



HAWAI‘I CIVIL RIGHTS COMMISSION

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This explanation is offered for informational purposes only, and does not constitute or reflect a HCRC decision, declaratory relief, rulemaking, or advisory opinion.

Question: Can an employer mandate or require employees to get a Covid-19 vaccination?

Short Answer: Our state fair employment law, Hawai‘i Revised Statutes § 378-2, prohibits discrimination based on race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, reproductive health decision, or domestic or sexual violence victim status. A vaccination requirement is a safety-based standard that does not on its face discriminate on any of these protected bases.

The Hawai‘i Civil Rights Commission does not have jurisdiction over complaints of employment discrimination based on vaccination status (vaccinated vs. unvaccinated), nor do we have jurisdiction over constitutional equal protection claims.

If an employee is a person who cannot get vaccinated because of a disability or religious belief and requests a reasonable accommodation (regular testing, remote work, etc.), an employer is obligated to consider the request and engage in an interactive process. An employer does not have to provide a requested accommodation if the accommodation presents a direct threat to health and safety of the employee or others in the workplace or imposes an undue burden that cannot be eliminated or reduced. Complaints alleging a denial of a reasonable accommodation for a disability or religious belief fall under HCRC jurisdiction.

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U.S. Equal Employment Opportunity Commission (EEOC) Guidance

The EEOC has issued a guidance, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” *Technical Assistance Questions and Answers - Updated on June 28, 2021*. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> See Section K.1 through K.13 of that EEOC publication covering, “**COVID-19 Vaccinations: EEO Overview.**”

Per that guidance from the U.S. Equal Employment Opportunity Commission, for entry to a workplace an employer is allowed to request proof of COVID-19 vaccination, and

may require employees to receive a COVID-19 vaccination as a safety-based qualification standard, if an unvaccinated employee would pose a direct threatⁱ to the employee or to others. An employer must consider requests for a reasonable accommodation based on a disability or a sincerely held religious belief, unless there is no way to provide a reasonable accommodation (that wouldn't impose an undue hardship on the employer) that eliminates or reduces the risk to the employee or to others. 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. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.

Note that the EEOC Technical Assistance Q&A cited above does not have the force and effect of law.

EEOC Guidelines are not accorded the force of law given administrative regulations, but while not controlling are considered for guidance, "...depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976)(citations omitted).

Given the thoroughness of the EEOC reasoning and analysis in the EEOC Technical Assistance Q&A, the HCRC Executive Director would rely on it for persuasive guidance. This initial reading does not constitute or reflect Commission decision, rulemaking, declaratory relief, or advisory opinion. Like the EEOC Q&A, it does not have the force and effect of law.

ⁱ A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. See 29 C.F.R 1630.2(r).