

Insights: Alerts

# EEOC Updates Guidance on Vaccine Related Topics

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*Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Resource Center](#) and/or your email for updates.*

The U.S. Equal Employment Opportunity Commission (EEOC) recently updated its available [guidance](#) on COVID-19 and the pandemic's interaction with the Americans with Disabilities Act ("ADA") and other equal employment statutes. Although the update provides some much needed clarity to certain vaccination issues facing employers as they return their employees to the work place, it also created new ambiguities in other areas and/or finalized guidance that appears to conflict with earlier available guidance. Specifically, the EEOC's updates provide new information for employers regarding whether an employee's vaccination status is confidential medical information (it is); whether employers may mandate vaccines (with some exceptions, they can); and, whether it is okay for employers to offer vaccination incentives to employees (within certain parameters, it is allowed).

## **Vaccination Status**

Prior to the May 28, 2021 updates, the EEOC did not directly address whether an employee's vaccination status was confidential medical information under the ADA. It had, however, stated that the act of getting vaccinated was not a medical examination and that an employer asking whether an employee had been vaccinated (without follow-up questions) was not a disability-related inquiry. The combination of this guidance implied that the EEOC may not consider an employee's vaccination status to be confidential medical information under the ADA. However, with its new round of guidance, the EEOC changed course. For the first time, the EEOC explicitly stated that vaccination status is, in fact, considered "confidential medical information" under the ADA.

According to the EEOC, an employer's inquiry into whether its employees have obtained a COVID-19 vaccine is still not considered a "disability-related inquiry" under the ADA, because the employer is not asking a question that is likely to disclose the existence of a disability since there are many reasons an employee may not have confirmation of receiving a vaccination besides having a disability. Therefore, the ADA's rules regarding disability-related inquiries do not apply to such requests for information.

That said, the EEOC's new guidance that employers should treat employee vaccine status as "confidential medical information" will likely raise questions for many employers concerning whether they can institute a

voluntary process by which employees provide their vaccination proof in order to stop wearing a mask (in accordance with CDC guidance from mid-May). Such a policy would lead to the employees' vaccination status of "fully vaccinated" being apparent based on the employee not wearing a mask. However, it would not necessarily result in the opposite, as fully vaccinated employees would still have the option of wearing a mask if they preferred to do so, which would lump certain fully vaccinated individuals into the same group/policy application as those who were not vaccinated/not fully vaccinated. Notably, the EEOC press release was clear that this last round of updated guidance did not include a direct response to the CDC's changed guidance from May 13, 2021. Employers should continue monitoring EEOC and CDC guidance regarding mask usages and employer policies going forward to ensure compliance with evolving guidelines.

### **Mandatory Vaccine Policies and Reasonable Accommodations**

The EEOC continues to advise employers that they may mandate that employees be vaccinated for COVID-19, subject to engaging in the interactive process to determine whether reasonable accommodations might exist for employees with either a disability/disabilities or a sincerely held religious belief that preclude them from being vaccinated. Employers will want to engage in an individualized assessment of the risks associated with an employee's request for a reasonable accommodation (including any direct threat posed by the employee's inability to be vaccinated).

The updated guidance also provides suggestions for employers of potential reasonable accommodations to consider in dealing with disabled employees or those with sincerely held religious beliefs, including: wearing protective masks; social distancing; working modified shifts; mandated periodic COVID testing; telework; and/or reassignment. The updated EEOC guidance also warns that fully-vaccinated employees may still require certain reasonable accommodations. One such situation could occur where an employee has an underlying medical condition that leaves them immunocompromised. The updated guidance requires employers to engage in the interactive process with such employees as they normally would do when an accommodation is requested, which should "typically include[] seeking information from the employee's healthcare provider with the employee's consent explaining why an accommodation is needed."

### **Vaccine Incentives**

Additionally, the EEOC's updated guidance is explicit that employers are allowed to offer incentives to encourage employees to obtain a COVID-19 vaccination. However, the EEOC requires that any incentives offered by an employer not be "so substantial as to be coercive." Importantly, employers also "may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated" without running afoul of the Genetic Information Nondiscrimination Act (GINA) or the ADA.

### **Pre-screening Questions**

Past guidance issued by the EEOC raised questions about whether the screening questions used in

administering COVID-19 vaccinations were disability-related inquiries under the ADA if/when the employer (or a healthcare provider contracted by the employer) was administering the vaccine directly. The updated guidance provides some clarity in this regard, confirming that because the pre-vaccination screening questions are likely to elicit information about a disability, if the vaccination by the employer is **mandatory**, then the ADA requires that the questions must be “job related and consistent with business necessity.” However, if the vaccination provided by the employer is completely **voluntary** – the employee has a choice about whether to receive the vaccine from the employer – then the employer need not show that such questions are job-related and consistent with business necessity.

### **Conclusion**

As with all things COVID-19 related, employers should carefully consider their COVID-19 policies to ensure compliance with available best guidance, as well as policies that work for their workforce and are most likely to lead to a safe workplace for employees. We will continue to monitor the situation and update as new information becomes available. Employers with additional questions should reach out to the team at Kilpatrick Townsend or their employment law counsel with specific questions.

## **Related People**

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