

EEOC Releases Updated COVID-19 Technical Assistance Guidance

Article By:

Elizabeth N. Hall

Patrick W. Spangler

Kathryn A. Rosenbaum

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) released updated and expanded technical assistance guidance regarding COVID-19 and, specifically, COVID-19 vaccines in the workplace (the “Guidance”). The Guidance is of particular importance to employers considering a return to work, and those evaluating whether (and how) they can require or incentivize their employees to receive a COVID-19 vaccine. Highlights from the Guidance include the following:

Employers can require vaccination, with some exceptions.

Per the EEOC, employers can require that employees be fully vaccinated before entering the workplace, subject to the employer’s obligations to provide reasonable accommodations under Title VII and the Americans with Disabilities Act (“ADA”). Employers must also ensure that any mandatory vaccination policy is administered in a non-discriminatory manner that does not have a disparate impact on any protected group.

Accommodations for disabilities. If an employee cannot receive a COVID-19 vaccine as required by the employer, the EEOC maintains that the employer must, consistent with the ADA, engage in the interactive process to determine if a reasonable accommodation is available that will not cause an undue hardship. Notably, the EEOC confirmed that an employee who cannot receive the vaccine because of a disability cannot be excluded from the workplace unless the employer can determine that the employee is a “direct threat” to the employee or others in the workplace. In making such an assessment, an employer must undertake a fact-intensive analysis that considers a variety of factors, including the duration of risk; the nature and severity of and likelihood and imminence of the harm; current medical knowledge about COVID-19 generally, and in relation to the employee; and facts specific to the employee’s working environment. If it is determined that the employee poses a direct threat, the employer must consider whether providing reasonable accommodation (such as requiring the employee to wear a mask), absent undue hardship, would eliminate or reduce the threat.

In addition, the EEOC notes that individuals who are fully vaccinated but immunocompromised, and

who therefore may not receive the full protections of the COVID-19 vaccine, may be entitled to a reasonable accommodation for their underlying disabilities due to a continuing concern that they face a heightened risk of severe illness from COVID-19 (despite their vaccinated status).

Accommodations for religious beliefs, practices or observances. Per the EEOC, employers must engage in an interactive process with employees who refuse the COVID-19 vaccine due to their religious beliefs, practices or observances, and accommodate those employees where doing so does not pose an undue hardship. Consistent with prior guidance, the EEOC notes that the undue hardship standard in this circumstance is easier for the employer to meet than that under the ADA.

Accommodations for pregnancy. The EEOC notes that pregnant employees may be entitled to accommodations in relation to an employer's mandate of the COVID-19 vaccine if such accommodations are provided to other employees who are similar in their ability or inability to work.

Employers must consider confidentiality obligations in relation to vaccination information.

In the Guidance, the EEOC takes the position that information regarding an employee's COVID-19 vaccination *is* protected confidential medical information under the ADA. Notably, however, the EEOC also states that an employer's inquiries regarding an employee's vaccination status, and its requests for documentation to confirm vaccination status, are not disability-related inquiries or medical examinations under the ADA. State privacy laws may also protect vaccine status information as well as proof of vaccination information. For this reason and in light of the EEOC's position, employers are well advised to consider maintaining the confidentiality of vaccination status to the extent possible, and to tread carefully when contemplating actions which may reveal to others – including other employees, clients and customers – which of its employees are vaccinated, and which are not.

The EEOC further reiterated in the Guidance that an employer mandating the vaccine and administering it (directly or through a third party) to employees must be aware that certain required pre-vaccination screening questions will implicate the ADA. In order to ask those questions, therefore, the employer must have a reasonable belief that an employee who does not answer the questions and who cannot receive the vaccine will pose a "direct threat," as stated above.

Employers may offer incentives for vaccination, with some exceptions.

The Guidance confirms that neither the ADA nor the Genetic Information Nondiscrimination Act ("GINA") are implicated if incentives are offered (i) to employees (or their family members) to voluntarily receive the vaccine from a third party unrelated to the employer or (ii) to employees to provide documentation confirming their vaccination status. Employers administering the vaccine (themselves or through an agent), however, are cautioned in the Guidance that under the ADA any incentive offered to employees who take the vaccine may not be "coercive." While "coercive" is not defined, the EEOC notes that prohibited incentives may include those that are "very large" and which therefore "could make employees feel pressured to disclose protected medical information" as part of the pre-vaccination screening process. Further, per the EEOC, employers will run afoul of GINA if they offer incentives to an employee in exchange for the employee's family member's receipt of a vaccination from an employer or its agent.

While the Guidance is informative, employers must be mindful that their obligations and rights under

state and local laws – including in relation to confidentiality and whether they can inquire about vaccination status or mandate a COVID-19 vaccine – may differ than those espoused by the EEOC. Employers are therefore encouraged to evaluate their vaccination practices and programs with legal counsel to ensure compliance with all applicable laws.

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