Wednesday, June 2, 2021

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated and expanded its guidance for COVID-19. The updates provide new information for employers, employees, and applicants regarding proof of documentation of vaccinations, mandatory vaccination requirements, and vaccine incentives.

The EEOC updated its guidelines with the understanding that its jurisdiction is limited to the federal equal employment opportunity (EEO) laws. The EEOC’s guidance neither interprets nor affects the legal implications of the “Emergency Use Authorization” granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of the COVID-19 vaccines. As such, the new updates below have been released for guidance under federal EEO laws only.

**Requesting Documentation or Proof of a COVID-19 Vaccination**

In its updated guidance, the EEOC clarified that employers may legally request documentation or confirmation of an employee's vaccination status. Requesting such documentation is not a disability-related inquiry under the Americans with
Disabilities Act (ADA) and it does not implicate Title II of the Genetic Information Nondiscrimination Act (GINA).

However, employers should be aware that documentation or any other confirmation of vaccination records are considered medical information. Therefore, these records must be kept confidential and maintained as medical records.

**Mandatory Employer Vaccination Programs Allowed**

The EEOC also clarified that federal EEO laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19 provided the mandatory vaccination requirement is both job-related and consistent with business necessity. Where employers choose to implement a mandatory vaccination program, they must also ensure that such a program is administered subject to any reasonable accommodation provisions of federal EEO laws.

Reasonable accommodations should be available to employees who are unable to be vaccinated due to an ADA-covered disability or a sincerely held religious belief. Employers should also ensure nondiscrimination for an employee who is pregnant. Determining whether a reasonable accommodation is possible is a case-specific inquiry. The reasonable accommodation analysis considers the employee's job description and the unique circumstances of the employer, and also depends on whether the accommodation is being sought under the ADA or due to a sincerely held religious belief.

As a best practice, employers introducing a mandatory COVID-19 vaccination policy should notify all employees that the employer will consider requests for a reasonable accommodation for disabilities or religious beliefs. The EEOC recommends that employers disclose that these requests will be considered on an individualized basis. Likewise, employers implementing a mandatory vaccine policy should provide managers, supervisors, and any other responsible individuals with clear information about how to handle accommodation requests.

The EEOC also urges employers to consider whether a mandatory vaccine requirement will have an adverse impact on employees based on protected categories such as race, color, religion, sex, national origin, or age. This consideration is most relevant where certain employees have a limited opportunity to receive a vaccination outside the workplace.

**Vaccine Incentives Allowed**

The EEOC also clarified that federal EEO laws do not prevent or limit employers from offering incentives to employees for providing documentation or any other confirmation showing that an employee received a vaccination from a pharmacy, health department, or other third-party health care provider. This means that employers may offer a cash incentive to employees who show proof of COVID-19 vaccination.

Incentives, both positive and negative, may also be offered to employees where the
employer, or any of its agents, administered the vaccine. However, where the employer or its agent administered the vaccine, employers must carefully consider whether their incentives will be considered coercive. Because vaccinations require employees to answer screening questions related to disabilities, substantial incentives that make employees feel pressured to disclose protected medical information will be considered coercive, and therefore impermissible.

It is likely that the EEOC will continue to review and update its COVID-19 guidance. Varnum will continue to monitor these developments and provide updates. Employers with union workforces may seek additional advice with respect to any contractual or bargaining obligations that may arise in connection with the application of this updated guidance.

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