

EEOC Updates Its Guidance Concerning COVID-19 Vaccine Policies in the Workplace

June 1, 2021

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its technical assistance guidance, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, concerning COVID-19 vaccination in the employment context. Below is a summary of the updated guidance.

General

- Under federal EEO laws, employers may require all employees entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation, disparate impact, and disparate treatment considerations.
- If an employer or its agent offers voluntary vaccination to employees, the employer must comply with its obligations under federal employment nondiscrimination laws.
- Employers can encourage employees and their families to get vaccinated without violating EEO laws, specifically by providing information to raise awareness about the benefits of vaccinations and addressing common questions and concerns (as indicated below).

Reasonable Accommodations Due to Disability

- An employer may impose a qualification standard, such as requiring COVID-19 vaccination, if it is job-related and consistent with business necessity. If an employee cannot meet the standard (in this context, being unvaccinated), the employer may not require compliance unless the employer can demonstrate that the unvaccinated individual would pose a direct threat to the workplace. The employer must make an individualized assessment, considering many factors, in making this determination.
- If the employer determines that the unvaccinated employee would pose a "direct threat" in the workplace, the employer must assess whether there is a reasonable accommodation which would reduce or eliminate the threat.
- As a best practice, employers should notify employees that requests for reasonable accommodation for a disability will be considered on an individualized basis when implementing a COVID-19 vaccination policy requiring confirmation of vaccination.
- An employee who does not get a COVID-19 vaccination because of a disability must let the employer know that he or she needs an exemption from the vaccine requirement or needs an accommodation at work, but the employee does not need to specifically refer to the ADA or use the phrase "reasonable accommodation." Employers should train managers and supervisors responsible for implementing the vaccination policy how to recognize a request for accommodation and provide them with information about how to handle accommodation requests.
- Upon receiving a request for reasonable accommodation because of a disability, employers should engage in a flexible, interactive process to gather supporting medical documentation about the employee's disability and identify workplace accommodation options that do not impose an undue hardship on the employer. Employers should consider all options before denying a request for accommodation.

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- If a fully vaccinated employee requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, the employer should process the request in accordance with applicable ADA standards, including engaging in an interactive process.

Disability-Related Inquiries and Medical Examinations

- If an employer requires its employees to get COVID-19 vaccination from the employer or its agent, the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employee apply to the pre-vaccination screening questions. Thus, they must be job-related and consistent with business necessity and in turn the employer must show that employees who do not answer the questions and cannot get vaccinated will pose a direct threat in the workplace. However, if an employer offers to vaccinate its employee on a voluntary basis, the employer can ask disability-related screening questions without having to satisfy that standard.
- The act of administering the vaccine by the employer or its agent is not a "medical examination" under the ADA.
- It is not a "disability-related inquiry" for an employer to inquire about or request confirmation of vaccination from a third party.
- An employee's COVID-19 vaccination information is medical information that must be kept confidential and separate from the employee's personnel files under the American with Disabilities Act (ADA).

Reasonable Accommodations Due to Religious Beliefs

- While an employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice or observance, employers can request additional supporting information if the employer has an objective factual basis to question the religious nature or the sincerity of a particular belief.
- An employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment.
- "Undue hardship" under Title VII is easier to demonstrate than the ADA's undue hardship standards, and requires only having more than minimal cost or burden on the employer. In determining whether accommodation would impose an undue hardship on the employer, employers should take into account several considerations, such as the portion of the workforce being vaccinated and the extent of employee contact with others.
- Ultimately, if accommodation cannot be provided, employers should determine if the employee has any other rights under the EEO laws or other federal, state and local regulations before taking adverse employment action against the unvaccinated employee.
- As a best practice, employers implementing a COVID-19 vaccination policy and requiring vaccination confirmation should notify employees that requests for reasonable accommodation for a religious beliefs, practice or observance will be considered on an individualized basis.

Considerations for Pregnant Employees

- If an employee seeks to be exempted from a vaccine requirement due to pregnancy, the employer must ensure that a pregnant employee is not being discriminated against compared to other employees similar in their ability or inability to work. If an employer provided modifications for employees who are similar in their ability or inability to

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work as the pregnant employee, the pregnant employee may be entitled to such modifications, including telework, schedule changes, assignment changes and leave.

- Employers should train supervisors, managers and human resources staff to handle exemption requests of pregnant employees to avoid discrimination claims.

Genetic Information Nondiscrimination Act and Vaccines

- Title II of GINA is not implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent, unless the pre-vaccination medical screening questions ask about the employee's genetic information (e.g. family medical history).
- Title II of GINA is also not implicated if an employer requires employees to provide confirmation of COVID-19 vaccination from a health care provider.

Vaccine Incentives

- Under the ADA and GINA, an employer may offer an incentive to employees to voluntarily provide confirmation that they or their family members received COVID-19 vaccines from a health care provider.
- Under the ADA, an employer may offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent if the incentive is not so substantial to be coercive.
- Under GINA, an employer may offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent if the employer does not acquire genetic information while administering the vaccines.
- Under GINA, an employer may **not** offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent, but may offer an employee's family member an opportunity to be vaccinated without offering the employee an incentive as long as the employer takes certain steps to comply with GINA.

If you have any questions about the updated EEOC technical assistance guidance or how the changes impact your workplace, please contact the authors of this alert or your Miller Canfield attorney.

This information is based on the facts and guidance available at the time of publication and may change.