



Equal Employment Opportunity Commission (EEOC)

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated its guidance on workplace COVID-19 vaccination issues under the federal EEO laws. The updated guidance is important for employers to consider in light of (a) the recent CDC guidance that vaccinated persons need not mask, socially distance or quarantine in most situations, while these restrictions are still recommended for the unvaccinated, and (b) state (or local) workplace safety requirements that differentiate between vaccinated and unvaccinated employees, such as in Pennsylvania, New Jersey and New York. Employers — and particularly those operating in multiple states — should be mindful of how the updated guidance impacts their efforts to comply with state requirements.

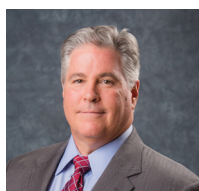
Many employers are now in the process of (i) determining whether to require or incentivize employees to vaccinate, (ii) assessing which employees are vaccinated and which are not, and (iii) evaluating whether to lift masking, social distancing and quarantine requirements for the vaccinated, while continuing them for the unvaccinated. The updated guidance addresses important issues including mandatory vaccination, reasonable accommodations related to vaccines, employer inquiries about vaccination status, confidentiality obligations regarding vaccination information and employer incentive programs for vaccines.

REQUIRING VACCINATIONS AND MAKING ACCOMMODATIONS

The EEOC guidance provides that employers may require employees to be vaccinated as a condition of workplace entry, subject to the obligation to accommodate the refusal or inability to become vaccinated based on disability, pregnancy or sincerely held religious beliefs, practices or observance. The guidance includes examples of potential reasonable accommodations, including masking and distancing, shift adjustments, telework and reassignment.

VACCINATION INQUIRIES

The guidance explains that requesting documentation or other confirmation of vaccination by a third party in the community, such as a physician, pharmacy or vaccination center independently selected by the employee, is not a disability-related inquiry under the Americans with Disabilities Act (ADA). This means that employers can inquire regardless of whether it



Sean Conaboy, MSW, MPA

SOCIAL SERVICES - BEHAVIORAL HEALTHCARE PRACTICE

sconaboy@nsminsuracebrokers.com

Office: (610) 808-9496 | Mobile: (610) 763-6219

nsminsuracebrokers.com



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is job-related and consistent with business necessity. However, if the vaccine is administered by the employer or its agent, the ADA would apply and employers may only make the inquiry if it is job-related and consistent with business necessity.

CONFIDENTIALITY OF MEDICAL INFORMATION

The guidance provides that documentation or other confirmation of COVID-19 vaccination is confidential medical information under the ADA and must be kept confidential and stored separately from the employee's personnel files.

VACCINE INCENTIVES

The guidance makes clear that there are no restrictions on the value of the incentives an employer may offer to employees if they or their family members become vaccinated, so long as the vaccination is from a provider other than the employer or an employer agent. Such independent providers may include an employee's own healthcare provider, such as a personal doctor, pharmacy, health agency or another healthcare provider in the community.

However, if employers offer incentives for vaccines provided by the employer or an employer agent, the incentive must not be "so substantial as to be coercive."

WHAT EMPLOYERS SHOULD DO

While the federal EEO laws do not generally prohibit employers from requiring vaccinations, employers should be mindful of how such a requirement is implemented in light of potential claims of discrimination based upon disparate treatment of protected class members or impact on protected groups.

Employers with workplaces that include both vaccinated and unvaccinated employees will need to consider whether to require all employees to comply with the same COVID-19 safety practices or differentiate between vaccinated and unvaccinated employees. Employers taking the latter approach should develop procedures for determining which employees are fully vaccinated and implementing safety practices that comply with the guidance regarding vaccination inquiries and the confidentiality of vaccination information.



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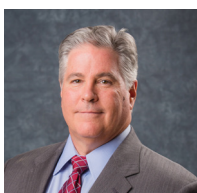


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In addition, employers will be well-served to begin developing a strategy for addressing vaccination-related employee relations issues, which are likely to arise regardless of whether the employer requires vaccination. While some employees will resist returning to work if they will be exposed to unvaccinated co-workers, others will view employer vaccination mandates (or workplace requirements applying only to the unvaccinated) as imposing on their personal rights. Suffice it to say that the manner in which employers address concerns of this nature as well as COVID-19-related workplace health and safety practices may have a profound impact upon employee morale, productivity and loyalty.

While the EEOC guidance is helpful in many respects, when coupled with the CDC's guidance and state/local requirements providing for masking, social distancing and quarantining for the unvaccinated but generally not for the vaccinated, there are myriad operational, legal and employee-relations issues for employers to potentially address, including:

- What impact would requiring vaccination have on employee safety, business operations and morale when compared to providing employee incentives for vaccination, encouraging vaccination or remaining silent on the issue? Is the answer different for only some positions?
- With respect to accommodation:
 - » If vaccination is required, how is an employer to determine whether the basis for an employee's refusal to be vaccinated is only general discomfort with receiving a shot or one that the employer must attempt to accommodate?
 - » What process will the employer use to identify protected requests for accommodation and assess whether and how to accommodate?
 - » How will confidentiality be maintained and retaliation claims avoided?
- In workplaces with both vaccinated and unvaccinated employees:
 - » How will the employer comply with CDC masking, social distancing and quarantine guidance applicable to unvaccinated employees (and similar applicable state/local requirements) without disclosing arguably confidential information about employee vaccination?



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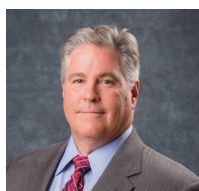
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- » Can or should employees be required to display visual indicators showing whether they are vaccinated?
- » Can or should unvaccinated employees be assigned to specific areas of the workplace?
- Under what circumstances are employee opposition to vaccination or other workplace COVID-related requirements protected?

Lastly, the EEOC's updated guidance, which is authoritative but not binding on the courts, includes the proviso that it was prepared before the CDC issued its updated guidance for fully vaccinated individuals, and the EEOC is considering its impact. Thus, further EEOC guidance updates may be issued. OSHA is also expected to shortly issue an emergency COVID-19 standard for healthcare employers and new general guidance. In addition to the evolving federal developments, employers should continue to be mindful of changing state and local requirements.



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