

# KEY QUESTIONS RELATED TO EMPLOYER COVID-19 TESTING & VACCINATIONS, INCLUDING VACCINE INCENTIVES & MANDATES



September 6, 2021 - On May 28, 2021, the EEOC issued updated [FAQ guidance](#) about how employers should comply with the Americans with Disabilities Act (ADA) and other federal employment laws while also observing all applicable emergency workplace safety guidelines during the coronavirus pandemic. The following questions and answers reflect the information contained in that guidance, as well as other applicable rules and regulations.

Questions	Answer and Examples
<b>May an employer request health information from an employee who calls in sick during the COVID-19 pandemic?</b>	<b>YES.</b> Employers may ask employees if they are experiencing symptoms for COVID-19 which include symptoms such as fever, chills, cough, shortness of breath or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
<b>Are employers permitted to take employees' body temperature during the COVID-19 pandemic?</b>	<b>YES.</b> Employers may measure employees' body temperature.
<b>May employers require employees to stay home or leave the workplace if they have COVID-19 symptoms?</b>	<b>YES.</b> The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace and stay home if symptoms are present.
<b>May an employer administer a COVID-19 test when evaluating an employee's initial or continued presence in the workplace?</b>	<b>YES.</b> The ADA requires any mandatory medical test of employees be "job related and consistent with business necessity." An employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard. Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable.
<b>Is it permissible for employers to ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19?</b>	<b>YES.</b> Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.  An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.
<b>May an employer ask an employee if they have family members who have COVID-19 or symptoms associated with COVID-19?</b>	<b>NO.</b> The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members.  GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease.
<b>What may an employer do if an employee refuses to take their temperature or answer questions about whether they have or symptoms associated with COVID-19?</b>	The ADA allows an employer to prohibit an employee from physical presence in the workplace if they refuse to have their temperature taken or refuses to answer questions about whether they have COVID-19, or have symptoms associated with COVID-19.
<b>If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?</b>	<b>YES.</b> The employer needs to maintain the confidentiality of this information.
<b>May an employer require all employees physically entering the workplace to be vaccinated for COVID-19?</b>	<b>YES.</b> However the employer needs to provide reasonable accommodations for employees who, because of a disability (including disabilities related to pregnancy) or a sincerely held religious belief, practice or observance, do not get vaccinated for COVID-19.
<b>May an employer offer an incentive to employees who voluntarily provide documentation or other confirmation that they (and/or their family member) received a vaccination on their own (i.e., vaccination through a third party, not administered through the employer or its agent)?</b>	<b>YES,</b> an employer may offer an incentive to employees who voluntarily provide documentation of their (or their family member's) vaccinated status if they were vaccinated by a third party (not the employer or its agent).  Additionally, employers should offer a reasonable alternative standard or alternate way for employees to obtain the vaccine incentive if the employee cannot get vaccinated due to a disability (including disabilities related to pregnancy) or a sincerely held religious belief, practice or observance.

Questions	Answer and Examples
<b>Can an employer impose a premium surcharge or offer an incentive through a group health plan or wellness plan that applies to COVID-19 vaccinated vs. non-vaccinated employees?</b>	<p><b>UNCLEAR.</b> It is best not to run vaccination incentives or premium surcharges through a group health plan or wellness plan. To the extent they are, the incentives should be no more than “de minimis.” For example, the value of a water bottle or other like giveaway.</p> <p>More specifically, due to the Biden Administration’s decision to review (and effectively “withdraw”) the relevant wellness incentive rules under the ADA and GINA applicable to most group health plans and wellness plans, it is unclear whether the EEOC will penalize employers for offering a vaccine incentive through a group health plan or wellness incentive that is more than “de minimis.” *See the footnote below explaining this in more detail.</p>
<b>May an employer offer an incentive to employees in exchange for the employee getting vaccinated (i.e., for a vaccination administered directly through the employer or its agent)?</b>	<p><b>YES,</b> as long as the incentive (which includes both rewards and penalties) cannot be so substantial as to be coercive, and so long as the employer does not acquire genetic information (including family medical history information) while administering the vaccines.</p> <p>Additionally, employers should offer a reasonable alternative standard or alternate way for employees to obtain the vaccine incentive if the employee cannot get vaccinated due to a disability (including disabilities related to pregnancy) or a sincerely held religious belief, practice or observance.</p>
<b>May an employer offer an incentive to an employee in return for an employee’s family member getting vaccinated (i.e., vaccination directly through the employer or its agent)?</b>	<p><b>NO.</b> Providing such an incentive would require the employer/vaccinator to ask the family member pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer’s receipt of genetic information in the form of family medical history of the employee (in violation of GINA).</p>
<b>Why it is it permissible for an employer to have a ‘smoker surcharge’ imposed on health plan premiums, but it’s not recommended to use a premium surcharge for unvaccinated employees?</b>	<p>Most wellness programs subject to a smoking surcharge are not making any kind of “medical examination” or “disability-related inquiry,” and therefore, the smoker surcharge component is not subject to the ADA and GINA wellness incentive rules.</p> <p>More specifically, virtually all smoker surcharge programs, simply ask an employee to sign an affidavit confirming they are a non-smoker or offer a smoking cessation course that has to be completed. Very few of them implement a blood test for nicotine or other similar type of “medical examination” that would subject that component of the health or wellness program to the ADA and GINA wellness incentive rules. *See the footnote below for more information.</p>

**\*Note about vaccine incentives or surcharges offered through a group health plan or wellness plan:** More and more employers are considering imposing a premium surcharge on employees participating in the company’s health plan who are not vaccinated for COVID-19.

Whether positioned as rewards, incentives or penalties, such incentives would likely be considered to be wellness program incentives that are subject to ADA/GINA wellness incentive regulations - rules that are currently “under review” by the Biden Administration (that is, effectively “withdrawn”).

Given the state of regulatory uncertainty about this practice, it is unclear if employers who impose a premium surcharge for unvaccinated employees will face penalties from the EEOC under the Biden Administration once it has completed its review of those regulations. Accordingly, we would recommend that employers seeking to impose such a premium surcharge for unvaccinated employees proceed with caution and discuss all of the possible implications with their labor and employment counsel.