



COVID-19 Update: EEOC Vaccine Incentive Programs

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 related technical assistance document, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” which can be found [here](#) (“WYSK”). This document was first published on March 19, 2020, and was last updated, as we noted in [this](#) previous WorkSmarts update, on December 16, 2020. Although the recent update was published without consideration of updated guidance from CDC for fully vaccinated individuals issued on May 13, 2020, it still contains valuable guidance for employers with respect to vaccines in the workplace.

Specifically, the updates reiterate and confirm the EEOC’s previous guidance stating that an employer may implement mandatory vaccination requirements if the employer determines that such a requirement is job related and consistent with business necessity, and provided that the employer understands its obligations under the equal employment laws. These obligations require an employer with a mandatory vaccine policy to consider whether employees with disabilities who cannot get the vaccine pose a direct threat in the workplace, and, if so, to then assess whether there is a reasonable accommodation that would allow the employee to perform the essential functions of the position before excluding an individual with a disability from the workplace.

In its most recent update, the EEOC notes that the best practice when implementing a mandatory vaccine policy is to inform all employees that the employer will consider requests for reasonable accommodations based on disability and religious circumstances on an individualized basis. However, in its introduction to the May 28 update, the EEOC was careful to state that its guidance relates only to the analysis of whether mandatory vaccine programs are lawful under the laws it enforces, noting that the vaccines are currently authorized under an emergency authorization from the Food and Drug Administration. This reference suggests that employers should

continue to carefully consider the status of vaccine approval in evaluating whether to implement mandatory vaccination requirements.

The most recent guidance also addresses vaccine incentive programs, stating explicitly in a new section of the WYSK document (section K.16) that employers may lawfully offer incentives to employees to voluntarily obtain the vaccine in the community, and require employees to show confirmation that they received the vaccination. The EEOC notes that incentives for community vaccination are lawful under both the Americans with Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”). If an employer or an employer agent (which may include a health insurance provider) is directly providing the vaccines, then an employer may only provide incentives to employees if they are not so substantial as to be coercive. Further, employers may not provide incentives to family members of employees to obtain the vaccine from the employer under GINA. The EEOC therefore suggests that for employers who incentivize employees to obtain the vaccines in the community, there is no need to undergo the analysis of whether the incentives are so substantial as to be coercive. This guidance is a welcome confirmation from the EEOC. For health care providers and others that may provide the vaccine directly to employees, however, the recent update confirms the need to limit incentive programs. The EEOC did not provide guidance regarding how large an incentive might be considered coercive, and proposed regulations regarding such incentives were recently withdrawn.

The EEOC’s update also confirms that employers must maintain information about employee vaccination status as confidential under the Americans with Disabilities Act (“ADA”). The EEOC explained that this information must be maintained as confidential because it is “medical information.” The need to maintain information as confidential applies regardless of whether employers obtain the information in connection with mandatory vaccination programs, vaccine incentive programs, or for any other reason.

The updated technical assistance document from the EEOC also notes that employers must continue to provide accommodations for employees with disabilities related to COVID-19. For example, employers may receive requests for accommodations from fully vaccinated employees who express concern that they may face an increased risk of severe illness from a COVID-19 infection. Such a

request should be considered by the employer as a request for reasonable accommodations, and be treated consistently with all other accommodation requests.

Key Takeaways

- The EEOC has reiterated its position that employers may implement mandatory COVID-19 vaccination policies consistent with equal employment opportunity laws, provided that in doing so, employers allow for an opportunity for employees to request accommodations in the event of disability-related concerns or sincerely held religious beliefs.
- Employers may lawfully offer incentives to employees to voluntarily obtain the vaccine in the community, and may further require employees to show confirmation that they received the vaccination. Employers must maintain vaccine-status information confidentially under the ADA.

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