



EEOC Provides Guidance on “Hot Vax Summer” Incentives

As COVID-19 vaccines have become increasingly available, many employers are evaluating how they can best encourage their employees to receive their vaccinations and contemplating if they can require vaccines for their employees.

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) announced¹ updates to its “What You Should Know About COVID-19” Frequently Asked Questions guidance to address certain compliance issues under the Americans With Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), privacy requirements under the Health Insurance Portability and Accountability Act (HIPAA), and other employment laws. This latest guidance will help employers refine their approaches, particularly as the Centers for Disease Control and Prevention (CDC) guidance and state restrictions move closer to pre-pandemic normalcy.

Background

The EEOC is responsible for enforcing employer requirements with respect to the ADA, GINA, and Title VII of the Civil Rights Act of 1964. The ADA, in part, prohibits employers from requiring medical examinations or gathering medical information in a compulsory or otherwise involuntary manner from prospective or current employees. GINA bars employers from using the genetic information of employees in a discriminatory manner for purposes of health insurance and employment. Title VII of the Civil Rights Act prohibits discrimination by covered employers on the basis of race, color, religion, sex, and national origin.

Highlights

Mandating Vaccines

Federal laws do not prevent an employer from requiring all employees to be vaccinated for COVID-19 before entering a job site or physically entering the workplace. However, employers that do require their employees to be vaccinated will need to adhere to the reasonable accommodation provisions of Title VII and the ADA, and other EEOC considerations (e.g., disabilities, pregnancies, religious beliefs). An employer may be able to require employees to receive COVID-19 vaccinations for safety-related standards, but it should be mindful that—if an individual is unable to receive the vaccine due to a disability—the employer *cannot* require such an employee to be vaccinated unless it has determined and can demonstrate that “the individual would pose a ‘direct threat’ to the health or safety of the employee or others in the workplace.” The EEOC guidance provides that a determination of whether an unvaccinated employee poses a “direct threat” is based on four factors:

- The duration of the risk,
- The nature and severity of the potential harm,

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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- The likelihood that the potential harm will occur, and
- The imminence of the potential harm.

This assessment is to be based on a “reasonable medical judgment that relies on the most current medical knowledge about COVID-19.”

Employer Vaccination Programs

Mandatory Vaccination Programs

If the employer is administering mandatory COVID-19 vaccines to its employees, the ADA’s restrictions on medical examinations and disability-related inquiries will apply. Specifically, the screening questions that are asked prior to the administration of the vaccine are—if the vaccine is administered by the employer or through its agent (i.e., an individual or entity having the authority to act on behalf of, or at the direction of, the employer)—considered to be disability-related inquiries. It is noteworthy, however, that the EEOC does not consider the act of administering the vaccine itself to be a “medical examination” under the ADA because that specific act does not involve seeking information about the employee’s physical or mental health.

As the screening questions prior to the administration of the COVID-19 are likely to be, at least in part, disability-related, the ADA requires that such questions be “job related and consistent with business necessity” when an employer (or its agent) administers the vaccine. The EEOC guidance reiterates that an employee who does not answer the pre-vaccine screening questions (and therefore cannot receive the vaccine) would need to “pose a direct threat to the employee’s own health or safety or to the health and safety of others in the workplace” based on objective evidence and medical judgement in order to make any job-related determination. This determination would be subject to the same four-factor threat analysis described above.

Voluntary Vaccination Programs

However, if an employer (or its agent) provides vaccinations through a voluntary program (e.g., onsite for the convenience of its employees), but the employees are permitted to receive their vaccinations elsewhere if preferred, the pre-vaccination questions do not have to be shown as strictly “job-related or consistent with business necessity.” However, the EEOC clarifies that an employee’s decision to answer these questions must also be voluntary. Employers are permitted to request documentation or proof of an employee having received the COVID-19 vaccination from a third party (e.g., a pharmacy or clinic); this is not a “disability-related inquiry” under the ADA. However, an employer is required to treat an employee’s documentation or proof of vaccination as confidential health information.

Incentivizing Vaccines

Some employers have considered encouraging their employees, and their families, to receive COVID-19 vaccinations, rather than make them mandatory, through incentive programs (such as a contribution to a Health Savings Account [HSA], cash, or gift cards). In the EEOC’s guidance, employers are permitted to offer such incentives for COVID-19 vaccines, but the rules differ with respect to whether the employee (or her/his family member) received the vaccine independently (e.g., at a healthcare provider) or through an employer-provided initiative.

The May 28 guidance clarifies that employers can offer incentives to employees who voluntarily offer documentation of a COVID-19 vaccine obtained through an outside party and that such

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requests do not constitute a “disability-related inquiry” under the ADA. Furthermore, the EEOC guidance clarifies that an employer does not request genetic information about employees or family members when requesting proof of vaccination. Therefore, an employer is permitted to offer incentives to employees who voluntarily provide documentation to show that they or their family members were vaccinated by an outside party (e.g., a pharmacy), as such documentation is not a request for genetic information under GINA. However, the EEOC’s guidance provides that it would be impermissible for an employer to offer incentives to an employee in return for an employee’s family member to receive a COVID-19 vaccine from the employer (or the employer’s agent) since that party would need to ask pre-vaccination medical screening questions, which include medical questions about the family member in order to administer the vaccine. An employer or its agent posing these medical questions would lead to the employer’s receipt of genetic information in the form of family medical history of the employee. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Employers may still offer the employee’s family member the opportunity to be vaccinated by the employer or its agent if they take certain steps to ensure GINA compliance.

The EEOC’s new guidance confirms that employers are allowed to offer incentives to employees who receive the COVID-19 vaccine; however, if the incentive is for a vaccine administered by the employer (or through a third-party provided on the employer’s behalf), the incentive cannot be “so substantial as to be coercive.” This limit, however, does not apply to incentives offered to employees to voluntarily provide substantiating documentation of vaccines they received independently (e.g., through a pharmacy or health care provider). According to the EEOC guidance, large incentives could make employees feel pressured to disclose protected medical information through the pre-vaccination disability-related screening questions.

Privacy

As stated earlier, the EEOC guidance reiterates that, under the ADA, employee medical data needs to be kept confidential and stored separately from the employee’s general personnel files. If, however, the COVID-19 vaccine is administered by a health care provider covered by HIPAA (as a covered entity), that health care provider would be prohibited from disclosing that the employee (or the employee’s family member) received the COVID-19 vaccine unless the individual provides a HIPAA authorization to disclose that health information. It is noteworthy that HIPAA would not permit a health care provider or health plan to make the administration of a COVID-19 vaccine contingent on that individual providing a HIPAA authorization form; such an authorization must be voluntary.

The EEOC’s May 28 guidance updates provide welcome clarification concerning employers’ ongoing attempts to bring their employees back into the office, including what measures can be taken to obtain proof of COVID-19 vaccination and how accommodation requests should be addressed.

We will continue to monitor and provide updates as further guidance is provided.