

LABOR AND EMPLOYMENT LAW INFORMATION MEMO

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EEOC Issues Revised COVID-19 Guidance

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued revised [guidance](#) regarding COVID-19. The updated guidance, consisting of 21 FAQs, includes information on mandatory vaccination policies, disability and religious accommodations, accommodations for vaccinated employees, and employer-provided vaccination incentives.

Mandatory Vaccinations: In this new guidance, the EEOC explicitly states that federal equal employment opportunity laws (EEO) laws do not prevent employers from requiring employees who are in the physical workplace to be vaccinated for COVID-19, so long as employers take into account employees who cannot be vaccinated for medical or religious reasons. The EEOC states that mandatory vaccination policies cannot be applied in a way that treats employees differently on the basis of race, sex, religion, or any other protected category under federal law. Moreover, employers with mandatory vaccination policies must take care to respond to “disparate impact” claims, which allege that certain individuals or demographic groups face greater barriers to receiving a COVID-19 vaccination than others. For those employers not wishing to impose a mandatory vaccination policy, the EEOC provides a list of resources that employers may provide to their employees to encourage employees to become voluntarily vaccinated.

Importantly, the EEOC also clarifies that its jurisdiction is limited to the federal EEO laws, and that it cannot offer an opinion about the legal implications of the Emergency Use Authorization (EUA) that the vaccines have been granted by the Food and Drug Administration (FDA).

In addition, the EEOC clarifies that information about an employee’s COVID-19 vaccination status is confidential medical information. Accordingly, it must be treated like other medical information and stored separately from an employee’s personnel file.

Disability Accommodations: The guidance compels employers to reasonably accommodate employees who are unable to be vaccinated due to a disability, as defined by the Americans with Disabilities Act (ADA), unless such an accommodation would cause an undue hardship to the employer.

If an employer wishes to exclude from the workplace an employee who is unvaccinated due to a disability, the employer must show that allowing the unvaccinated employee in the workplace would pose a “direct threat” under the ADA. The “direct threat” analysis is a fact-intensive individualized assessment of the employee’s ability to safely perform the essential functions of the job. The determination that a particular employee poses a direct threat should be based on reasonable medical judgment that relies on the most current medical knowledge about COVID-19, such as the rate of community spread, and other CDC guidance. The assessment of direct threat should also take into account of the type of work environment, such as: whether the employee works alone or with others, or works inside or outside; as well as other factors like ventilation, interactions with others, the number of vaccinated employees already in the workplace, whether other employees are wearing masks, and the types of health screenings in place.

However, even if an employer concludes that an unvaccinated employee with a disability poses a “direct threat,” the employer has an obligation to explore whether providing a reasonable accommodation would eliminate the threat. The EEOC provides the following examples of potential reasonable accommodations that may be provided to such employees, including: requiring an unvaccinated employee entering the workplace to 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. The EEOC also notes that employees who do not receive a vaccination due to pregnancy are also entitled to reasonable accommodations if the employer makes modifications or exceptions for other employees.

Religious Accommodations: The EEOC also provides that employers must reasonably accommodate employees who do not receive the vaccination due to a sincerely held religious belief, as mandated by Title VII of the Civil Rights Act. Employees who request a religious accommodation are entitled to an interactive process similar to that of employees with disabilities. However, the standard for “undue hardship” under Title VII is less stringent than under the ADA. In addition, the guidance explains that because the definition of religion is broad, employers should ordinarily assume that an employee’s request for the religious exemption is based on a sincerely held religious belief, unless the employer is aware of facts suggesting otherwise.

Accommodations for Vaccinated Employees: Increasingly, there have been questions regarding vaccinated employees who request accommodations based on a heightened risk of COVID-19 due to a disability. The guidance sets forth that employers must engage in the interactive process with these employees, and that employers may not simply assume that a vaccinated individual does not need an accommodation. As with the usual interactive process, the employer is entitled to medical documentation from the employee certifying the need for the accommodation, which is also subject to the undue hardship analysis.

Vaccination Incentives: The EEOC addresses employer-provided vaccination incentives for the first time in the May 28th guidance, as analyzed under the Genetic Information Discrimination Act (GINA) and the ADA. According to the guidance, employers may offer incentives to employees to get vaccinated from a third-party vaccination provider, and may require incentives for employees to show proof of said vaccination(s). Employers who administer vaccinations directly may also offer incentives to its employees to receive the vaccine, but the incentive may not be so substantial as to be coercive. Finally, employee incentives may not be offered for employees’ family members to be vaccinated from the employer, although employers may offer family members the opportunity to be vaccinated without an accompanying incentive. In such circumstances, employers cannot take adverse actions against employees whose family members choose not to be vaccinated.

It is again important to note that this guidance does not address how the Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination rules apply to a vaccine incentive program. For a more detailed analysis of this issue, please see Bond’s [Employee Benefits Information Memo](#) on this topic.

In addition to its updated guidance for employers, the EEOC also issued a guidance document directly towards employees on May 28, 2021. This document, which can be found [here](#), addresses many of the same points as the employer guidance, and makes clear that employees who do not receive the vaccine due to medical or religious reasons are entitled to reasonable accommodations.

If you have questions regarding the EEOC’s latest guidance, or any other COVID-19 legal requirements, please contact [Rebecca Kimura](#), [Theresa Rusnak](#), any Bond attorney with whom you are regularly in contact.

