



REQUIRING THE COVID-19 VACCINATION AT WORK:




WHAT DEALERS NEED TO KNOW

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CAN DEALERS REQUIRE THE VACCINE AS A CONDITION OF EMPLOYMENT?




- **Emergency Use Authorization vs. FDA Vaccine Licensure Approval**
- **Answer: Yes, with some caveats.**

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Can Dealerships Require The Vaccine As A Condition Of Employment?



- **Emergency Use Authorization**
 - FDA must inform vaccine recipients of emergency use, known/unknown and potential benefits and risks, right to refuse the vaccine, and of any available alternatives to the product.
 - This information is in a patient fact sheet provided at the time of vaccine administration - consideration for Dealerships who give the vaccine on-site.
 - Review FDA website.

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Exemptions to Mandatory Vaccinations

- Medical consequence to taking the vaccine (ADA/LAD)
- Sincerely held religious beliefs / objections (Title VII/LAD)

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MANDATING VACCINES

- The Dealership requires the vaccine. An employee requests a medical exemption.
- The requirement screens out employees with disabilities.
- The Dealership must show "that an unvaccinated employee would pose a **direct threat** due to a significant risk of substantial harm to the health or safety of the individual or others that *cannot be eliminated or reduced by reasonable accommodation.*"

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Dealership Mandated Vaccines

- The Dealership must conduct an **individualized assessment of 4 factors** to determine if a direct threat exists:
 1. The duration of the risk;
 2. The nature and severity of the potential harm;
 3. The likelihood that the potential harm will occur; and
 4. The imminence of the potential harm.
- Direct threat means the Dealership determined that an unvaccinated employee will expose coworkers to the virus.

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MANDATING VACCINES

- The Dealership cannot exclude the employee unless no reasonable accommodation is available (absent undue hardship) to eliminate/reduce the direct threat.
- No automatic termination.
- Other accommodations? Remote work? Leave?
- Other laws? FMLA?

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MANDATING VACCINES

- When considering accommodations/undue hardship, consider:
 - Prevalence in the Dealership of employees who are vaccinated
 - CDC Recommendations
 - OSHA Guidelines.

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Exemptions to Mandatory Vaccinations

- **Sincerely Held Religious Beliefs** – reasonable accommodation unless the accommodation would pose an undue hardship: Employers do not have to accommodate secular or medical beliefs about vaccines
- If the Dealership has an objective basis to question the belief, can request additional supporting information. **Consider using a Religious Accommodation Request Form.**

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RELIGIOUS ACCOMODATIONS

- This information could be a first-hand explanation from the employee or may be verified by third parties.
- Third-party verification does **NOT** have to come from a religious official or member of the worker's religion – it can also be provided by others who are aware of the employee's religious practice or belief

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RELIGIOUS ACCOMODATIONS

- EEOC encourages employers to “assume that an employee's request for religious accommodation is based on a sincerely held religious belief.”
- If the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.
- Be mindful not to pry for too much information. An employer that asks for unnecessary evidence risks liability for denying a reasonable accommodation request.

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Request for Accommodation: Medical Exemption from Vaccination

- Employers must interact with employees under the ADA in good faith
- Use an Interactive Process Questionnaire to be completed by the Employee's Physician that asks the following:
 - Nature of the employee's impairment(s);
 - The duration of the need for accommodation; AND
 - The extent to which the impairment(s) conflict with the employer's vaccination requirement.
- If you want to talk to the employee's doctor, you need a HIPAA Release signed by the employee

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Exemptions to Mandatory Vaccinations

Accommodations can include:

- Remote Work
- Social Distancing
 - Masking
- Shift Changes
- Location Change
- Unpaid Leave

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ACCOMODATION CONSIDERATIONS

- **Determine If The Accommodation Poses A Direct Threat Or Creates An "Undue Hardship"** or poses a direct threat to the health and safety of others.
- **Undue hardship** is *more than a de minimis cost or burden* - increased cost to the employer is not enough!
- According to the EEOC, "If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace."
- Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities."

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Medical Inquiries – Prescreening Questions

For Dealerships that mandate the vaccine at work or contract with a third-party vendor:

- ADA limits medical inquiries about an employee's physical or mental impairments or health.
- The vaccine is not a medical examination.
- Prescreening vaccine questions may be disability related inquiries (questions that are likely to elicit health information).
- If the Dealership administers the vaccine, it must show that the prescreening inquiry is "job-related and consistent with business necessity."

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MEDICAL INQUIRIES

- To show that prescreening medical questions are job related and consistent with business necessity, then:
 - The Dealership must show that it had a reasonable belief, based on objective evidence, that an employee who does not answer the questions (and, therefore, does not receive a vaccination), will pose a direct threat to the health or safety of her or himself or others.

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Prescreening Questions - GINA

- Genetic Information Non-Discrimination prohibits Employers from making employment decisions based on the Employee's Genetic Information or obtaining genetic information.
- Vaccine prescreening questions make ask about family history and implicate GINA.
- Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.

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PRESCREENING QUESTIONS - GINA

- If the prescreening questions request genetic information, then Employers may want to opt for proof of vaccination vs administering the vaccine themselves.
- Inform employees when providing proof of the vaccination not to provide any genetic information.

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Medical Inquiries – Prescreening Questions

Exceptions to showing that screening questions are job related and consistent with business necessity:

- If the Dealership offers the vaccine on a voluntary basis (employees choose whether to be vaccinated), then employee voluntarily answers pre-screening questions. If the employee refuses to answer, the Dealership may decide not to vaccinate the employee. No retaliation for failing to answer the prescreening questions.
- If the employee receives a Dealership required vaccination from a third party that does not have a contract with the Dealership (pharmacy or other health care provider).

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Vaccination Documentation

- Dealerships can request proof that an employee has been vaccinated.
 - This is not a disability related inquiry; unlikely to elicit medical information.
 - Tell employee not to supply medical information.
- Asking why an employee did not take the vaccination may trigger an impermissible medical inquiry. This inquiry must be “job-related and consistent with business necessity.”

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Employees Who Object to Mandatory Vaccinations and Employee Education



- Dealing with employees who:
 - Distrust the vaccine
 - Believe they will become ill from the vaccine
 - Claim the vaccine advances a political agenda
 - Claim that the Dealership is exerting control over their rights to freedom over their persons/medical decisions

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Employees Who Object to Mandatory Vaccinations & Employee Education



- Written Vaccine policy?
- Incentives?
- Training / Education?
- Essential job requirement / discipline / termination?

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Incentives



- EEOC Wellness Rules
- Beware if Dealership sponsored
 - Given by the Dealership or a Third Party Contracted by the Dealership
- De minimis value
 - Gift Cards OK

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Potential Personnel Policies To Consider Adding/Revising



- Covid-19 Plans
- Written Vaccine Policy
- Coronavirus Leave Policy
- Remote Work Policy
- Return to Work Policy
- "Stop the Spread" Policy
- Safety Screening Policy (e.g., Temperature Checks or Questionnaires)
- Update NJFLA & Leave Policies



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