

COVID-19: EEOC ISSUES LONG-AWAITED GUIDANCE ALLOWING EMPLOYERS TO PROVIDE EMPLOYEES WITH INCENTIVES FOR COVID-19 VACCINATIONS

Date: 3 June 2021

U.S. Labor, Employment, and Workplace Safety Alert

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On 28 May 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Questions and Answers titled, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”](#) (Guidance).¹ The Guidance states that employers may offer incentives (in some instances, substantial incentives) to employees who voluntarily demonstrate that they received a COVID-19 vaccination.

Employers had been waiting in limbo to learn whether such incentives were allowed. In fact, in February 2021, the U.S. Chamber of Commerce and other trade associations urged the EEOC to provide clarification on the extent to which employers may offer their employees vaccination incentives. Thus, this Guidance should come as welcome news.

EEOC REAFFIRMS THAT MANDATORY VACCINATIONS ARE PERMITTED, SUBJECT TO “REASONABLE ACCOMMODATIONS” AND “DIRECT THREATS”

Before discussing incentives, the EEOC stated outright what was implicit in its previous guidance: that employers generally may require all employees entering the workplace to be vaccinated for COVID-19, except in two situations.

First, employers must make “reasonable accommodations” for employees with disabilities or sincerely held religious beliefs, unless doing so would create an “undue hardship on the employer’s business.” The EEOC explained that reasonable accommodations for unvaccinated employees might include: wearing a face mask, social distancing, working a modified shift, getting periodic tests for COVID-19, teleworking, or accepting a reassignment. The Guidance also reminded employers that (1) it is unlawful under the Americans With Disabilities Act (ADA) for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation; and (2) even vaccinated employees may request reasonable accommodations, e.g., immunocompromised individuals may require accommodations because their conditions may prevent the vaccine from offering the full measure of protection.

Second, an employer may require all employees to meet a safety-related standard requiring COVID-19 vaccination, unless an employee cannot meet that standard and does not pose a “direct threat” to the business. This means that if a particular employee cannot meet such a safety-related standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose

a “direct threat” to the health or safety of the employee or others in the workplace. Determining whether an employee is a “direct threat” is a fact-intensive analysis that was discussed in an [earlier alert](#).²

SIZE OF THE INCENTIVE DEPENDS IN PART ON WHO ADMINISTERS THE VACCINATION

The Guidance generally permits employers to offer incentives to employees who receive a vaccination. However, the scope of what incentives are permissible depends on whether the employees received a vaccination on their own or whether they received a vaccination administered by the employer or its agent.

There are no apparent limits on the size of the vaccination incentive employers may offer to employees who use third-party providers unaffiliated with the employer to obtain their vaccine (i.e., an employee's personal physician or pharmacy, or a state-run vaccination center). Such incentives, referred to as “documentation” incentives, would be provided upon the employees providing documentation that they received a vaccine in the community. The EEOC explained that, “requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA.”

However, if the incentive, “which includes both rewards and penalties,” is offered to employees receiving a vaccination administered by the employer or its agent, the incentive must not be “so substantial as to be coercive.” The Guidance does not clarify which incentives may rise to the level of “substantial” or “coercive.” Nevertheless, the EEOC's January 2021 proposed rules for employer wellness programs are at least somewhat instructive—even though they were [later withdrawn](#).³ The January 2021 proposed rules had stated that employers could offer only “de minimis” incentives (e.g., a water bottle or gift card of modest value) for employees participating in a wellness program in order to comply with the ADA and Genetic Information Nondiscrimination Act (GINA). Although those proposed rules were withdrawn on procedural grounds (the rules had not been finalized by the time of President Biden's inauguration), the rationale for offering only de minimis incentives seems to be in line with the EEOC's current concern that a large incentive may be tantamount to “coercion.” While an argument can be made that the threshold at which an incentive becomes “coercive” is significantly higher than a “de minimis” amount, at the very least, an employer offering a de minimis incentive should be safe under the EEOC's standard.

The reason that the EEOC differentiates between “documentation” incentives and employer-administered vaccination incentives is to ensure that employees are not pressured into disclosing their medical information. As noted above, the EEOC has indicated that asking employees to provide documentation that they received a vaccination in the community is not a “disability-related inquiry covered by the ADA.” However, when an employer (or its third-party provider) offers vaccines, the pre-vaccination screening questions elicit medical information, and thus “a very large incentive could make employees feel pressured to disclose protected medical information.”

INCENTIVES FOR EMPLOYEES' FAMILY MEMBERS

The Guidance also permits employers to offer incentives to their employees in exchange for providing documentation that *their family members* received a vaccination from an unaffiliated provider. GINA is not implicated by such incentives because the fact that someone received a vaccination does not constitute either a “family medical history” or a form of genetic information under GINA.

However, such incentives may only be offered as part of the “documentation” option. Employers may not offer any incentives in exchange for employees' family members getting vaccinated *by the employer or its agent*. Incentives for employer-administered vaccinations would subject the family member to screening questions, and the information disclosed thereby would enable the employer to possess the employee's family medical history, which is prohibited under GINA.

Employers may still offer vaccinations to employees' family members *without incentives*, as long as certain steps are taken to comply with GINA. For example, employers cannot require that family members get vaccinated; the screening information must be kept confidential and used only for the purpose of providing the vaccination; and the family member must provide prior written authorization before being asked any pre-screening medical questions.

EMPLOYERS MUST KEEP VACCINATION DOCUMENTS CONFIDENTIAL

The EEOC's Guidance reminds employers that an employee's documentation of COVID-19 vaccination is considered “medical information” under the ADA (even though documentation showing that an employee received a COVID-19 vaccination in the community is not a “disability-related inquiry” covered by the ADA). Such information must be kept confidential and stored separately from the employee's personnel files.

EMPLOYERS MAY ENCOURAGE VACCINATIONS WITHOUT INCENTIVES

EEOC Guidance reiterated that, short of offering incentives or mandating vaccinations, employers can encourage employees and their family members to receive vaccinations. This encouragement may be done by providing educational information about COVID-19 vaccines, raising awareness about the benefits, and addressing common questions and concerns.

CONCLUSIONS

While the EEOC's new guidance does not answer all vaccine-related questions, it does clarify that employers may offer at least some incentives to employees who receive COVID-19 vaccinations. Employers who wish to offer “substantial incentives” to their employees should opt for the “documentation” incentive option, since employers that administer the vaccine themselves (or through their agent) will be able to offer only “non-coercive” incentives. Finally, while helpful, it is important to note that the EEOC's Guidance constitutes only one federal agency's interpretation; other agencies, and state laws and regulations, may impose additional or different requirements regarding vaccination incentives.

FOOTNOTES

¹ The EEOC's original [Guidance](#) was released on 20 December 2020, and discussed in an earlier alert: [COVID-19: Mandatory Vaccinations: New EEOC Publication Provides Timely Guidance for Employers](#) (23 December 2020).

The EEOC's current Guidance was prepared prior to the Center for Disease Control and Prevention's (CDC) issuing its guidance on 13 May 2021, which recommended the loosening of public mask wearing and social distancing guidelines for fully vaccinated individuals. See [COVID-19: Returning to a Mask Free Workforce? Not](#)

[Quite Yet](#) (18 May 2021). For now, the EEOC says only that it is in the process of “considering the impact of this CDC guidance” on the EEOC’s own guidance.

² [COVID-19: Mandatory Vaccinations New EEOC Publication Provides Timely Guidance for Employers](#) (23 December 2020).

³ Our discussion of the January 2021 proposed rules, along with their subsequent withdrawal, is discussed [here](#) (17 February 2021).

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