

Eye on Washington Regulatory Update



EEOC Issues Further COVID-19 Vaccination Guidance

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued updated and expanded guidance for employers regarding COVID-19 vaccinations. The new guidance is in addition to previous guidance provided by the EEOC and addresses four topics as follows:

- (1) mandatory vaccination policies;**
- (2) accommodations;**
- (3) information about employee vaccination status; and**
- (4) vaccination incentives.**

A brief highlight of each of the four topics is provided below.

(1) Mandatory Vaccination Policies

In the updated guidance, the EEOC reaffirms that employers can require that employees receive the COVID-19 vaccine as a condition of accessing the workplace. However, it stresses that employers must comply with their obligation to explore reasonable accommodations for employees who cannot be vaccinated due to disabilities or religious beliefs. In addition, accommodation requests should be addressed on an individualized basis. It also encourages employers to train managers and supervisors on how to recognize and handle accommodation requests.

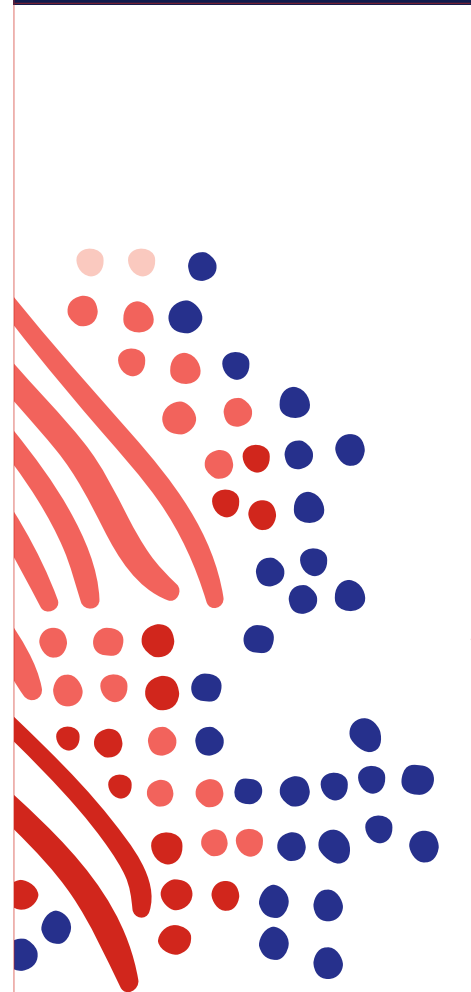
The EEOC further cautioned in its guidance that if an employer requires employees receive a vaccination administered by the employer or its agent, the Americans with Disabilities Act (ADA) restrictions on making disability-related inquiries apply to the required pre-vaccination screening questions. Consequently, the employer must demonstrate that the screening questions are "job related and consistent with business necessity." However, it is important to note that employers who offer to vaccinate employees on a voluntary basis need not meet this requirement.

(2) Accommodations

Descriptions of several options that employers can explore to meet their accommodations obligations under Title VII and the ADA are provided in the updated guidance. These options include the following:

- Providing personal protective equipment (PPE).
- Ensuring the employee is able to work at a safe social distance.
- Offering modified or staggered shifts.
- Subjecting the employee to periodic COVID-19 tests.
- Permitting teleworking.
- Exploring reassignment.

The guidance informs that even those employees that are fully vaccinated may be entitled to reasonable accommodations if they have a continuing concern that they face a heightened risk of severe illness from COVID-19. A prime example is the case of immunocompromised employees. Upon receiving an accommodation request, whether the genesis of that request is from an unvaccinated or fully vaccinated employee, employers are required to engage in an interactive dialogue with the employee to determine what accommodation, if any, may be available and appropriate.



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It is also explained in the guidance that employees who choose not to receive a COVID-19 vaccine due to pregnancy may seek job adjustments or request exemptions from their employer's vaccination requirement. When an employee seeks an exemption due to pregnancy, employers must ensure that the employee is not being discriminated against relative to similarly situated employees.

(3) Information About Employee Vaccination Status

The guidance clarified that information about an employee's COVID-19 vaccination status is considered confidential medical information under the ADA. Therefore, while employers are allowed to request or require confirmation of vaccination from employees, employers are required to keep such documentation or other confirmation confidential. In addition, this information must be kept separate from an employee's personnel file.

(4) Vaccination Incentives

The EEOC had received a number of questions with regard to what extent employers can encourage employees to receive a COVID-19 vaccine. In its guidance, the EEOC clarified that employers are allowed to promote vaccination in several ways. For example, employers can encourage employees and their families to get vaccinated by educating them about the vaccine and its benefits, including addressing common questions and concerns.

Incentives may also be offered by employers to employees to voluntarily confirm their vaccination status or to receive a vaccination administered by the employer or its agent. However, any incentives

offered in connection with a vaccination administered by the employer or its agent must not be so substantial as to be "coercive." This applies to incentives that are both rewards and penalties. However, this limitation does not apply if the incentive is offered to employees to voluntarily provide confirmation that they received a vaccination from a third-party provider.

Providing incentives to employees is generally permissible under the Genetic Information Nondiscrimination Act ("GINA"). Significantly, however, employers cannot offer incentives to employees in exchange for their family members to receive a vaccine from the employer or its agent. However, employers may offer an incentive to employees to provide documentation or other confirmation that their family members received a vaccine from their own health-care provider.

The guidance cautions that employers must not require employees to have their family members vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers who administer vaccines to employees' family members must keep all medical information obtained during the screening process confidential and ensure that such information is used only for the purpose of providing the vaccination.

For a copy of the updated EEOC guidance, click on the link provided below.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

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