

RetailLawBCLP

EMPLOYEE COVID VACCINATION STATUS: YOU ASKED. THEY ANSWERED. NOW WHAT?

Jun 15, 2021

As employers make plans to modify pandemic-related work-from-home arrangements and require employees to come into the workplace, many have wrestled with “the vaccination status question.” Should employers ask employees whether they are fully vaccinated against COVID-19, or even require employees to provide proof of vaccination before returning to work (subject to certain accommodation obligations)?

The U.S. Equal Employment Opportunity Commission’s (“EEOC”) COVID-19 Guidance has made clear that, under the Americans with Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”), employers are generally permitted to inquire about vaccination status, because the question is not a disability-related inquiry or a medical examination. In light of this guidance, many employers have opted to ask the vaccination status question, and are doing so in various voluntary or mandatory ways, *e.g.*, through surveys, through required completion of forms or attestations, or even by requesting proof of vaccination (i.e., a copy or photograph of the employee’s CDC-issued vaccination card received at the time of vaccination).

But once the vaccination status question is asked and answered, what can and should an employer do with the vaccination status information? Can it be the basis for employment-related decisions? Are there any restrictions on providing employees’ vaccination status to other employees, such as managers, or even to third parties, such as clients or vendors? Where should an employer keep the information?

Recently, the EEOC updated its Guidance to partially address these questions:

K.4. Is information about an employee’s COVID-19 vaccination confidential medical information under the ADA? (5/28/21)

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, *this information, like all medical information,*

must be kept confidential and stored separately from the employee's personnel files under the ADA.
(emphasis added)

Notably, this new guidance requiring vaccination status information to be kept confidential is arguably at odds with the EEOC's separate guidance that requesting such information in the first place is not a disability-related inquiry or a medical exam. The guidance appears inconsistent because, under ADA regulations, the obligation to handle information confidentially stems from the information being collected through a medical examination or certain specifically defined medically-related inquiries. And, having approved asking about vaccine status, it would seem that the EEOC must at least be contemplating that employers will use this information for legitimate purposes in its business operations.

Nonetheless, with this Guidance in mind, employers who ask for or require employees to provide their vaccination status should consider the following when determining whether and how to use and maintain the information:

1. Handle Documentation And Information Related To Vaccination Status In A Confidential Manner: Maintain any written information or documentation concerning vaccination status in a confidential medical file. Ensure that any individuals who receive the information are aware of the obligation to keep it confidential. If employees' vaccination status information is collected in the aggregate (e.g., in a spreadsheet indicating which employees are vaccinated), take steps to ensure confidentiality, including password protecting the spreadsheet and sharing it only with Human Resources team members who have a need to know this information.
2. Weigh The Risks And Benefits Before Sharing Vaccination Status Outside Of HR: As confidential medical information, under ADA regulations, vaccination status information may only be shared in limited circumstances.
 - *The Employee's Manager or Supervisor.* The ADA regulations permit sharing confidential medical information with managers for certain limited purposes, specifically "regarding necessary restrictions on the work or duties of the employee and necessary accommodations."

As such, employers likely should not disseminate vaccination status widely to all managers. But, an employer may consider permitting HR to share each employee's vaccination status with only that employee's direct manager, and only when necessary for a business purpose relating to the employee's performance of his or her responsibilities or need for accommodations.

For example, vaccination status information could be related to the "restrictions on the work or duties" of an employee if, for example, an employer is revising or eliminating its in-office mask and social distance policies for vaccinated employees. A manager must know the vaccination status of the employees reporting to them in order to enforce the policy with respect to those who are not fully vaccinated.

Knowing an employee's vaccination status may also be necessary when deciding on work assignments; for example, an employer may need to know which employees are vaccinated for purposes of handling certain business travel obligations (*but see* Note 4 below regarding accommodations).

- *The Employee's Co-Workers:* Employees' vaccination status likely should not be shared with co-workers, as there would not likely be a legitimate business reason to do so. Moreover, from a personnel relations perspective, employees are not likely to be comfortable with their vaccination status being shared widely. Indeed, employers may find it necessary to remind employees that probing questions into co-workers' vaccination status and the underlying reasons for not being vaccinated are not appropriate workplace discussions, in light of the potential for an employee facing those questions to allege harassment based on a protected class (e.g., disability, religion).
- *Clients, Customers, and Vendors:* Some clients, customers, or vendors may request vaccination status information regarding the employees with whom they interact. Disclosure to such third parties, however, is not provided for under ADA regulations and should be avoided.

As an alternative, employers may choose to instruct their employees – regardless of vaccination status – to comply with any restrictions that third parties have implemented with respect to non-vaccinated individuals, such as that they wear a mask and socially distance while in the third party's workspace. Or, the employee may choose to voluntarily disclose directly to the third party the employee's vaccination status (but voluntariness is key).

3. Avoid Asking "Why Not?": Caution those who receive vaccination status information that they should not ask follow up questions of employees who are not vaccinated, such as, "Why are you not vaccinated?" The EEOC's Guidance states that these kinds of questions may elicit information regarding a disability, and therefore the ADA requires that such a question must be "job-related and consistent with business necessity." To the extent this information may be needed for a business purpose, Human Resources should handle such questioning to help avoid stumbling into an ADA violation.
4. Consider Vaccination Status, But Be Prepared to Discuss Accommodations: Employment-related decisions may be based on vaccination status in certain situations; for example, vaccination status may play a role in determining whether an employee can engage in certain work assignments (such as travel), return to the workplace, or participate in certain work-related activities. However, the EEOC's Guidance makes clear that while employers may require employees to provide vaccination status information, employers must also be prepared to provide reasonable accommodations under the ADA (when a disability precludes an employee from getting vaccinated), the Pregnancy Discrimination Act (if a pregnant employee has been told by a healthcare provider not to be vaccinated), or Title VII of the Civil Rights Act (when an employee has a sincerely held religious belief that prohibits them from receiving the vaccine). Employers

may also have additional accommodation obligations under relevant state and local laws. As a result, employers should proceed cautiously when making employment-related decisions based on vaccinated status, and must be prepared to engage in the interactive process with those who cannot be vaccinated.

There may come a time when COVID-19 infection rates are so low, and vaccination rates so high, that inquiring into an employee's vaccination status is no longer necessary or reasonable. Until then, employers asking the question should properly handle the information received in response, and consult with employment counsel if they have questions regarding any step in the return-to-work planning process.

RELATED PRACTICE AREAS

- Retail & Consumer Products

MEET THE TEAM



Patrick DePoy

Chicago

patrick.depoy@bclplaw.com

[+1 312 602 5040](tel:+13126025040)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.