

EEOC Issues Updated Guidance on Vaccinations in the Workplace

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On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated its [technical assistance guidance](#) for the first time since December 16, 2020, to address COVID-19 vaccinations of employees in the workplace. The guidance clarifies a number of issues for employers, including those related to mandatory vaccination policies, incentive programs related to employee vaccination, and treatment of employee medical information. The following topics may be of particular interest to employers from an employment and benefits perspective:

Mandatory/Voluntary Vaccination Programs

- The guidance clarifies that under federal Equal Employment Opportunity laws employers lawfully can mandate the COVID-19 vaccination for employees entering the workplace, as long as employers provide reasonable accommodations to employees who are unable to get vaccinated due to a disability or a sincerely-held religious belief, practice or observance (unless such accommodation would pose an undue hardship on the employer's business operations). The EEOC reiterates that it is beyond its jurisdiction to discuss the approach of the Food and Drug Administration (FDA) with regard to vaccines and the legal implications related to approval of the vaccine, namely that the Pfizer-BioNTech, Moderna, and Johnson & Johnson/Janssen COVID-19 vaccines were approved via Emergency Use Authorization rather than full FDA approval.
- The EEOC cautions employers that workplace vaccination requirements may negatively impact certain groups of employees based on protected characteristics such as race, color, sex, or national origin, because some individuals or groups may face more difficulty in accessing COVID-19 vaccinations. Further, it would be unlawful to apply to employees a vaccination requirement that discriminates against a protected group. Employers, therefore, may be at risk of claims of disparate treatment or disparate impact should they mandate

vaccination.

- The EEOC describes several options for potential reasonable accommodations for employees who do not receive the COVID-19 vaccine due to a disability or a sincerely-held religious belief (e.g., wearing a mask, social distancing, working a modified shift, undergoing periodic COVID-19 tests, teleworking, or accepting reassignment).

Treatment of Employee Medical Information

- According to the EEOC, employers lawfully may require employees to present documentation or other confirmation of vaccination; however, employers should exercise caution in limiting this inquiry to avoid unintentionally eliciting medical information about an employee's disability. Further, information about an employee's COVID-19 vaccination status (whether vaccinated or not) is considered confidential medical information under the Americans with Disabilities Act (ADA) and, as such, must be safeguarded and must be maintained separate from employees' personnel files.
- Employers that choose to administer COVID-19 vaccines will be required to ask screening questions immediately prior to administering the vaccine, which may elicit information about a disability; any such inquiries must be "job related and consistent with business necessity" under the ADA. Employers that offer to vaccinate their employees on a voluntary basis (where employees can choose whether or not to get the COVID-19 vaccine from the employer) do not have to show that any pre-vaccination screening questions are job-related and consistent with business necessity if the employee's decision to answer the questions is voluntary.

Incentivizing Vaccination in the Workplace

- Employers wishing to provide incentives to employees to encourage vaccination, such as a paid day-off, cash payment, gift card, or other tangible gift, should be aware of the various federal rules applicable to wellness programs. Specifically, depending on the terms of the incentive program, the program could subject the employer to various wellness program rules, including, but not limited to, the Health Insurance Portability and Accountability Act of 1996, as amended (HIPAA), the ADA, the Employee Retirement Income Security Act of 1974, as amended (ERISA), and/or the Genetic Information Nondiscrimination Act of 2008, as amended (GINA).
- The EEOC guidance clarifies that if an incentive is offered to employees for voluntarily receiving the vaccination through a program administered by the employer or its agent, the incentive may not be so substantial as to be coercive. However, this requirement does not apply to employers that simply request documentation of an employee's vaccination status if the employee received the vaccine through their health care provider or another entity in the community (e.g., a local drugstore).

While the updated EEOC guidance provides clarification on a number of issues, there are still many outstanding questions with which employers are grappling. For example, the types or value of incentives that are appropriate for employers to offer, and whether employers may distinguish vaccinated employees in the workplace (visually or otherwise) to ensure workplace safety, among

other issues. Robinson+Cole continues to monitor relevant guidance to assist its clients in making decisions related to workplace safety and operations.

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