

EMPLOYMENT ALERT: NEW EEOC GUIDANCE ON VACCINES...AND MORE
June 3rd, 2021

On May 28th the EEOC updated its [COVID-19 guidance](#). There is a lot of detail in the guidance, so we have summarized the highlights of the new content.

1. Mandatory Vaccines

For the first time EEOC comes out and says that under the ADA and other federal non-discrimination laws, employers may require vaccines for all employees “entering the workplace” provided some accommodations are made. The reference to “entering the workplace” is clearly intentional. It leaves open the question whether all employees, including those who never step foot in the workplace, could be subject to mandatory vaccinations. Note that EEOC only gives an opinion on the applicability of federal non-discrimination laws, and not on other federal and state laws.

2. Emergency Use Authorization

The biggest issue raised in lawsuits challenging mandatory employer vaccines is the fact that FDA has only given emergency use authorization (“EUA”). EEOC understandably passes on the question whether EUA prohibits mandatory vaccination policies by noting it’s “beyond the EEOC’s jurisdiction.”

3. Reasonable Accommodations

When considering what are reasonable accommodations for unvaccinated employees, EEOC indicates that a requirement that an unvaccinated employee wears a face mask at work could be a reasonable accommodation. This may help ease the fears of the employers who worry that such a requirement might single the employee out and inadvertently disclose the fact that the employee may be disabled.

Also, it’s noteworthy that periodic COVID tests of an unvaccinated employee are listed as a possible accommodation.

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4. Don't Forget Pregnant Employees

EEOC reminds employers about considering “adjustments” for pregnant employees if the employer makes exceptions for other employees (i.e. for religious or medical reasons). In other words, remember to reasonably accommodate pregnant employees as well.

5. The Confidentiality of Vaccine Information

We've been advising clients that vaccine information is confidential. EEOC has now come out and said both documentation “or other confirmation” of COVID-19 vaccinations is confidential medical information under ADA. “Other confirmation” is a broad term, so employers should also treat oral disclosures in a confidential manner.

6. Best Practices

EEOC notes several “best practices.” We take this to be advice to employers, as compared to requirements. They include:

- (a) In a vaccine policy explain that you will consider reasonable accommodations based on disability and religion.
- (b) Train your leaders/supervisors how to handle accommodation requests for vaccine exemptions.

7. Incentives

If an employer offers an incentive for voluntary vaccinations, and the vaccinations are administered by the employer or an agent, any financial incentive must not be too large. In EEOC parlance “not so substantial as to be coercive.”

Therefore, the simplest course is to incentive employee vaccines, but not provide them as the employer, and you should not run afoul of incentive requirements. You may reward employees without concern for giving you proof of vaccination from a third-party in the community.