-19.

Ask employees to self-monitor their physical condition and report to you immediately if they begin to exhibit COVID-19 symptoms.

- Ask employees to not report to or leave the workplace for COVID-19-related reasons.

## What Can Be Included In An Employer's COVID-19 Toolkit?

- Ask for a return to work/fitness for duty note from a physician for an employee who been excluded from the workplace for COVID-19 reasons.
- Require employees to disclose travel and vacation plans outside of your business footprint

Discourage/prohibit travel to Covid-19 hot spots

Discourage/prohibit employees from participating in large gatherings

Require unpaid quarantine after returning from travel

- Mandatory mask requirements in the workplace.
- Conduct temperature screenings of employees in the workplace.
- Requiring COVID-19 viral tests for employees entering or returning to workplace.

**Can an employer add a mandatory COVID-19 vaccine policy to its COVID-19 toolbox?**



# EEOC Guidance On COVID-19 Vaccine (March 2020)

The last time the EEOC addressed vaccines was with the H1N1 pandemic. Although the EEOC did not declare H1N1 a declare threat, it simply updated that same guidance in March 2020 for the COVID-19 pandemic.

## **13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).<sup>(36)</sup>

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **\*As of the date this document is being issued, there is no vaccine available for COVID-19.**

# EEOC Guidance On COVID-19 Vaccine (December 2020)

In December 2020, the Federal Food and Drug Administration authorized the Pfizer COVID-19 vaccine for emergency use, and the EEOC updated its vaccine guidance.

- COVID-19 Vaccine is not a medical examination prohibited or limited by the ADA.
- Asking or requiring employees to show proof of receiving a COVID-19 vaccination is not a disability-related inquiry under the ADA. \*\* Confidentiality (Need to Know Basis)
- Employer's may administer the COVID-19 vaccine, if job-related and consistent with business necessity. \*\* Pre-screening Vaccination Questions may implicate the ADA's provisions on disability-related inquiries.



# EEOC Guidance On COVID-19 Vaccine (December 2020)

## Pre-Screening Vaccination Questions

If an employer requires the COVID-19 vaccine and the pre-screening questions are a medical inquiry, an employer must have 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 her or himself or others.

Two Exceptions:

- (1) Voluntary Vaccination Policy/Voluntary to Answer Pre-Screening Questions; and
- (2) Mandated Vaccine Policy but by third party that does not have a contract with the Employer

# EEOC Guidance On COVID-19 Vaccine (December 2020)

## Medical Accommodation

If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite (based on an individualized assessment), 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 burden to the employer 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.

Potential Accommodations: Telework, working off-site, temporary re-assignment, vacant positions, additional PPE



# EEOC Guidance On COVID-19 Vaccine (December 2020)

## Religious Accommodation

- An employer is required to accommodate an employee's sincerely held religious belief, practice or observance, unless it would cause an undue hardship on the business.
- Title VII defines "religion" very broadly. It includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism. It also includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.
- For religious accommodations, courts have said that an "undue hardship" is created by an accommodation that has more than a "de minimis," or very small, 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.

# What If Employee Cannot Accommodated?

**K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)**

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 if any other rights apply under the EEO laws or other federal, state, and local authorities.

**Termination is not automatic, but EEOC offers no alternatives.**

**Options: Leave of absence? Waiting for conditions to change?**

# Constitutionality of State Mandated Vaccines

In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), a plaintiff challenged Massachusetts's compulsory vaccination law under the Fourteenth Amendment. The United States Supreme Court held that mandatory vaccination was within the State's police power, rejecting the claim that the individual liberties guaranteed by the Constitution overcame the State's judgment that mandatory vaccination was in the interest of the population as a whole.

Although the United States Supreme Court did not directly address freedom of religion in *Jacobson*, it stated in *Prince v. Massachusetts*, 321 U.S. 158 (1944), that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

In *Workman v. Mingo County Bd. of Educ.*, 419 Fed.Appx. 348, 353–54 (4th Cir.2011) (unpublished). The Fourth Circuit Court of Appeals agrees that a state vaccination mandate does not violate freedom of religion. The Fourth Circuit followed the logic that states and their schools are not discriminating based on religion when mandating all school age children be vaccinated, but, instead, are taking action to protect their students.



# Should All Employers Mandate the COVID-19 Vaccine?

**Vaccine mandate should be “job-related and consistent with business necessity.”**

Healthcare Providers – direct patient care, high-risk populations

- Better position to mandate vaccine without accommodation
- *See Robinson v. Children’s Hospital Boston*, (D. Mass. April 4, 2016) – the hospital mandated flu vaccine for all employees who worked near patient care areas. It accommodated disability, but it refused to provide religious accommodation. The federal district court found undue hardship, if reasonable accommodation increased risk of patient safety or legal liability.

Public facing businesses

- Retail stores (cashiers v. stock people)
- Restaurants/Bars (wait staff v. cook staff)

Office-setting (greater telework and social distancing possibilities)

- Law firms
- Accountants

# EEOC Settlements Concerning Failure to Accommodate

## **Memorial Healthcare to Pay \$74,418 to Settle EEOC Religious Discrimination Lawsuit**

*Hospital Unlawfully Refused Reasonable Accommodation for Religious Belief and Rescinded Job Offer, Federal Agency Charged*

DETROIT - Memorial Healthcare, which operates a hospital in Owosso, Mich., will pay \$74,418 and furnish other relief to settle a religious discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency announced today. The EEOC alleged that Memorial violated federal law by refusing to hire a medical transcriptionist because of her religious beliefs against receiving flu shots and refusing to accommodate those beliefs.

June 2019

<https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit>

## **Mission Hospital Agrees to Pay \$89,000 To Settle EEOC Religious Discrimination Lawsuit**

*Asheville Hospital Fired Employees for Declining Flu Vaccination, Federal Agency Charged*

ASHEVILLE, N.C. - Mission Hospital, Inc., a North Carolina corporation based in Asheville and the main hospital of Mission Health System, has agreed to pay \$89,000 and furnish other relief to settle a religious discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today. The EEOC had charged that Mission Hospital violated federal law when it refused to accommodate and fired employees who declined flu vaccinations based on their religious beliefs.

January 2018

<https://www.eeoc.gov/newsroom/mission-hospital-agrees-pay-89000-settle-eeoc-religious-discrimination-lawsuit>

## West Virginia's COVID-19 Jobs Protection Act

On March 19, 2021, Governor Jim Justice signed the COVID-19 Jobs Protection Act, but it is effective retroactively from January 1, 2020 and applies to any cause of action accruing on or after that date.

The Act's stated purpose is to "preclude all suits and claims against any persons for loss, damages, personal injury, or death arising from COVID-19" and to "[p]rovide assurances to businesses that reopening will not expose them to liability for a person's exposure to COVID-19."

"Arising from COVID-19" includes, "[i]mplementing policies and procedures designed to prevent or minimize the spread of COVID-19." Therefore, for example, if a company enacts a new rule preventing an employee from coming to work sick, even if the symptoms are not COVID-19 related, and terminates an employee for violating that policy, the company may be protected from a future discrimination claim filed by that employee.

The Act provides that "workers' compensation benefits shall be the sole and exclusive remedy" for "work-related injury, disease, or death caused by or arising from COVID-19 in the course of and resulting from covered employment."

The Act does not provide protections for persons who engaged in intentional conduct with actual malice. With this exception, individuals will be able to bring claims against those whose actions meet this criterion.



## COVID-19 Vaccine Incentives

Under the ADA, disability-related inquiries of employees generally must be job-related and consistent with business necessity, unless made in a voluntary wellness program. A key compliance challenge for wellness programs is the size of the incentive – whether the size/type of the incentive causes a loss of voluntariness.

In latest proposed rules, the EEOC limited incentives offered with wellness programs to a “de minimis” standard. Examples of de minimis incentives generally include items such as a water bottle or a gift card of modest value. The EEOC withdrew those proposed rules to allow for review by the Biden administration.

In February 2021, business associations sought vaccine incentive guidance from the EEOC: (1) A definition of what qualifies as a permissible incentive, wanting the definition to be as broad as possible to ensure the process is efficient and effective and (2) an explanation that allows COVID-19 vaccine incentives to be distinguished from wellness programs.

Types of Incentives Being Offered: Gift Cards and Cash Incentives, Paid Time Off to use for Vaccinations and Any Side Effects, Payment Incentives (Based on Hourly Rate), Paid Time Off to use for any reason.

# Resources

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Updated on September 16, 2020)

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (updated March 21, 2020)

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

CDC Guidance for Employers and Workplaces on COVID-19:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

CDC COVID-19 Vaccination:

<https://www.cdc.gov/vaccines/covid-19/index.html>

Job Accommodation Network (JAN): Accommodation and Compliance: Coronavirus Disease 2019 (COVID-19)

<https://askjan.org/topics/COVID-19.cfm>

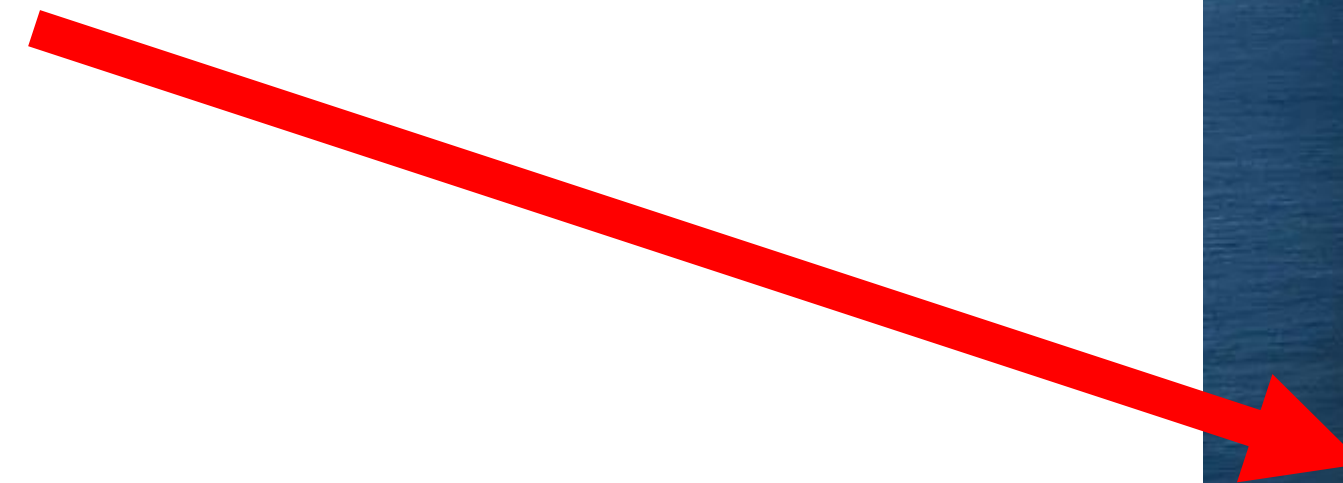
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## 2021 Winter/Spring Board Development Lunch & Learn Series

### ***Education v. Lobbying: Making Your Case Without Crossing the Line***

May 11, 2021 • 11:30 AM - 1:00 PM

Presenter: Richard R. Heath, Jr., Attorney, Bowles Rice

### ***Sustaining & Renewing Your Culture When Dealing with the Unexpected***

June 8, 2021 • 11:30 AM - 1:00 PM

Presenter: Joe Tye, CEO and Head Coach, Values Coach, Inc.

Register at: [www.wvruralhealth.org/events](http://www.wvruralhealth.org/events)







**Community immunity begins with each one of us. Together, we can stop the spread of COVID-19. Learn more at [vaccinate.wv.gov](https://vaccinate.wv.gov) #CommunityImmunityWV**





**Choosing to get vaccinated against COVID-19 helps protect the health and wellbeing of our communities.**

**Together, we can stop the pandemic and build [#CommunityImmunityWV](#).**



**Thank you for taking part in this  
webinar!**

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