



## National Compliance Update

USI EMPLOYEE BENEFITS

June 4, 2021

# EEOC Issues Guidance on Employer COVID-19 Vaccine Policies

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) posted updated technical assistance guidance related to employer policies on COVID-19 vaccinations, and the impact of EEO laws including the Americans with Disabilities Act (“ADA”), the Genetic Information Nondiscrimination Act (“GINA”), and Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (“Title VII”).<sup>1</sup>

The guidance is contained in Section K of the EEOC’s “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” in the form of detailed questions and answers (K.1 to K.21).

This article provides a high-level summary of the EEOC guidance, with references to the relevant numbered questions for more information on a particular point. The guidance is detailed and addresses employer practices in responding to and evaluating accommodation requests, which are beyond the scope of this article.

Employers should review this guidance and their policies with employment counsel. Keep in mind this guidance is limited to federal EEO laws. State and local laws, along with collective bargaining and other employment agreements, may impose further restrictions.

### CONFIDENTIALITY OF COVID-19 VACCINATION INFORMATION

The guidance states that under the ADA, an employer is required to “maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination,” regardless of whether an employee’s vaccination is obtained in the community or directly from the employer.

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<sup>1</sup> See USI’s National Compliance Update, “[EEOC COVID-19 Guidance Updated for Vaccines](#)” (December 17, 2020), for a summary of the EEOC’s original technical assistance guidance related to employer policies and COVID-19 vaccinations.

Therefore, if an employer collects or retains documentation of an employee's vaccination, this documentation must be kept confidential and stored separately from the employee's personnel files, like all medical information under the ADA. [K.4]

#### **MANDATORY EMPLOYER VACCINATION PROGRAMS**

Federal EEO laws do not prohibit an employer from requiring employees to be vaccinated before physically entering the workplace, as long as the employer complies with the reasonable accommodation provisions of the ADA and Title VII [K.1, K.2] for an employee who does not wish to be vaccinated due to:

- Disability, [K.5, K.6]
- Pregnancy, [K.13] or
- A sincerely held religious belief. [K.6, K.12]

The guidance provides examples of reasonable accommodations, including:

- wearing a face mask,
- working at a social distance from coworkers or non-employees,
- working a modified shift,
- getting periodic tests for COVID-19, or
- given the opportunity to telework. [K.2]

As with any employment policy, an employer should be attentive to whether its vaccination requirement has a disparate negative impact on employees covered by a protected category, such as situations where accessibility barriers make it difficult to obtain a vaccination. [K.1]

The guidance also clarifies:

- If an employer **requires employees to provide documentation of their vaccination from an unrelated third party** in the community (such as a pharmacy, personal health care provider, or public clinic) this generally will not raise issues under EEO laws, assuming a reasonable accommodation exists for employees who cannot be vaccinated due to disability, pregnancy, or a religious objection. [K.9, K.15]
  - For purposes of the ADA, merely requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry. GINA is not implicated, provided the pre-vaccination medical screening questions do not include questions about the employee's genetic information (including family medical history). As described later, the current recommended screening questions do not ask about genetic information.
- If an employer **requires employees to get a vaccination from the employer or its agent**<sup>2</sup> (for example, from an onsite nurse or a workplace clinic), the pre-vaccination medical screening questions are likely to elicit information about an employee's disability.
  - This raises ADA issues, as an employer can only require an employee to answer such questions if they are "job-related and consistent with business necessity." To meet this standard, an employer would have to assert that an employee's refusal to answer (and therefore failure to receive the vaccine) would pose a direct threat to the health and safety of the employee or others in the workplace. Therefore, when an employer

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<sup>2</sup> An employer's agent is an individual or entity having the authority to act on behalf of, or at the direction of, the employer. [K.7]

- requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA. The guidance provides further information on evaluating these situations. [K.5, K.7]
- However, GINA would not be implicated as long as the pre-vaccination medical screening questions did not include questions about the employee's genetic information, such as asking about the employee's family medical history. The pre-vaccination medical screening questions recommended by the Centers for Disease Control and Prevention ("CDC") as of May 27, 2021,<sup>3</sup> do not ask about family medical history or any other genetic information. [K.14]
  - Employers may not require employees to have their family members vaccinated and must not penalize employees if their family members decide not to get vaccinated. [K.21]

## **VOLUNTARY EMPLOYER VACCINATION PROGRAMS AND INCENTIVES**

### *Voluntary vaccinations provided by the employer.*

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An employer may wish to facilitate the vaccination process by making vaccinations available to employees and/or family members. This means the employer or its agent will have to ask the employee and/or family members to answer pre-vaccination medical screening questions.

Unlike a mandatory program (described above), the guidance makes clear if an employer offers to vaccinate its employees on a voluntary basis (meaning the employees can choose whether to get the COVID-19 vaccine from the employer), the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. Therefore, if the employee is voluntarily answering the CDC-recommended pre-vaccination medical screening questions in this context, this doesn't trigger concerns with the ADA or GINA. [K.8, K.14, K.19]

For an employee's family member, the employer must take extra steps to comply with GINA. For example, the family member must give a voluntary written authorization before answering medical condition questions, and the employer must keep the family member's medical information confidential and inaccessible to any individual who makes employment decisions for employees. [K.21]

An employer who offers voluntary vaccinations also must comply with federal employment nondiscrimination laws. For example, it would not be permissible to exclude certain employees from the opportunity to be vaccinated based on national origin or another protected basis under the EEO laws. [K.10]

### *Employer offering incentives to encourage vaccinations.*

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Under the latest guidance, an employer may offer an incentive (such as cash or paid time off) to employees who voluntarily provide documentation that the employee or family member received a vaccination from an unrelated third party (e.g., pharmacy, health care provider, community health clinic, etc.). The guidance does not limit the level of incentive in this situation. [K.16, K.18]

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<sup>3</sup> The CDC's "Prevaccination Checklist for COVID-19 Vaccines" is found at <https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf>

However, if an employer is offering an incentive in exchange for a vaccine administered by the employer (or its agent), additional compliance issues arise.

- **Incentives for employees cannot be “substantial.”** An employer may offer an incentive to employees who voluntarily receive a vaccination administered by the employer (or its agent), as long as the incentive is not so substantial as to be coercive. A very large incentive could make employees feel pressured to disclose protected medical information to the employer or agent in violation of the ADA, because the employee would be required to answer pre-vaccination disability-related screening questions asked by the employer (or its agent). The guidance does not provide details on what level of an incentive would be considered “coercive.” [K.17] This incentive design would not raise issues under GINA as long as an employer does not acquire genetic information in connection with administering the vaccines to employees. [K.19, K.14]
- **No incentives for family members.** An employer may not offer an incentive to an employee in exchange for a family member receiving a vaccination administered by the employer (or its agent). GINA prohibits an employer from providing an incentive in exchange for genetic information, which includes the family medical history of the employee that would be provided by the family member answering the pre-vaccination medical screening questions. [K.20]

### **EMPLOYER-PROVIDED VACCINE EDUCATION**

Employers can also encourage employees and their family members to be vaccinated by providing information “to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.”

The guidance lists a number of public resources with vaccination information; for example, the federal government’s online [vaccines.gov](#) site and the CDC’s [background information for employers about workplace vaccination programs](#). [K.3]

### **EMPLOYER NEXT STEPS**

- Review this new guidance carefully and consult legal counsel in developing COVID-19 vaccine policies, particularly those that involve vaccination mandates, vaccination incentives, employer-administered vaccines, or employees’ family members.
- Review other applicable federal, state, and local laws.
- Keep up to date on further developments. This updated EEOC guidance was prepared before, and does not specifically address, the [CDC’s new guidance for fully vaccinated individuals](#) issued on May 13, 2021. The EEOC is considering the impact of this CDC guidance and whether to issue any additional updates to its own guidance.

### **RESOURCES**

- Section K, Vaccinations of the EEOC’s “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” is found at: <https://www.eeoc.gov/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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