

COVID-19 Vaccines: Updated Considerations for Employers

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In our March 23, 2021 client advisory on COVID-19 vaccines^[1] we discussed the Equal Employment Opportunity Commission (EEOC) pandemic guidance for employers relating to vaccination requirements in the workplace. Generally, employers can require employees to receive a COVID-19 vaccine for the employee to be allowed to work onsite. However, employers must provide exemptions or accommodations for employees with a disability (under the Americans with Disabilities Act (ADA)) or a sincerely held religious objection (under Title VII of the Civil Rights Act (Title VII)) to the extent that such accommodations do not impose undue hardships on the employer. On May 28, 2021, the EEOC updated and supplemented its earlier guidance to address questions relating to: 1) requiring and encouraging vaccination for employees physically entering the workplace, including through offering incentives to employees who provide proof of vaccination; 2) an employer's accommodation obligations under the ADA and Title VII; and 3) the confidentiality of information relating to employees' vaccination status. Employers should note that the EEOC's jurisdiction is limited to federal equal employment opportunity laws such as the ADA and Title VII and that other federal, state, and local laws and regulations may govern COVID-19 vaccination of employees.

Vaccine Requirements, Encouragement and Incentives

The updated EEOC guidance reiterates that employers can require employees to receive a COVID-19 vaccine as a condition of physically entering the workplace as long as employers comply with their obligations under the ADA and Title VII to consider reasonable accommodations for employees who cannot be vaccinated. For employers who prefer to encourage, rather than require, their employees to get vaccinated, the updated EEOC guidance suggests that employers "provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns."^[2] The updated guidance also includes several links to resources for employers to provide to employees seeking information on how to get vaccinated, including assistance in multiple languages and with transportation to vaccination sites.

The updated guidance clarifies that employers may offer incentives to employees who provide documentation or other confirmation that the employee received a COVID-19 vaccine because requesting proof of vaccination is not a disability-related inquiry covered by the ADA or an unlawful request for genetic information protected by the Genetic Information Nondiscrimination Act (GINA). The updated guidance also indicates that employers may offer incentives to employees who provide proof that the employee's family members have been vaccinated without violating GINA.

Reasonable Accommodations

The updated EEOC guidance provides examples of potential reasonable accommodations that employers may consider to meet their obligations to employees under the ADA and Title VII, including: 1) requiring the employee to wear a mask; 2) requiring the employee to work a staggered shift; 3) making changes in the work environment, such as by improving ventilation systems or limiting contact with other employees and non-employees; 4) permitting telework if feasible; or 5) reassigning the employee to a vacant position in a different workspace. The updated guidance also explains that even employees who are fully vaccinated against COVID-19 may be entitled to reasonable accommodations if the employee has a continuing heightened risk of severe illness from a COVID-19 infection as a result of an underlying

disability (*i.e.*, immunocompromised individuals for whom vaccination may not offer the same level of protection). Accordingly, employers should respond to all requests for accommodation, whether from vaccinated or unvaccinated employees, by engaging in an interactive process to determine if there is a disability-related need for a reasonable accommodation and, if such a need exists, exploring potential reasonable accommodations that may be provided absent undue hardship to the employer.

The updated guidance also addresses employees who choose not to receive a COVID-19 vaccine due to pregnancy. Under Title VII, employers must ensure that an employee who seeks an exemption from the employer's vaccine requirement due to pregnancy is not discriminated against compared to similarly situated employees. Accordingly, a pregnant employee may be entitled to job modifications such as teleworking, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similarly situated in their ability or inability to work.

Proof of Vaccination

As explained previously and above, employers are permitted to request or require proof of vaccination from employees. The updated EEOC guidance clarifies that documentation or other confirmation of COVID-19 vaccination is confidential employee medical information under the ADA. Accordingly, documentation or other confirmation of vaccination status must be kept confidential and stored separately from employees' personnel files.

Conclusion

Given the various legal concerns implicated by COVID-19 vaccinations in the workplace, including offering incentives, requests for reasonable accommodations under the ADA and Title VII, documentation relating to vaccination status, and the need to evaluate federal, state and local laws relating to employee vaccination, employers are encouraged to consult counsel to assist in evaluating the implications of vaccination policies for their individual workplace.

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[1] Available here: <https://www.clm.com/covid-19-vaccines-considerations-for-employers/>.

[2] The updated EEOC guidance is available here: [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eEOC.gov\)](#).

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