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EEOC Issues Additional Guidance on COVID-19 Vaccines

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On May 28, the EEOC issued updated and expanded guidance for employers, addressing many unanswered questions regarding COVID-19 vaccinations. The updates supplement prior EEOC guidance and focus on four topics: (1) mandatory vaccination policies; (2) accommodations; (3) information about employee vaccination status; and (4) vaccine incentives. Below, we highlight the key guidance on each topic.

1. **Mandatory Vaccination Policies**

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

The EEOC further cautions that if an employer requires employees to receive a vaccination ***administered by the employer or its agent***, the ADA's restrictions on making disability-related inquiries apply to the required pre-vaccination screening questions. Thus, such employers must demonstrate that the screening questions are "job related and consistent with business necessity." On the other hand, employers who offer to vaccinate employees on a voluntary basis need not meet this standard.

2. **Accommodations**

The updated guidance describes several options that employers can explore to meet their accommodations obligations under Title VII and the ADA, including: providing PPE, ensuring the employee is able to working at a social distance, offering a modified or staggered shift, subjecting the employee to periodic COVID-19 tests, permitting teleworking, or exploring reassignment.

The EEOC advises that even fully-vaccinated employees may be entitled to reasonable accommodations if they have a continuing concern that they face a heightened risk of severe illness from COVID-19 (*e.g.*, immunocompromised employees). Employers who receive an accommodation request—whether from a fully-vaccinated or unvaccinated employee—must engage in an interactive dialogue with the employee to determine what accommodation, if any, may be available and appropriate.

The guidance also explains 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 such an exemption, employers must ensure that the employee is not being discriminated against relative to similarly situated employees.

3. **Information About Employee Vaccination Status**

The EEOC's guidance clarifies that information about an employee's COVID-19 vaccination status is considered confidential medical information under the ADA. Accordingly, while employers are permitted to request or require confirmation of vaccination from employees, they must keep documentation or other confirmation confidential and separate from an employee's personnel file.

4. **Vaccination Incentives**

Finally, in response concerns about the extent to which employers can encourage employees to receive a COVID-19 vaccine, the EEOC guidance clarifies that employers can promote vaccination in several ways. As an initial matter, employers can encourage employees and their families to get vaccinated by educating them about the vaccine and its benefits, and by addressing common questions and concerns.

Employers may also offer incentives to employees to voluntarily confirm their vaccination status or to receive a vaccination administered by the employer or its agent. However, incentives (which include both rewards *and* penalties) offered in connection to a vaccination administered by the employer or its agent must not be so substantial as to be "coercive." 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.

The guidance also confirms that 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 inventive 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.

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Our team is closely monitoring for additional EEOC guidance on the COVID-19 vaccine and will continue to provide updates as they become available.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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