

The EEOC's Latest Guidance on COVID Vaccine

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Employers have been waiting for some definitive guidance from the EEOC on the issue of vaccines in the workplace – and here it is!

On May 28, the EEOC updated its [Technical Assistance Guidance](#) and has now stated with certainty that employers CAN indeed require employees to be vaccinated before coming in to the office or workplace. The updated guidance also addresses accommodations for the vaccinated, vaccine incentives, and vaccines for pregnant employees, among other questions. However, since this was drafted before the CDC came out with its latest guidance, it does not specifically address all issues related to the handling of unvaccinated and vaccinated employees in the workplace.

Below are some key points of the new guidance:

Mandatory Vaccination is Lawful, But Accommodations Must Be Offered

Even though many employers have opted against mandatory vaccination for their employees, the EEOC made clear that they can, in fact, mandate vaccinations for those who want to report to work. The key for employers, however, is they must engage in the interactive process and provide reasonable accommodations under the ADA and Title VII, for eligible employees seeking an exception to the mandate.

The EEOC offers some examples of possible accommodations, most of which are no surprise, such as allowing unvaccinated employee to wear a face mask, maintaining social distance from others, working a modified shift, periodic COVID-19 testing, being allowed to telework or, as a last resort, reassignment to another position.

Further, the EEOC makes clear that employees who claim they cannot get vaccinated because of disability or religious objections must notify their employer of the need for an exemption and must also present some proof to back up that exemption. Of course, these accommodations may not be possible for all workplaces and all employees, and it will be a case by case decision how employers handle accommodation requests.

For instance, you will have to consider whether the employee who cannot be vaccinated must be in the workplace to do their job, and whether their presence presents a 'direct threat' to others.

The EEOC also advises employers to consider whether a vaccine mandate may have an adverse impact on or disproportionately exclude employees based on their race, color, religion, sex, national origin, or age. Specifically, the updated guidance states that "[e]mployer should keep in mind that 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.”

For industries where employees interact with the public, like retail and hospitality, a mandatory vaccine policy could be a good thing. Not only will it comfort customers and co-workers, but can even be used to differentiate from other businesses. For example, a restaurant that can say “All of our servers are vaccinated,” may have a leg up on others in the neighborhood.

However, employers should also consider the downside to a mandatory vaccine policy – the ability to provide or consider reasonable accommodations for those employees with disabilities or religious objections. As recommended by the EEOC, the process should be to announce that vaccination is mandatory and that requests for reasonable accommodation based on disability or religious objection will be considered.

Disclosing Vaccine Status - Keep it Confidential

The EEOC states that employers may lawfully ask employees to disclose their vaccine status, whether or not there is a mandatory vaccination policy in place. However, employers cannot ask why employees did not get the vaccine because this inquiry is not considered a “disability-related” inquiry under the ADA.

In other words, pre-vaccination questions are permissible under the ADA. However, an employee’s decision to answer those questions are purely voluntary; they do not have to tell you why they are not vaccinated. You may also face challenges from employees to those questions.

Further, the EEOC makes clear in its updated guidance that documentation concerning proof or confirmation of vaccination is a medical record subject to the strict confidentiality requirements of the ADA.

Lastly, you cannot ask your employees whether their family members have been vaccinated because it is prohibited under GINA.

Can Vaccinated Employees Request an Accommodation?

What about vaccinated employees who are still nervous about returning to work because of COVID? Is this even something that employers must consider at this point?

According to the EEOC, at least on paper, the answer is YES. The EEOC states that fully vaccinated employees, if they are still concerned about a potential COVID-19 infection, may still be entitled to reasonable accommodation based on an underlying medical condition. The EEOC explains that for employees with certain medical conditions (i.e. immunocompromised), the vaccine may not offer the same measure of protection as other vaccinated individuals. In this situation, employers must engage in the interactive process with such employees and provide accommodations, absent undue hardship.

Can You Require Pregnant Employees To Get The Vaccine?

Studies have confirmed that pregnant women can safely be vaccinated, and that it may be a good thing. However, there is still hesitation on this issue.

The EEOC states that employers may require pregnant employees to be vaccinated. It also addresses how employers should handle pregnancy related requests for accommodation from the vaccine.

In addressing accommodation requests by pregnant employees, the EEOC states that you cannot discriminate. In other words, the pregnant employee who requests an accommodation must be treated the same as “other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work.”

This suggests that employers should accommodate pregnant employees who do not get the vaccine in the same manner as they would for employees who cannot get the vaccine because of a disability or religious objection.

Vaccine Incentives Are Generally Fine

Vaccine incentives can be divided into two groups, (1) incentives for employees to get a vaccine from a 3rd party, and (2) incentives if the employer is doing the vaccinations.

For Group 1, if an employer is not doing the vaccinating, the EEOC makes clear that it CAN lawfully offer employees an incentive to get vaccinated. So, free lunch or a gift card for the vaccinated is fine. It is also lawful to offer employees and family members education about the efficacy of the vaccines.

For Group 2, if it is the employer or an agent of the employer providing the vaccines, incentives may be offered, as long as they are not “so substantial as to be coercive.” The EEOC stated that a “very large incentive” could make employees feel pressured to disclose protected medical information. Having said that, the agency failed to give any guidance on what is or is not considered a “very large incentive.” Employers who plan to provide the vaccine directly or through an agent should consider any incentives carefully.

Conclusion - Where Does this Leave Us

The good news is that the updated guidance provides a clear answer on the question of vaccines. If you believe that it will be good for your business to require those who are coming to the workplace to be vaccinated, you may lawfully make that a requirement.

So:

- You can ask employees if they are vaccinated;
- You can offer an incentive to be vaccinated, with some caveats; and
- You can mandate a vaccine for those coming to work.

If you decide that you want to mandate vaccines, you will inevitably face difficult accommodation questions from employees who do not want the vaccine and these are all questions which you should consider. Thinking in advance about how you will handle accommodation issues and questions is not only wise, but necessary. Some questions that will arise are:

- Will you allow the unvaccinated employees to come in with masks? Will that make other employees feel unsafe?
- Am I going to require pregnant employees to be vaccinated?
- What proof will be required of those who claim they require accommodations?

- Will you allow the unvaccinated to continue to work remotely? How do you then handle vaccinated employees who want to also work remotely?
- Should you offer a vaccine incentive?

Regardless of which way your company decides to go, all employers must update their COVID-19 policies (yes, again) and make sure front line managers are educated on these issues.

Since COVID-19 hit us in 2020, the workplace as been filled with challenges. If you have any questions on these and other workplace issues, be sure to contact your Kelley Drye contact to get the answers!