

Updated EEOC Guidance Regarding COVID-19 Vaccinations

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Practice Area: Labor and Employment

Since the COVID-19 vaccines have become readily available to the public, employers have inquired about the legality of mandatory and voluntary vaccination policies as well as vaccination incentive programs to encourage employees to get vaccinated. On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) posted long-awaited guidance for employers explaining how the equal employment opportunity (“EEO”) laws such as the Americans with Disabilities Act (“ADA”), the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (“Title VII”) apply to vaccination policies, vaccination incentive programs, and confidential employee documentation relating to such policies and programs (the “updated guidance”). The updated guidance can be found here, under Section K, the Vaccination Section, of the EEOC’s What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws website.¹ The key updates are as follows.

Antidiscrimination and Reasonable Accommodation Principles

- **Mandatory Vaccination Policies for Employees Physically Entering the Workplace** – Employers may require that all of their employees physically entering the workplace be vaccinated for COVID-19. If employers have a mandatory COVID-19 vaccination policy, they must also comply with the “reasonable accommodation” provisions of the ADA, Title VII, and other EEO considerations for those employees who are unable to receive the vaccine due to a disability or a sincerely-held religious belief. Importantly, however, the updated guidance does not address mandatory COVID-19 vaccination policies for remote workers.
- **Disparate Impact/Treatment Concern with Mandatory COVID-19 Vaccination Policies** – Employers should remember that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement. Because of these disparate impact concerns, employers may be required to respond to allegations that a facially-neutral, non-discriminatory COVID-19 vaccination requirement constitutes a disparate impact on a protected group, such as minorities. It would also be unlawful for employers to apply a mandatory COVID-19 vaccination policy to employees in a manner that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.
- **Pregnant Employees and Mandatory Vaccinations** - Under Title VII, an employer must ensure that pregnant employees are not discriminated against compared to other employees similar in their ability or inability to work. Therefore, a pregnant employee may be entitled to a job modification, including telework, changes to work schedules or assignments, and leave to the extent that such modifications are provided for other employees.
- **Telework/Reassignment as a Reasonable Accommodation Options** - Employees who are unable to receive the vaccine due to disability and/or sincerely held religious reasons must be offered reasonable accommodation to allow the employee to be physically present to perform his or her current job without posing a direct threat. As a part of the reasonable accommodation process, the employer must consider if telework is an option for that particular job as an accommodation, and, as a last resort, whether reassignment to another position is possible.

Incentive Programs

- **COVID-19 Vaccination Incentive Programs** – Employers may offer bonuses and other incentives to employees to encourage them to voluntarily get the COVID-19 vaccination from a third party not acting on the employer’s behalf. Federal EEO laws do not prevent or limit employers from offering such incentives.
- **Employers Administering Vaccines, Incentive Must Not Be Coercive** – Employers or their on-site agents who administer vaccines to their employees may offer incentives for employees to get vaccinated, as long as the incentives are not coercive. Unfortunately, the updated guidance does not provide details on what incentives could be coercive. Because vaccinations screening may have questions that require employees to answer disability-related screening questions, a very large incentive could pressure the employees to disclose protected medical information to their employer and be impermissible.

Employer Rights to Information and Confidentiality

- **Requests for Vaccination Cards (and Other Documentation)** – Employers can request that employees provide confirmation of their COVID-19 vaccination status (e.g. Vaccination record card or pharmacy records).
- **Confidentiality of Employee Vaccination Cards (and Other Documentation)** - If employers choose to obtain vaccination information from their employees such as vaccination cards or other vaccination documentation, such information should be considered confidential pursuant to the ADA and should be kept separate from the employee personnel files.
- **Educational Information** - Employers may provide employees and their family members with information that educates them about COVID-19 vaccines and raises awareness about the benefits of the COVID-19 vaccination. The updated guidance also highlights federal government resources available to those individuals seeking more information about how to get the COVID-19 vaccination.

Practical Considerations for Employers

Employers will likely continue to wrestle with whether or not they should have a mandatory or voluntary COVID-19 vaccination policy and whether or not they should offer some form of incentive to their employees to get the COVID-19 vaccine. To assist in employer decision-making processes, the following considerations are important for employers to consider in light of the EEOC's updated guidance:

1. If employers have a mandatory vaccination policy, they should ensure that their policy provides for reasonable accommodations under EEO laws,
2. As a best practice, provide notice to employees of the ability and process for requesting an accommodation if vaccinations are mandated;
3. Review prior EEOC guidance to determine how to accommodate employees with disabilities or religious objections to the vaccine;
4. If employers have a mandatory vaccination policy, they must ensure that it does not have a disparate impact on anyone based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information;
5. If employers are administering vaccinations themselves, they must ensure that any incentive provided to vaccinate is not coercive;
6. Employers must keep employee vaccination cards and other documentation as a part of their confidential medical file;
7. Telework should be considered for employees with disabilities who are unable to receive the vaccine in the "reasonable accommodation" process; and
8. Employers should monitor workplace vaccination policies to ensure that minorities, as well as other protected groups, are not subject to a barrier to employment under a mandatory vaccination program.

¹ On May 13, 2021, the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) issued updated guidance for fully vaccinated individuals, exempting them from masking requirements "except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance." The EEOC is considering the impact of this CDC guidance on EEOC's COVID-19 technical assistance provided to date. Thus, it is unclear how much weight, if any, the EEOC gave in the updated guidance that is the subject of this Legal Update.

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