

Blog Post

Objections to COVID-Testing and Asking Vax Status Up Front: Best Practices

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Employers are being inundated with employee requests for exemptions, not just from mandatory vaccination policies, but also from policies requiring regular COVID-19 testing. How do employers square their duty to provide a safe workplace with the duty to try to accommodate employees who refuse even to be tested? And can they avoid some of the headaches by asking applicants about their vaccination status up front? We look at both of those questions in the context of EEOC [guidance](#) updated October 25, 2021, and offer some tips.

Handling Religious Objections to Testing

Many employers have already implemented mandatory COVID-19 vaccine requirements. Further, private employers with 100 or more employees soon will be required to ensure their employees are either “fully vaccinated” or provide proof of a negative COVID-19 test at least once a week under the [forthcoming Occupational Safety and Health Administration rule](#).

Forms for asserting religious objections to vaccination, along with quotes from scripture and letters from ostensible pastors, are widely available on the internet, contributing to a flood of requests for exemptions based on religion. Now, some of the people opposed to vaccinations are also objecting to COVID-19 testing.

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It is important to note that the EEOC has unequivocally stated that “the federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA,” and other applicable law. (Some states have pursued, or are pursuing laws to ban vaccine mandates, so check your local laws, too.)

The EEOC itself has expressly said that periodic testing may be a reasonable accommodation for an employee objecting to vaccination for medical or religious reasons if it does not pose an undue hardship on the operation of the employer’s business. Further, current CDC guidelines state that screening unvaccinated individuals is a key way to identify those who are asymptomatic and do not have known, suspected, or reported exposure to COVID-19. The CDC has specifically identified testing employees in a workplace setting as a measure to identify unknown cases and to prevent further transmission of COVID-19.

So, when an employee refuses both vaccination and testing—even now, before the new OSHA rule has taken effect—may an employer simply fire the employee?

Alas, that would not be the best course of action. A request for exemption from *testing* on religious grounds should be treated the same as a request for exemption from *vaccination* on religious grounds. We’ve offered some tips for handling requests for religious exemptions from vaccination in a prior [blog](#). As we noted, an employer need not grant a proposed accommodation if it imposes an “undue hardship.” In the religious context, establishing an “undue hardship” only requires a showing that the proposed accommodation poses a “more than de minimis” cost or burden on the employer. This is a considerably lower standard for an employer to meet than under the Americans with Disabilities Act (ADA), where to demonstrate undue hardship the

employer must show the proposed accommodation would involve “significant difficulty or expense.”

Note that where an employer allows testing as an alternative to vaccination, it should use reliable and accurate testing based on the most up-to-date guidance from public health authorities. Where an employee objects to a specific form of testing, employers might consider other means of testing. However, providing testing as an accommodation may present additional costs, operational burdens, and limitations to an employer that may rise to a level of an undue hardship. For example, if an employee claims their religion won't allow anything to be put in their body and therefore a nasal swab is too invasive, would a saliva test be acceptable? Would it render a timely and accurate result? Consider that it may take several days to receive the results from a saliva-based PCR test, whereas nasal swab antigen test results may be available within minutes. If the employee must wait 2-3 days for test results and avoid the workplace until they arrive, would that affect the employer's operations more than minimally? Is the cost of the test itself more than minimal? Or, depending on the worksite and nature of the work performed, would periodic testing even be sufficient to mitigate the safety risk of having an unvaccinated worker in the role?

As with handling religious requests for exemption from *vaccination*, employers facing religious requests for exemptions from *testing* should undergo the same detailed process outlined in our prior blog. To summarize, engage in the “interactive process” to discuss the employee's specific religious objection, explore whether a reasonable accommodation is available, and document both the process and outcome.

And one more thing to remember if you have a unionized workforce: the EEOC says “a proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona

fide seniority system or collective bargaining agreement.”

Inquiring About Vaccination Status During the Hiring Phase

In the current hot job market with many job seekers vying for jobs with higher pay, better work-life balance, and better benefits, there has been a new trend by job applicants to promote themselves to future employers by highlighting their vaccination status. This new trend also follows a corresponding new practice by employers to advertise that they are seeking employees who are fully-vaccinated. It was reported by [Indeed's hiring lab](#) in August 2021 that the share of the website's job postings per million requiring vaccination was up 242 percent from July 2021. Some of these job postings ask job applicants to upload their CDC vaccination cards to verify their vaccination status or offered applicants a vaccine bonus as a means of attracting top talent. Further, recent surveys are suggesting that hiring managers are making decisions based on an applicant's vaccination status.

In a [survey](#) by Resume Builder, one-third of hiring managers stated they would automatically eliminate an application because the applicant failed to list their vaccination status. In the same survey, 69 percent of hiring managers stated they were more likely to hire an applicant that received the COVID-19 vaccine. These survey results further support the rise in applicants publishing their COVID-19 vaccination status on their job applications, resumes, and LinkedIn profiles in hopes that it will give them an edge over other applicants.

In certain industries where employees will interact with high-risk individuals such as personal care and home health services, childcare, and social services, employers understandably want to hire employees that are fully vaccinated. However, employers should be mindful that requiring an employee to submit proof that they have received the COVID-19 vaccine

prior to extending an offer can raise red flags. If an employer refuses to consider an applicant because the applicant did not include their COVID-19 vaccination status on their resume or application, an employer could run the risk of violating ADA, Title VII, or other state or local anti-discrimination laws.

The EEOC has expressly advised that the ADA does not prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19 vaccination. That is because by simply asking whether the employee obtained a COVID-19 vaccination, the employer is not asking a question that is likely to disclose the existence of a disability. There are many reasons an employee may not be vaccinated besides having a disability. Accordingly, the EEOC says, “requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA’s rules about making such inquiries do not apply.” However, such information is medical information and must be kept confidential.

To avoid violating anti-discrimination laws, employers should do the following if they have determined that a future employee will need to be fully vaccinated for the position:

- Provide a notice that the company has a mandatory vaccination policy and indicate that accommodations and exemptions will be considered in accordance with applicable federal, state, and local laws.
- If a specific position within the company requires the applicant to have the COVID-19 vaccine, post a notice within the job requirements section for the job posting explicitly notifying applicants of this requirement.
- If you ask an applicant about vaccination status, pose it as a “yes” or “no” question and instruct them not to provide any additional information.

- After extending a job offer, if the applicant refuses to be vaccinated or refuses to be tested because of medical or religious reasons, employers should assess whether a reasonable accommodation, absent undue hardship to the employer, could reduce or eliminate a “direct threat” to the health and safety of the applicant or others in the workplace. If no reasonable accommodation exists, and the applicant’s refusal creates an undue hardship on the company, an employer can then make the determination the applicant should not be hired for the position.

As new trends concerning mandatory COVID-19 vaccinations and testing arise, employers should be mindful that certain employment decisions, though well intentioned, could trigger possible claims against the employer. For assistance with navigating these and other workplace issues, contact your Akerman attorney.

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