

EEOC Issues Updated Guidance Addressing COVID-19 Vaccine Incentives Among Other Issues

Labor & Employment Law Update

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On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated its guidance regarding employers offering incentives for employees to be vaccinated against COVID-19. The updated guidance also clarifies issues related to

whether employers can mandate that employees be vaccinated before entering the workplace.

Interestingly, the EEOC's guidance on vaccine incentives is broken into two parts: (1) incentives for employees voluntarily providing proof that they received a vaccination on their own, and (2) incentives for employees who voluntarily receive a vaccination administered by the employer or its agent.

As to the first scenario, the EEOC's guidance says little more than that requesting proof of vaccination is not a disability-related inquiry covered by the Americans with Disabilities Act (ADA), and also does not seek information protected by the Genetic Information Nondiscrimination Act (GINA), and therefore employers may offer incentives to employees who provide proof that they were vaccinated.

The guidance for the second scenario is a bit more detailed. It states that incentives may be offered, so long as the incentive (whether it is a reward or penalty) "is not so substantial as to be coercive." The difference between the first and second scenarios is that in the second scenario, employees will likely be required to disclose protected medical information as part of the vaccine provider's pre-vaccination inquiry. An incentive that is too large could make employees feel pressured to disclose that protected medical information, and that undue pressure may violate the ADA.

The EEOC's guidance is that the incentive limitation in the second scenario does not apply to the first scenario—because the first scenario is just asking for proof of vaccination status, which is not a disability-related inquiry in the EEOC's eyes. However, we recommend caution in providing large incentives in first scenario circumstances, too, given the recency of this EEOC guidance, and the thorny issues and litigation risks that can arise with respect to incentive programs that touch on employee health and medical information.

On the subject of mandatory vaccines, the EEOC's updated guidance makes clear that "federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19," subject to reasonable accommodation and other EEO considerations. The guidance includes expanded advice for responding to employees who do not want to be vaccinated due to medical or religious reasons or because of pregnancy. (A word of caution: federal EEO laws are not the only game in town, and there is a possibility that other laws could prohibit employers from imposing mandatory vaccine policies—so be careful.)

The EEOC's next piece of guidance should not come as a surprise to our loyal readers: employees' COVID-19 vaccination documentation is confidential and must be kept separate from employee personnel files, like other medical information.

The EEOC's updated guidance also includes several links to resources available for employers to educate their employees about COVID-19 vaccinations and related issues.

As discussed above, issues relating to vaccine incentives—and really any issue relating to COVID-19 vaccines in the workplace—can get thorny very quickly. With that in mind, we recommend engaging experienced employment counsel before wading too deep into these issues.

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