

EEOC Updates COVID-19 Guidance, Authorizes Employer Vaccine Incentives

Written by Christopher Feudo, Christian Garcia

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its guidance concerning COVID-19 vaccinations in the employment context. Most significantly, the EEOC offered long-awaited guidance on the permissibility of employer programs that offer incentives to employees who receive COVID-19 vaccinations, providing that such programs are permissible if the incentives offered are “non-coercive.”

As employers prepare to return employees to the physical workplace, many have shied away from mandating employee vaccinations. Instead, employers have focused on encouraging employees to receive vaccinations voluntarily, and have turned to incentive programs to spur vaccination rates among their workforces. Until this new guidance, however, the EEOC had not indicated whether vaccination incentive programs would be permissible under the nondiscrimination laws it enforces.

In its new guidance, the EEOC states that employers may lawfully offer incentives to their employees for providing medical confirmation of their vaccination status or for participating in an employer-sponsored vaccination program, provided that the incentives offered are not coercive. The EEOC did not state which type of incentives it would view to be non-coercive, but specifically, it noted that a “very large incentive” might pressure employees to disclose protected medical information in violation of applicable federal anti-discrimination laws.

The EEOC also expanded on its previous guidance on other issues pertinent to employers navigating returns to the workplace after a yearlong pandemic. In particular:

- The EEOC confirmed that employers can lawfully require vaccinations for all employees returning to the workplace, provided that reasonable accommodations are made for employees who refuse to take the vaccine because of disability, a sincerely held religious belief, or pregnancy. The EEOC also suggested that fully vaccinated employees who suffer from underlying medical conditions that heighten the risk of danger from contracting COVID-19 might be entitled to reasonable accommodations.
- The EEOC reaffirmed that, in considering reasonable accommodation issues, employers must undertake an “individualized assessment” of the “direct threat” employees who refuse to take the vaccine pose to themselves and the workplace.
- The EEOC indicated that requiring unvaccinated employees to wear a mask, work a modified shift, receive periodic COVID-19 testing, or telework might constitute reasonable accommodations.
- The EEOC confirmed that employers may lawfully request confirmation of an employee’s vaccination status, but took the position that information concerning an employee’s vaccination status is confidential medical information subject to the protections of the Americans with Disabilities Act. As such, documentation of an employee’s vaccination status must be kept confidential and stored separately from employee personnel files.
- According to the EEOC, employers may lawfully request confirmation of the vaccination status of an employee’s family members.
- Employers, or their agents, may lawfully administer vaccinations in the workplace, but employee participation in such programs must be voluntary. Employers may also administer vaccinations to an employee’s family members, so long as they comply with the strictures of the Genetic Information Nondiscrimination Act.

While the EEOC’s guidance answers certain questions on employers’ minds and provides further explanation on previous guidance, questions remain, including most significantly what types of vaccination incentives the EEOC will find to be non-coercive. Employers should contact their attorneys to discuss the implications of the new guidance, including how to construct a vaccination policy in compliance with federal anti-discrimination laws in light of the newly issued guidance.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

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