

# A POINTED QUESTION: HOW TO ASK EMPLOYEES IF THEY'VE BEEN VACCINATED WITHOUT HAVING TO CALL YOUR LAWYER FIRST

Insights  
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Now that the country is on course to see all adult Americans eligible for COVID-19 vaccination in a matter of days, and an increasing number of employees are returning to the workplace, vaccination status is likely to be an increasingly common topic over the coming weeks and months. Which leads to these inevitable questions: when and how can employers ask their workers whether they've been vaccinated without getting into hot water? Whether it's an innocent question asked while trying to make conversation or an inquiry posed to determine whether someone can return to normal duties, you need to understand your legal rights and obligations regarding this serious topic. Missteps can easily lead to legal complications.

## A Simple Vaccine Question is Okay, But Be Wary of Going Further

The Equal Employment Opportunity Commission has indicated in [recent guidance](#) that it is generally permissible for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws.

And in many cases, the answer to that question alone may be all you really need. If you don't really need to know anything beyond a simple "yes" or "no" to the question of whether they have been vaccinated – and in most cases, you won't – the EEOC suggests warning employees not to provide any other medical information in response to your

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question to make sure you don't inadvertently receive more information than you want.

If you require proof of vaccination, you should ask the employee to provide documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. The documentation you receive should be treated as a confidential medical record.

But issues could arise if you venture further than asking this simple question. Asking follow-up questions could trigger obligations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) depending on a variety of factors, so you need to tread cautiously if you take the questions any further.

### **Going Further with Your Inquiries**

That's not to say you can't or shouldn't ask anything further than eliciting a simply yes-or-no answer. There may be circumstances where it is advisable or even necessary to ask more. In those cases, the key considerations relate to the kinds of questions posed and the kinds of responses provided. These are the situations that raise potential legal issues that *will* likely require you to confer with your lawyer.

### ***Questions about why the employee isn't vaccinated***

If you need information about why the employee has not yet been vaccinated, you might end up eliciting information about the employee's medical status. Therefore, you can only pose such questions if they are "job-related and consistent with business necessity." As the EEOC has said, you meet this standard if you have a reasonable belief, based on objective evidence, that an employee who is not vaccinated would pose a direct threat to the health or safety of themselves or others. This can be a challenging and complicated hurdle to clear. You should coordinate with legal counsel to determine whether you can meet this standard in your situation.

If you are treating workers differently based on vaccination status – for example, not allowing them to participate in certain work activities, work in certain locations, interact with the public or other employees, etc. – and you have



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confirmed with counsel that you have a valid justification for doing so, you may need to ask additional questions to assist with an interactive process. It may be that you need to provide reasonable accommodations to those workers unable to be vaccinated due to underlying medical conditions or sincerely held religious justifications. Each situation will require a case-by-case, fact-specific analysis, and you should be prepared to engage in substantive interactive process discussions related to any accommodation requests.

**Employment Discrimination and Harassment**

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### ***Questions about how the vaccination process went***

If your managers are asking follow-up questions to find out how the employees fared after vaccination – especially after the second dose of Moderna and Pfizer vaccines – you need to recognize that this can be a slippery slope. Such questions could reveal information related to disability status (see above) that you would otherwise not want to know about. Caution your managers to tread carefully when asking such questions, even if their intent is innocent, and train them to know what to do if they receive information that should lead to human resources involvement.

### ***Questions to help with an employee leave program***

It is always permissible for your managers to ask about the medical status of an employee in order to help administer an employee leave program that includes absences for vaccine side effects, whether due to federal or state law or due to company policy. As with any such inquiries about medical status, however, make sure your managers know that they need to keep the information confidential to protect the privacy of any medical records received, and to only ask questions that lead them to gather the type of information necessary.

### **What Steps Should You Take Right Now?**

- Decide as a company if you need to know workers' vaccination status, and if so, who will be responsible for this inquiry.
- Train your managers not to casually ask your workers about their vaccination status unless there is a specific work-related reason for the question. There may be a natural curiosity or concern on the part of your managers

in posing such questions, but you need to let them know about the possible risks involved.

- Keep information you receive as confidential as you would any medical-related information in order to comply with privacy obligations.
- Ask employees to be respectful of other employees' privacy. Not all employees are comfortable sharing their personal information, and silence should not be interpreted as approval or disapproval of vaccines.
- Even if you learn that an employee has been fully vaccinated, don't let up on your social distancing, mask-wearing, and other safety precautions that you already have in place. While [federal guidance allows you to ease up on quarantine procedures for vaccinated workers](#), that is currently the extent to which you should relax your protocols.
- If your business is subject to California's broad data privacy law – [the CCPA](#) – you need to recognize that collecting information from employees about their vaccination status triggers the “notice at collection” requirement. While you may not have to provide a different or new CCPA notice every time you ask for or receive such information, you may need to ensure that the broader notice you have already provided to all employees (i.e., the notice to inform the employee of all categories of personal information your company collects about or from the employee, along with all the business purposes for which the information is used) covers this type of data collection. Check with your legal counsel to ensure you are in compliance with California law.

## Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney.