

# CAN YOU ASK APPLICANTS ABOUT THEIR VACCINE STATUS? 3 OPTIONS FOR EMPLOYERS

Insights  
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As more businesses are requiring proof of vaccination for their employees and customers, a question that often arises is whether it is lawful to ask an applicant about their vaccine status. While we are generally hesitant about encouraging such inquiries (for the reasons summarized below), the short answer (in nearly all places in the U.S.) is yes. However, because questions about the vaccination status of applicants could easily dovetail into additional questions that may reveal a disability or religious objection to the vaccine – information you’d rather not have at that stage of the hiring process – there are some important nuances to consider. So what is the best way for employers to determine whether applicants are vaccinated? Here are three options to consider if you decide you need to know whether applicants are vaccinated.

## Background

Late last year, the [EEOC issued guidance](#) making it clear that asking an employee whether they are vaccinated is not an inquiry that violates the Americans with Disabilities Act (ADA). The ADA prohibits employers from asking job applicants – prior to making a conditional offer of employment – questions that may reveal the applicant has a disability. These inquiries should be limited to *after* an employer extends a job offer to an applicant and need to be job-related and consistent with business necessity.

In May, the [EEOC further clarified](#) that inquiring about vaccine status or requesting proof of vaccination was not a disability-related inquiry under the ADA. The inquiry itself

## Related People



**Myra K. Creighton**

Partner

[404.240.4285](tel:404.240.4285)



**Samantha J. Monsees**

Partner

[816.842.8770](tel:816.842.8770)

does not violate the ADA, but the question of vaccination status often brings up additional conversation that may turn into disability-related information, especially if you ask – or the applicant volunteers – why they are or are not vaccinated.

### Considerations Before Asking About Vaccine Status

Before you begin asking applicants about their vaccine status, there are several things you should consider in order to avoid violating state and federal laws.

- It is important that you understand whether **state or local laws** prohibit or require inquiry on vaccination status. In Montana, for example, lawmakers recently enacted a statute prohibiting employers from inquiring about, or requiring, vaccines. In contrast, Santa Clara County California requires that all businesses located within the county inquire on the vaccination status of their employees. Several other states have passed laws prohibiting *state* agencies or entities from requiring their employees to be vaccinated, but these laws do not apply to private employers.
- You will also want to determine **why you're asking** about vaccination status. Before you start asking applicants about whether they're vaccinated, make sure you have a business reason for doing so and the inquiry is related to the job for which the applicant is applying. There are myriad legitimate reasons for making the inquiry, including if your company is a part of an industry that is required to be vaccinated ([such as healthcare workers in California](#)) or if your organization has mandated that some or all of your employees be vaccinated.
- If your company has mandated vaccines, you will want to make sure that this is listed on the **job posting as a condition of employment**. You will also need to make it clear in your job advertisement that the company is an Equal Opportunity Employer and reasonable accommodations will be considered as described in more detail below.

### 3 Options for Employers

Once you determine if the question is permissible and solidify your reason for asking the question, here are three options for you to consider – from least risky to most risky.



**J. Hagood Tighe**

Partner and Co-Chair, Wage and Hour Practice Group

803.740.7655

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### Service Focus

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1. **State the Policy to the Applicant:** An easy way to address whether an applicant is vaccinated is to make a blanket statement in the hiring process that your company requires employees to be vaccinated as a condition of employment, subject to accommodation. This statement can be provided in writing during the hiring process and repeated verbally at the outset of the interview process. "If you are hired, we will require you to prove that you have received the COVID-19 vaccine or have a valid religious or medical reason not to be vaccinated." You will want to ensure that your statement instructs the applicant not to reveal information about their vaccine status and that you're only informing them of what the company's expectations are before the applicant begins work.
2. **Ask on the Application:** To avoid any risky follow-up questions that could violate state or federal laws (or to avoid being wrongly accused of making such inappropriate inquiries), you can include the question on your job application. This way, applicants simply check a box with "yes" or "no" as to whether they are vaccinated and there's no mistaking what was asked about. In doing this, you want to be sure that your application includes language advising the applicant that the company will make reasonable accommodations for new hires with a valid medical or religious reason not to be vaccinated. You can even include this information in the question itself: "We require all employees to be vaccinated. Are you vaccinated or have a valid medical or religious exemption from receiving a COVID-19 vaccine? Yes or No." If using paper applications on which applicants may write in additional information, consider adding language discourage this – such as "Only provide a yes or no answer and do not provide any additional information."
3. **Ask the Applicant in the Interview:** Employers may opt to ask applicants directly during the interview process whether they are vaccinated. This option is the riskiest because discussion about vaccines can quickly result in the applicant revealing disability-related information to the employer, so you will want to feel confident in your process (and your interviewers) if you proceed. If you decide to go this route, any question needs to be tailored to your policy. You want to ensure your hiring team knows how to appropriately ask the question and follow the below steps:

- **Inform Your Team:** Ensure all individuals who are involved with screening and interviewing applicants know what they can and cannot say to applicants about their vaccine status.
- **Provide a Script:** It would be wise to provide a simple script to your hiring staff making it very clear how to appropriately ask whether someone is vaccinated. For example, if your company has mandated vaccines, you may say, "If hired, we require that all employees be vaccinated, unless a medical or religious accommodation is needed. Only provide a yes or no answer and do not provide any additional information: are you vaccinated?" or "If hired, we require that all employees be vaccinated, unless a medical or religious accommodation is needed. Only provide a yes or no answer and do not provide any additional information: will you be vaccinated by \_\_\_\_ date?"

Equipping your hiring teams with a roadmap of what they can and cannot say about vaccination status can help avoid liability. Engaging counsel to help craft these communications is best practice.

## What About New Hires?

Some employers are only requiring their new hires (but not current employees) to be fully vaccinated. A policy like this, while possible, can create problems under the ADA's "direct threat" analysis. When someone seeks an accommodation or exemption from a vaccine requirement, the analysis typically comes down to whether the particulars of that **job** would cause an unvaccinated employee to pose a direct threat in the workplace that cannot be eliminated through reasonable accommodation or that it would otherwise be unreasonable under the ADA to grant the exemption or that it would result in an undue hardship. Because the analysis is job-specific, it can cause problems to treat employees differently based on whether they are a new hire or an incumbent employee in the same position. It is likely that the employer would have to grant such accommodation and that the employee would be able to work subject to the employer's safety protocols for current unvaccinated employees.

## Properly Handle Vaccination Documentation

Regardless of how you gather information about the vaccination status of new hires, there is very little reason to require proof that an applicant is vaccinated at the application stage. Instead, you can collect this information after you extend the job offer but before the first day of employment. It's important to note that even though asking an applicant about their vaccination status is permissible, you'll need to ensure you are treating the information as confidential if you collect proof of vaccination, the same you would with any other medical information. Depending on your location, you also may be subject to state privacy laws (such as California, which require employers subject to the California Consumer Privacy Act (CCPA) to provide a specific notice to employees about their privacy rights). If you have questions about whether your business is subject to state specific privacy laws, consult with your Fisher Phillips attorney.

## **Conclusion**

The vaccine landscape is constantly changing, and we will continue to monitor these developments. Be sure you are subscribed to [Fisher Phillips' Insight System](#) 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 or the author of this Insight.