

EEOC Updates Its Guidance on Vaccine Mandates, Incentives, Confidentiality

By Katharine C. Weber, Jenifer M. Bologna, Patricia Anderson Pryor, Andrew F. Maunz &

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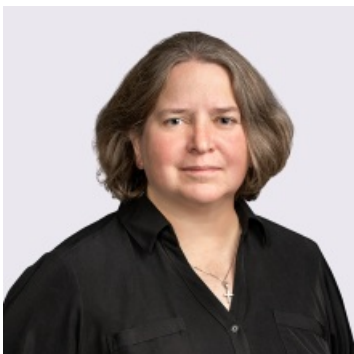
Katharine C. Weber

Principal
(513) 898-0050
katharine.weber@jacksonlewis.com



Jenifer M. Bologna

Principal
(914) 872-6869
Jenifer.Bologna@jacksonlewis.com



Patricia Anderson Pryor

Office Managing Principal

In its latest update to informal guidance on COVID-19 vaccination issues, the Equal Employment Opportunity Commission (EEOC) addressed vaccination mandates, incentives, and confidentiality, among other topics.

The guidance on the EEOC's website, updated May 28, 2021, continues to leave many employers with questions. This article summarizes some highlights and observations based on the latest information.

Mandating the Vaccine

The EEOC started by reminding employers, "It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA [Emergency Use Authorization] or the FDA approach Indeed, other federal, state, and local laws and regulations govern COVID-19 vaccination of employees." The EEOC clarified that it opines only on the legal implications under the federal discrimination laws and not on the overall legality of such mandates.

According to the EEOC, the federal equal employment opportunity (EEO) laws do not prevent an employer from requiring all employees *physically entering the workplace* to be vaccinated for COVID-19. However, such a requirement is subject to the reasonable accommodation provisions of Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) and other EEO considerations, including concern with disparate impact. The EEOC is silent on whether employers can mandate the vaccine for remote workers. It is critical that employers consider fully the limitations the EEOC references.

The EEOC stated that employers can require COVID-19 vaccination of all employees entering the workplace, so long as certain requirements are met. First, the qualification standard must be job-related and consistent with business necessity. Second, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require that employee's compliance, unless it can demonstrate the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. This remains a controversial position and some employers may argue that a lower burden of proof applies.

Direct Threat

The EEOC reminded employers that to determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make *an individualized assessment* of the employee's present ability to safely perform the essential functions of the job.

According to the guidance:

The determination that a particular employee poses a direct threat should be



Andrew F. Maunz

Of Counsel
412-338-5144
Andrew.Maunz@jacksonlewis.com

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based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

The EEOC stated that, even if the assessment demonstrates an employee with a disability who is not vaccinated would pose a direct threat to the employee or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask or work a staggered shift or the employer can make changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permit telework if feasible, or reassign the employee to a vacant position in a different workspace.

The EEOC recommended that, as a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees it will consider requests for reasonable accommodation based on disability on an individualized basis.

Reasonable Accommodations

The EEOC reminded employers that Title VII and the ADA may require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.

In addition, employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

The EEOC provided examples of reasonable accommodations. These include an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or, finally, accept a reassignment.

Disparate Impact

On disparate impact of a vaccine requirement, the EEOC stated:

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex,

or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

Incentives

The EEOC clarified that incentives may be provided to encourage vaccination without running afoul of the EEOC's laws, as long as the incentive is not tied to the employee receiving the vaccine from the employer or someone with whom the employer contracted. Simply providing an incentive for employees to voluntarily provide proof of vaccination they received from a third party (*e.g.*, a pharmacy or health clinic) is not a disability-related inquiry and, therefore, the ADA's limits on incentives are not implicated.

However, if the incentive is tied to a vaccine provided by the employer or its agent, then any incentive (which includes both rewards and penalties) must not be so substantial as to be coercive.

An employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent.

Finally, employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated.

Confidentiality

On confidentiality of an employee's vaccination information, the EEOC noted:

ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Unfortunately, the EEOC offered no opinion as to what, if anything, employers could do with the information once collected, in light of its suggestion that confidentiality applied. Nevertheless, this too is a controversial position. The EEOC's view on confidentiality of medical information sometimes is broader than that included in the ADA itself.

If you have any questions or would like additional guidance, please contact a Jackson Lewis attorney.

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