

EEOC Updates COVID-19 Guidance Regarding Vaccination Incentives, Reasonable Accommodation, and Other Issues

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated the vaccination section (section K) of its “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#).” The update clarifies a number of vaccination issues with which employers have grappled without any official guidance to advise them.

The vaccination issues that the EEOC update addresses include the following.

Mandatory COVID-19 Vaccine Policies—General

The EEOC continues to advise that employers may mandate that employees be vaccinated for COVID-19, subject to reasonable accommodations for employees with disabilities or a sincerely held religious belief that precludes them from being vaccinated. The updated guidance, however, cautions employers that they may need to consider the disparate impact that mandatory vaccination policies may have on other protected classes, including race, color, national origin, and age. Accordingly, employers with vaccine mandates may wish to periodically assess the extent to which the policy is disproportionately screening out employees in protected categories.

Types of Reasonable Accommodations to Mandatory Vaccines

Section K.2 of the updated guidance offers some suggestions to employers as to reasonable accommodations they might consider for employees with disabilities and/or sincerely held religious beliefs. These accommodations include wearing face masks, socially distancing, working modified shifts, testing periodically for COVID-19, working remotely, and/or reassignment. The EEOC explains that employers also may need to accommodate employees who are not vaccinated due to pregnancy. Of course, these examples of reasonable accommodations are not exhaustive, and employers may consider other reasonable accommodations as well.

Vaccine Information

Section K.3 explains that employers may encourage employees and their family members to get vaccinated by providing them with information “to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.” The EEOC proposes several public resources from which employers may obtain appropriate COVID-19 educational materials.

Vaccine Incentives for Employees

The updated guidance confirms that employers may offer vaccination incentives to employees so long as the incentives are “not so substantial as to be coercive.” Employers also “may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer’s behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated” without violating the Genetic Information Nondiscrimination Act (GINA).

Vaccine Incentives for Family Members

Although employers may offer incentives to employees to become vaccinated, the EEOC takes the position that employers may not lawfully offer employees incentives for *family members* to become vaccinated. The EEOC reasons that such an incentive would violate GINA because it “would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member.” The EEOC points out that GINA does not restrict an employer from offering family members the opportunity to get vaccinated on a voluntary basis without an incentive.

Confidentiality of Vaccination Information

As many employers already concluded and are practicing, section K.4 of the guidance confirms that vaccination status is confidential medical information. Accordingly, employers must maintain the information’s confidentiality and store it separately from the employee’s personnel file. It is unclear whether the EEOC would take the position that having employees wear visual indicators of their vaccination status, such as a wristband or sticker, would violate the Americans with Disabilities Act (ADA).

Direct Threat of Unvaccinated Individuals

Although employers can mandate vaccines, section K.5 makes clear that employers may not force compliance on employees who have disabilities precluding vaccination unless the employer can demonstrate that the employee poses a direct threat to the health and safety of the employee or others in the workplace.

The updated guidance explains that employers should conduct such an assessment based “on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.” These factors include the following:

- “the level of community spread at the time of the assessment”;
- U.S. Centers for Disease Control and Prevention (CDC) statements;

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- information provided from the employee’s health care provider with the employee’s consent; and
 - “the type of work environment, such as: 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 non-employees; 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 social distancing.”

Of course, this updated guidance underscores that the direct threat assessment will likely vary over time and from circumstance to circumstance, and employers will want to carefully consider the latest medical knowledge and the particular circumstances of the employee’s work environment in determining whether a given unvaccinated employee poses a direct threat. Put another way, the new guidance stands as a warning against implementing a blanket policy excluding unvaccinated employees from the workplace on the basis that they pose a direct threat to the workplace. As infection numbers continue to decline, the direct threat argument generally begins to weaken. Finally, the EEOC guidance notes that, even if an employer determines that an unvaccinated employee would pose a direct threat, the employer must assess whether “providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat.”

Interactive Accommodation Process

Section K.6 of the updated guidance discusses how an employee should request a reasonable accommodation from a vaccination mandate, as well as how employers should respond to such accommodation requests. While the guidance provides employers with helpful resource references, the EEOC confirms that employers should follow the same interactive process that they do with other disability accommodation requests.

Pre-screening Questions—General

Previous EEOC guidance raised questions regarding whether pre-screening questionnaires used by healthcare providers in administering the COVID-19 vaccine would raise restrictions or concerns under federal EEO laws where the vaccine is administered directly by the employer or through a healthcare provider under contract with the employer. Section K.7 of the updated guidance expands on that discussion by noting that “because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be ‘job related and consistent with business necessity’ when an employer or its agent administers the COVID-19 vaccine.” Similar to the discussion above, the EEOC states that an employer would need to first “have a reasonable belief, based on objective evidence” that an unvaccinated person would pose a direct threat in the workplace. However, section K.8 of the guidance makes clear that such pre-screening questions do not violate the ADA, regardless of any direct threat, when employees are vaccinated on a voluntary basis.

Pre-Screening Questions—No GINA Issues

Previous EEOC guidance cautioned that pre-screening questions associated with getting the COVID-19 vaccine may violate the GINA when asked of current employees when such questions

seek “genetic information.” In sections K.14 and K.15 of the updated guidance, the EEOC now clarifies that based on the pre-screening questions that vaccine providers currently are using, GINA is not implicated when employees get a COVID-19 vaccine.

Voluntary Vaccine Offers to Only Some Employees

Some employers have looked at the possibility of offering voluntary vaccinations to only a select group of employees. Section K.10 of the guidance makes clear that doing so is lawful, as long as the employer’s selection criteria are not discriminatory.

Reasonably Accommodating Fully-Vaccinated Employees

In section K.11 of the guidance, the EEOC cautions that some fully-vaccinated employees may still need reasonable accommodations, such as when an employee has an underlying medical condition that creates a heightened risk of severe illness from COVID-19. In those circumstances, the EEOC states that employers should follow the normal ADA interactive accommodation process, which “typically includes seeking information from the employee’s health care provider with the employee’s consent explaining why an accommodation is needed.”

Reasonably Accommodating Religious Objections

Section K.12 of the guidance provides helpful insight to employers regarding how to navigate religious accommodation requests. The EEOC notes that such requests may come in the context of seeking an exemption from a vaccine requirement altogether or in seeking the ability to receive an alternative version of the COVID-19 vaccine that is not objectionable on religious grounds (or waiting until such an alternative becomes available). The EEOC recommends that “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.” However, if an employer is aware of facts that would create an objective basis on which to question “the religious nature or the sincerity” of a belief, practice, or observance, “the employer would be justified in requesting additional supporting information.”

Conclusion

While the updated CDC guidance contains a significant amount of new discussion regarding COVID-19 vaccine issues in the workplace, most employers will find that the new guidance affirms practices and policies they have already been following or anticipating, rather than dictating a major change in policy or practices. However, in addition to reassurance, some employers may find that the updated guidance adds helpful context and talking points to help better ensure that employer assessments (such as whether an employee poses a direct threat) are taking into consideration the appropriate type of information that the EEOC, and potentially courts, will deem relevant.

It is unclear whether the EEOC would take the position that having employees wear visual indicators of their vaccination status, such as a wristband or sticker, would violate the ADA.

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