

CLIENT ALERT

EEOC Issues Updated Guidance on COVID-19 Vaccines and the Workplace

June 2, 2021

On Friday May 28, the Equal Employment Opportunity Commission (“EEOC”) updated its [Technical Assistance Q&A](#) regarding what employers should know about COVID-19, the Americans with Disabilities Act (the “ADA”) and other EEO laws to address questions specific to vaccinations and the workplace. Friday’s update marks the first time the EEOC has issued additional clarification since the first COVID-19 vaccine was approved for Emergency Use Authorization in December 2020. Significantly, this guidance makes clear that employers may, in general, require employees who physically enter the workplace to be vaccinated for COVID-19 as long as the employer provides reasonable accommodations under the ADA and Title VII for employees who cannot be vaccinated because of a disability or a sincerely held religious belief, respectively—provided such accommodations do not pose an undue hardship on the business.

The EEOC offered examples of reasonable accommodations, including allowing unvaccinated employees to wear a face mask, work at a social distance away from others, work a modified shift, get periodic COVID-19 tests, receive the opportunity to telework or accept a reassignment. The EEOC specifically suggests that employers rely on [Centers for Disease Control and Prevention \(“CDC”\) recommendations](#) when deciding whether there is an effective accommodation that would not pose an undue hardship on the employer.

The EEOC nonetheless cautioned employers that an otherwise lawful policy could still run afoul of EEO laws if it disproportionately excludes employees based on a protected category. As the EEOC explained, “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.” Additionally, the EEOC’s guidance only extends to federal EEO laws. States and localities may still enact restrictions on mandatory vaccination programs. Employers should be mindful of these potential legal pitfalls prior to implementing a mandatory vaccine program, notwithstanding this guidance, and may instead consider whether they can accomplish their goals through a voluntary COVID-19 vaccination policy with incentives.

To that end, in response to employer concerns that offering incentives to encourage employee vaccination could violate the ADA or the Genetic Information Nondiscrimination Act (“GINA”), the EEOC further explained that incentives are generally acceptable for voluntary vaccination policies. Employers may offer incentives for employees to provide documentation or other confirmation of their vaccination, or the vaccination of their family members, from a third-party provider not acting on the employer’s behalf. Such a policy complies with both the ADA and GINA, as long as the records are stored separately from the employee’s personnel file and kept confidential, like any other confidential medical information under the ADA. These records, including the pre-vaccination questions, are neither a disability-related inquiry nor family medical history.

Employers also may offer incentives for employees to receive a vaccination from the employer directly or its agent. Where the employer or its agent is administering the vaccine, however, such incentives (be they incentives rewards or penalties) may not be “so substantial as to be coercive.” The EEOC has not yet defined “coercive” or offered any examples of acceptable or

unacceptable incentives, except to say that “very large incentive[s] could make employees feel pressured to disclose protected medical information” as part of an employer-administered vaccine program, even if labeled as “voluntary.”

When it comes to family members, the EEOC opined that employers could provide family members with an opportunity to be vaccinated through an employer-administered program. But employers may not provide incentives for family-member vaccinations and must ensure that the screening questions directed towards family members are used only for the purposes of vaccination. Information collected from family members by employers offering vaccines should not be disclosed to anyone responsible for making employment decisions.

This latest guidance comes on the heels of updated recommendations from the CDC regarding permissible activities for fully-vaccinated individuals—including that fully-vaccinated individuals do not need to wear masks either inside or outside under most circumstances. Read together, the EEOC and the CDC guidance would permit employers—at least under federal EEO law—to craft policies differentiating among employees based on vaccination status, so long as the employer offers reasonable accommodations for employees who are unable to be vaccinated for protected reasons. Employers are encouraged to review their COVID-19 policies and practices in light of these developments and consult with counsel to ensure compliance with applicable law before implementing changes.

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