

Questions Remain After EEOC's Vaccine Guidance Update

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On May 28, the U.S. Equal Employment Opportunity Commission released a long-awaited update[1] to its technical assistance guidance on COVID-19 and the Americans with Disabilities Act, the Rehabilitation Act and other federal equal employment opportunity laws.

The document addresses frequent employer questions related to requiring vaccines for employees and providing incentives to employees to encourage vaccinations under the ADA, Title VII of the Civil Rights Act and the Genetic Information Nondiscrimination Act, or GINA.

The EEOC's update should reassure and help guide employers seeking to mandate or encourage employee vaccination in accordance with federal equal employment opportunity laws.

The updated guidance says federal employment nondiscrimination laws allow employers to require COVID-19 vaccines for employees entering a workplace as long as employers make reasonable accommodations in accordance with Title VII and the ADA for persons with disabilities, persons with sincere religious beliefs and pregnant employees.

Examples of accommodations for unvaccinated employees include face masks, social distancing, modified schedules, telework or reassignment to a vacant position. The EEOC also suggests that employers monitor a policy's impact to ensure that it does not disproportionately affect or exclude employees based on race, color, religion, sex, national origin or age.

The guidance further says that employers may encourage employees and their family members to receive a vaccination without violating federal equal employment opportunity laws by:

- Offering incentives to employees who voluntarily participate in an incentive program and provide documentation or other confirmation that they and/or their family members received a vaccination from a third party;



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- Offering incentives to encourage employees to receive a vaccine administered by an employer or its agent, so long as the incentive is not so substantial as to be coercive;
- Offering incentives to an employee's family member to receive the vaccine without giving the employee an incentive, so long as the employer keeps all vaccination information it acquires confidential and does not provide it to managers, supervisors or others who make employment decisions for employees; and
- Providing employees with information to educate them and their family members about the benefits of COVID-19 vaccination.

The EEOC also clarified that employers may not offer an incentive to an employee in return for an employee's family member receiving a vaccination by the employer or its agent — but vaccinations provided by an unaffiliated third party are permissible.

It also stated that employers must treat COVID-19 vaccination information as a confidential medical record. This means that under the ADA, vaccination information must be kept confidential and stored separately from the employee's personnel files.

Employers that require employees to receive a COVID-19 vaccine from the employer or its agent must ensure that any screening questions asked during the process are job-related and consistent with business necessity, in accordance with the ADA. The guidance notes, however, that current COVID-19 screening questions do not implicate GINA.

Implications for Employers

The new guidance broadly permits employers to mandate COVID-19 vaccinations for employees entering a workspace and require proof of vaccination without violating federal employment nondiscrimination laws, as long as the employer makes reasonable accommodations available to employees with disabilities, employees with religious beliefs and pregnant employees.

It also allows employers to provide incentives to employees and their family members to receive a vaccine from a third party or submit proof of vaccination from a third party, and it permits employers to offer incentives to employees to receive a vaccine administered by the employer or its agent so long as the incentive is not coercive.

Notably, the EEOC's guidance does not define or otherwise give examples of what constitutes a coercive incentive. As a result, employers impacted by these incentive provisions are now struggling to determine what rises to the level of a coercive incentive.

This issue is closely tied to the EEOC's position regarding voluntary participation in employer wellness programs. While the EEOC proposed new regulations in this area in January, those were withdrawn after President Joe Biden's inauguration.

Given the lack of formal guidance on this subject, it is not surprising that the EEOC did not provide more in this technical assistance document. But it is a recurring issue — particularly for employers looking to increase employee participation — and one the EEOC will need to address.

In addition, the guidance does not address whether employers must provide reasonable accommodations to incentive programs.

For example, if an employer provides a \$100 incentive to those who submit proof of vaccination, must the employer provide the same incentive to those who cannot get vaccinated because of disability, pregnancy or a strongly held religious belief?

If so, what does an unvaccinated employee need to do to earn the incentive? Or are such employees similarly situated to all unvaccinated employees, regardless of reason, and therefore not entitled to the incentive at all?

A more conservative reading of the ADA and Title VII dictates providing an incentive in exchange for some action, such as reviewing COVID-19 safety literature, watching a training or even writing an essay. Some employers, however, are willing to take the risk and are only offering the incentive to those who have been vaccinated.

The guidance's declaration that employers must keep information about an employee's COVID-19 vaccination confidential also raises tricky questions regarding how employers may use such information. For instance, does that mandate apply only to formal documentation related to vaccination — e.g., a vaccine card or a written attestation — or does it more broadly prohibit any disclosure of an employee's vaccination status?

We believe the most straightforward reading is to limit that requirement to formal documentation related to vaccination. While portions of the updated guidance seem to define the confidentiality requirement broadly, the most specific question related to the issue — question K.9. — says only that "documentation or other confirmation of vaccination provided by the employee" qualifies as medical information.

This interpretation also reconciles the updated EEOC guidance with earlier U.S. Centers for Disease Control and Prevention guidance^[2] on safety measures for vaccinated persons, which seems to allow implementation of different policies based on vaccination status. Absent further clarification, however, employers will continue to have questions in this area.

Finally, just because mandatory vaccinations do not violate federal equal employment opportunity laws does not mean that an employer can ignore state and local laws that might be inconsistent or more restrictive. For example, the EEOC guidance does not exempt employers from complying with the new Montana state law that prohibits mandatory vaccination of employees.

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[1] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

[2] <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.