

Can Employers Ask Job Applicants About Vaccination and COVID-19?

By Allen Smith, J.D.

May 24, 2021

More employers are asking job applicants about their COVID-19 vaccination status as they try to protect co-workers and customers. But before you add this to your list of interview questions, know that there are legal limits to such questions.

Employers that are asking these questions need to make sure they're doing so appropriately. Andrew Maunz, an attorney with Jackson Lewis in Pittsburgh, said, "Determining any type of term or condition of employment based on vaccination status is going to open up a lot of legal issues for employers, so they need to think very carefully about why the person's vaccination status is relevant."

Employers should only ask applicants vaccination questions that pertain to the job, explained Carolyn Rashby, an attorney with Covington & Burling in San Francisco.

So, if the company is not asking employees if they have been vaccinated (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Employers-Should-Be-Cautious-When-Asking-About-Vaccination-Status.aspx), it should not pose that question to applicants, either.

Legal Requirements About Vaccinations

The Americans with Disabilities Act (ADA) prohibits employers from asking applicants questions that are likely to reveal the existence of a disability before making a job offer. The Equal Employment Opportunity Commission (EEOC) has clarified that asking employees whether they have received the COVID-19 vaccine is not a disability-related inquiry under the ADA.

"It's critical, though, that employers and their hiring teams don't overstep," Rashby said. "While asking about the vaccination itself will usually be permissible, follow-up questions that may reveal a disability can be asked only if they are job-related and consistent with business necessity." Any follow-up questions, such as asking why an individual didn't receive a vaccination, should be reserved until after making a job offer, she said.

Focus on the health and safety of the workforce, she recommended. "Whether asking applicants about their vaccination status is advisable may depend, for example, on the employer's industry, whether employees can socially distance and the percentage of the workforce that is already vaccinated."

Maunz said it often "is not going to be worth the trouble for most employers to ask about vaccination status."

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COVID-19 Vaccination Resources

(www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Conditioning a job on vaccination status could lead to accommodation requests—both disability- and religious-based—and claims of discrimination by individuals under various protected bases who say they were unlawfully screened out, he noted. "Ultimately to defend themselves, employers will likely have to show that their vaccination policy is job-related and consistent with business necessity," said Maunz, a former EEOC legal counsel who oversaw the agency's COVID-19 guidance.

Can an Employer Require Vaccination Before Hiring?

Employers may require that new hires be vaccinated by the first day of work, provided they accommodate those who can't receive the vaccine for disability- or religious-based reasons, Rashby said.

"Transparency is key here," she said. Employers should let applicants know at the earliest possible stage in the process, including the job advertisement or posting, that vaccination is required and that the company will consider accommodations for disability- and religious-based reasons.

"Employers should also keep in mind when setting start dates that it takes a certain amount of time to be fully immunized after the final dose of the vaccine," she said. "To take the pressure off, some employers are requiring that new hires just have at least one dose before their first day of work."

If a mandatory policy is being implemented, make sure the job description notes that being vaccinated is part of the job description, said Kristin White, an attorney with Fisher Phillips in Denver.

Applicants shouldn't worry about bringing proof of vaccination to a job interview—and employers shouldn't require it, said Adam Kemper, an attorney with Kelley Kronenberg in Fort Lauderdale, Fla. "I don't think bringing a copy of the vaccination receipt to an interview is appropriate. I think the focus of the interview should be on a candidate's qualifications and expertise for the position in question. If the company considers making an offer following the interview, then it can inquire about vaccination status."

If an employer keeps a record of vaccinations, the proof should be treated as a confidential medical record and retained accordingly, said Ashley Cuttino, an attorney with Ogletree Deakins in Greenville, S.C.

"Employers must check state and local law to see whether there is a prohibition, such as a law effectively making vaccination status a protected characteristic," said Howard Lavin, an attorney with Stroock in New York City. Montana (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-limits-inquiries-into-immunization-status.aspx), for example, has a law prohibiting employers from requiring employees to disclose their immunization status and barring employers from requiring employees to receive certain types of vaccines or to possess an immunity passport.

Santa Clara County, Calif. (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/California-County-Requires-Employers-to-Ascertain-Vaccination-Status.aspx), on the other hand, requires business to ascertain the vaccination status of all staff.

Employers are still struggling with whether to require workers to get the COVID-19 vaccine, Cuttino noted. EEOC guidance provides that employers may lawfully mandate vaccinations.

In some states, such as Hawaii, retaliating against an employee because of refusal to take a vaccination could lead to strong claims of wrongful discharge in violation of public policy and whistleblower laws, cautioned Jeffrey Harris, an attorney with Torkildson, Katz, Hetherington, Harris & Knorek in Honolulu.

Inquiring About COVID-19

An employer can ask applicants if they currently have COVID-19 or COVID-19 symptoms, Cuttino said.

"If the employer screens everyone who comes on its campus for COVID-19, then someone coming in for a job interview can also go through the screening process," Maunz said. "But asking screening questions or COVID-19 status for someone who is not coming into the workplace is not a good idea."

In addition, asking applicants whether they have ever had COVID-19, as in a past infection, is likely prohibited by the ADA, he added.

"Governmental agencies are constantly modifying their guidance in light of the existing data," Kemper said. "Thus, it is important for companies to stay on top of the latest guidance, be comfortable with modifying their workplace policies and procedures, and work closely with employment counsel to ensure their existing employment policies and practices are up to date and compliant."

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