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EEOC Issues Updated Guidance on COVID-19 Vaccination Policies

Beginning in March 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) began publishing [guidance](#) for employers outlining what COVID-19 related inquiries, accommodations, and safeguards could be implemented without running afoul of applicable federal employment laws. The guidance includes frequently asked questions and covers topics ranging from medical inquiries, temperature checks, COVID-19 testing, confidentiality, reasonable accommodations, return to work procedures, and vaccines, among others.

On May 28, 2021, the EEOC issued updated [guidance](#) related to COVID-19 vaccines, providing its opinion on what can and cannot be done from a legal standpoint.

Of course, whether something “can” be done is just one factor to consider in deciding whether it “should” be done. The latter inquiry depends upon a variety of employer-specific factors.

The EEOC’s updated guidance addresses the following:

1. Mandatory COVID Vaccines

The EEOC’s position is that it is not unlawful under federal employment laws to require employees to receive a COVID-19 vaccine as a term of continued employment, so long as the employer complies with its reasonable accommodation obligations. Absent undue hardship or a direct threat, employees with disabilities or sincerely held religious beliefs that prevent vaccination may be entitled to a reasonable accommodation. Likewise, pregnant employees are entitled to similar modifications as those provided to employees based on disability or religion.

In Section K.2 of its [guidance](#), the EEOC provides some examples of potential reasonable accommodations that might be provided in these scenarios, including social distancing, masking, modified shifts, periodic tests for COVID-19, the opportunity to telework, or even reassignment. In considering these examples, what is reasonable will depend upon the actual circumstances of the employer’s workplace, the essential functions of the employee’s position, and the specific employee involved. Moreover, as conditions and circumstances change, including rates on community infection, vaccination, and recovery, what is reasonable will inevitably evolve.

Additionally, the EEOC notes that, as with any employment policy, employers that implement a mandatory vaccine policy must be aware of the potential liability related to disparate impact of the policy based on race, color, national origin, religion, sex, and age. The EEOC encourages employers to consider that some demographic groups may face greater barriers to receiving a COVID-19 vaccination and thus may be more likely to be disparately impacted by a vaccination requirement.

One topic not addressed by the EEOC’s guidance is employees who have previously been infected with COVID-19. While research continues on the effects of COVID-19, employers

contemplating a vaccine policy should consider how to account for and potentially accommodate employees who have recovered from COVID-19 and have some level of antibody protection.

2. Documentation and Confidentiality of Vaccination Status

The EEOC states that an employer may request and require an employee to provide documentation that the employee received a COVID-19 vaccine, and that such requirement is not a disability-related inquiry covered by the Americans with Disabilities Act (“ADA”) and does not violate the Genetic Information Non-Discrimination Act (“GINA”).

The EEOC further advises that to comply with the ADA, such documentation must be kept confidential and stored separately from the employee’s personnel file.

Despite its guidance that an employee’s vaccine status be kept confidential, the EEOC does not address how to reconcile this requirement with an employer’s contemplated policy that only unvaccinated employees must continue to wear masks within the workplace. It remains to be seen how the EEOC and courts will address this discrepancy.

3. Incentive Programs

The EEOC’s position is that an employer can lawfully offer an incentive to employees to voluntarily obtain a COVID-19 vaccine and to provide documentation of the same. According to the EEOC, such “incentives” can include both rewards and penalties. As noted above, the employer is required to keep vaccination information confidential pursuant to the ADA.

Where an incentive is provided for an employee to obtain the vaccine from a third party (not the employer or its agent), there are no limitations on the incentive amount.

However, where the employer or its agent administers the vaccine, the EEOC states that the incentive offered to employees must not be so substantial as to be coercive. This restriction on incentives for employer or employer-agent administered vaccines arises from the ADA, which generally prohibits employers from making disability-related inquiries to their employees, including pre-vaccination screening questions, with limited exceptions. From the EEOC’s perspective, a “very large incentive” in the context of an employer or employer-agent administered vaccine “could make employees feel pressured to disclose protected medical information.”

The EEOC does not provide guidance on what is a permissible incentive versus what is potentially coercive. In the event such an incentive policy is implemented, the more conservative approach is to seek confirmation of vaccination administered by a third party.

Finally, to the extent employers offer a monetary incentive to non-exempt employees to encourage vaccination, such incentives likely will have a wage and hour impact. Specifically, the incentive likely will need to be accounted for in the employee’s regular rate of pay for purposes of calculating overtime pay for the pay periods covered by the incentive.

For more information on these issues, please reach out to a member of Cline Williams’ [Labor and Employment Law Section](#) and [Employee Benefits Section](#).

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