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EEOC Updates and Expands COVID-19 Vaccination Technical Assistance and Rules for Employer Vaccine Incentives

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Who Needs to Know

All employers considering mandatory vaccinations and vaccine incentives at the workplace.

Why It Matters

The EEOC updated technical assistance questions and answers regarding COVID-19 vaccinations on May 28, providing some much-needed clarity for employers.

After over five months of silence since first addressing the issue in mid-December 2020, on May 28 the U.S. Equal Employment Opportunity Commission (EEOC) finally released [updated technical assistance questions and answers for employers regarding COVID-19 vaccinations](#). Though this technical assistance addresses questions many employers have about mandatory vaccinations, vaccine incentives, and the confidential nature of an employee's vaccine status, it admittedly does not consider the updated guidance issued on May 13 by the Centers for Disease Control and Prevention (CDC) exempting fully vaccinated individuals from masking requirements "except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance." Below, we address some of the salient points from the latest technical assistance.

[Employer Mandatory Vaccination Programs and Reasonable Accommodations](#)

The EEOC reiterated that employers may establish mandatory vaccination programs for employees physically entering the workplace as long as they consider requests for reasonable accommodations for religion, disability, and pregnancy as required by Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). A mandatory program can be legally implemented under the ADA if all employees (or a subset of similarly situated employees) are required to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination.

[Reasonable Accommodations](#)

Employees unable to become vaccinated due to a disability or sincerely held religious belief may be entitled to a reasonable accommodation, absent undue hardship on the operation of an employer's business. The revised

technical assistance also emphasizes that employers need to accommodate employees disabled by pregnancy under the ADA, and that “employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions [to its vaccination policies] for other employees.”

The EEOC provides the following accommodation examples for unvaccinated employees:

- Wearing a face mask;
- Working at a distance from coworkers or nonemployees;
- Working a modified/staggered shift;
- Getting periodic tests for COVID-19;
- Making changes to the work environment (e.g., improved ventilation systems);
- Teleworking; or
- Reassignment.

Any COVID-19 vaccination policy should make clear to employees that the employer will consider requests for reasonable accommodation on an individual basis. Employers should also ensure that all supervisors and those responsible for implementing any type of vaccination policy have been trained to identify and respond to requests for reasonable accommodation.

Undue Hardship

If an employee is unable to receive the vaccine due to disability, an employer cannot require the employee to become vaccinated unless the employer can demonstrate that the unvaccinated individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. Even if an employer concludes an unvaccinated employee would be a direct threat, the employer must still assess whether a reasonable accommodation would reduce or eliminate the threat and provide such an accommodation absent undue hardship. In the context of the ADA, undue hardship means significant difficulty or expense.

Similarly, when an employee claims that a sincerely held religious belief, practice, or observance prevents them from getting the COVID-19 vaccine, the employer must also consider reasonable accommodations, absent undue hardship on the operation of the employer’s business. However, an undue hardship under Title VII is anything that has more than a minimal cost or burden on the employer. It is a much easier standard for employers to meet than the ADA’s undue hardship standard.

When considering the undue hardship posed by an unvaccinated employee, employers should rely upon the most

current medical knowledge about COVID-19, including the level of community spread at the time of the assessment and the latest CDC guidance. Employers should also consider a variety of other factors including, but not limited to:

- Whether the employee works alone or with others, or works inside or outside;
- The available ventilation;
- The frequency and duration of direct interaction the employee typically will have with other employees and/or nonemployees;
- The number of partially or fully vaccinated individuals already in the workplace;
- Whether other employees are wearing masks or undergoing routine screening testing; and
- The space available for physical distancing.

Finally, the EEOC notes that if “an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work,” and that the employer should offer job modifications (including telework) and leave to the extent that such modifications are provided for other similarly situated employees.

The EEOC states that employers should consider all possible options before denying an accommodation request. As more and more Americans become vaccinated every day, it will become increasingly difficult for employers to assert that an unvaccinated employee poses a direct threat that cannot be reasonably accommodated.

Disparate Impact Considerations

Employers with a vaccine requirement may also need to respond to concerns that the requirement has a disparate impact on, or disproportionately excludes, an employee based on protected characteristics including age, race, color, religion, sex, and national origin. The EEOC cautions that employers should keep in mind that mandatory vaccination policies could have a disparate impact on certain segments of the population because “some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others” and “may be more likely to be negatively impacted by a vaccination requirement.”

Proof of Vaccination and Confidentiality

The EEOC clarified that while an employer can require an employee to present documentary confirmation of vaccination, like all medical information, such information must be kept confidential and stored separately from the employee’s personnel file. Some employers have considered requiring unmasked, vaccinated employees to wear pins or stickers to demonstrate their vaccination status to others in the workplace. Although the guidance does not address the CDC’s May 13 guidance relaxing mask requirements for fully vaccinated individuals, it appears that the EEOC would find such a practice unlawful.

If an employer is concerned about storing, or even seeing, an employee's COVID-19 vaccination card, the employer can (a) ask employees to show proof of vaccination (without retaining a copy of the vaccination card) or (b) accept a signed attestation from an employee regarding his or her vaccination status in lieu of presenting the vaccination card.

Vaccine Incentives

The EEOC makes it clear that an employer can offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community. Employers should be comforted that, at least under federal law, they can provide additional vacation days, cash bonuses, and other prizes to employees who provide proof of vaccination.

Interestingly, the EEOC also notes that the Genetic Information Nondiscrimination Act (GINA) permits employers to offer incentives to employees providing documentation that the employee's family members have been vaccinated.

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While most employers with mandatory vaccination policies are merely requiring proof of vaccination, some employers are operating their own vaccination clinics or contracting with a third party to provide vaccines directly to employees. In these instances, employers have many more obligations including greater confidentiality requirements and limitations on incentives that they can provide. For example, if the employer or the employer's agent administers the vaccine directly, the employer or agent can only offer employees incentives — perks or penalties — if they are "not so substantial as to be coercive."

Furthermore, as of this writing, nearly every state in the union has legislation pending that would prohibit employers from mandating employee vaccinations. While the EEOC guidance clearly endorses vaccine mandates and incentives under federal law, such programs may not be permissible under state or local law. As such, employers should consult with experienced legal counsel before implementing any type of mandatory vaccine or vaccine incentive policy.

As the United States continues its emergence from the COVID-19 pandemic, employers should continue to monitor regulatory updates from federal, state, and local authorities, including the CDC and Occupational Safety and Health Administration (OSHA), for the latest guidance and rules regarding COVID-19 vaccinations and [mask/physical distance mandates](#). Please contact any [Troutman Pepper Labor and Employment attorney](#) if you have any questions about the EEOC's latest vaccine guidance impacting your workplace's immunization policies and procedures.

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