

New EEOC Guidance Addresses Covid Vaccine Incentives

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With the new CDC guidelines and diminishing number of COVID cases, returning to work has taken center stage. We are still seeing few employers mandate vaccination for employees (and this trend is reported in the news). And we are seeing some lawsuits opposing employer-mandated vaccination, such as one filed against a hospital-employer by a group of Texas employees, alleging that the mandatory vaccinations violated the Nuremberg Code.

Instead of requirements, many employers want to use incentives. Until recently, there was uncertainty as to how these incentives may be viewed under federal employment law. But on May 28, the U.S. Equal Employment Opportunity Commission issued updated and expanded guidance related to the COVID-19 pandemic. Among the topics addressed in the updated technical assistance document is how the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) apply when an employer offers incentives for employees to provide documentation or other confirmation of vaccination when an employee gets a COVID-19 vaccine.

Incentives

The EEOC said employers will not run afoul of the ADA if they offer any incentive to employees who voluntarily provide proof that they got vaccinated by a **third party** (e.g., pharmacy, health department, personal health care provider or public clinic), saying that this information “is not a disability-related inquiry covered by the ADA.” GINA is also not violated when an employer offers 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.”

Employers may only offer incentives to employees for voluntarily receiving a vaccine administered by the **employer or its agent** if the incentive (which includes both rewards and penalties) is “not so substantial as to be coercive.” The EEOC reasons that “a very large incentive could make employees feel pressured to disclose protected medical information” when responding to the employer’s pre-vaccination medical screening questions. Unfortunately, the guidance does not define “substantial.” It likely means something more than *de minimis* but there is no clear answer. Recent employer surveys note that the most popular incentives employers have offered are paid time off and cash/gifts.

Under certain conditions, employers can also offer an employee’s family member an opportunity to be vaccinated. However, employers cannot require family members to be vaccinated and should not offer employees incentives for family member vaccination. This would be considered a violation of GINA.

Regardless of where an employee was vaccinated, employers who request documentation or other confirmation of COVID-19 vaccination must ensure that this information is maintained confidentially and separate and apart from the employee's personnel file.

Other Updates

The guidance reaffirmed that federal laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. As a part of the reasonable accommodation process, the employer must consider if telework is an option for that particular job, and, as a last resort, whether reassignment to another position is possible. The updated guidance does not address mandatory COVID-19 vaccination policies for remote workers.

The EEOC's guidance also clarifies that employees who are not vaccinated because of a pregnancy may be entitled to certain accommodations under Title VII if the employer makes modifications or exceptions for other employees "who are similar in their ability or inability to work." These modifications may be the same as the accommodations offered to employees based on a disability or religious belief.

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination. The guidance provides several government resources for those seeking more information about how to get vaccinated.

Takeaways

The technical assistance answers COVID-19 questions only from the perspective of the EEO laws. Employers still need to be aware of other federal, state and local laws regarding the COVID-19 pandemic.

Employers must also keep in mind that some employees may not be able to be vaccinated due to religious or disability reasons. If the employer offers vaccine incentives, failure to provide those same incentives to these employees may lead to claims under the ADA or Title VII. Employers will need to consider offering alternative means by which an employee can earn an incentive if they cannot be vaccinated due to a disability or sincerely held religious belief.

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