June 11, 2021

EEOC OKs Employer COVID-19 Vaccine Mandates and Incentives

For more than a year, the Equal Employment Opportunity Commission (EEOC) has provided guidance regarding how federal antidiscrimination laws affect employers' responses to the COVID-19 pandemic. Now that COVID-19 vaccines are widely available throughout most of the country and the CDC has lifted most of its restrictions for fully vaccinated people, the EEOC provided an update on May 28 advising that employers may require employees entering the workplace to be vaccinated against COVID-19 and that they may offer employees incentives to get vaccinated.

Before addressing the specifics, it is important to note what the EEOC's guidance does and does not address. The EEOC administers federal equal employment opportunity laws such as the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 and the Genetic Information Nondiscrimination Act (GINA). Its guidance addresses only those laws. It does not address other issues that are beyond its jurisdiction, such as whether the Food and Drug Administration's provision of only emergency use authorizations for the COVID-19 vaccines affects employers' ability to require them. The EEOC does not address any state or local laws, which may impose additional restrictions.

The EEOC advises that the federal equal employment opportunity laws, including the ADA and Title VII, do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19. However, employers still may be required to provide reasonable accommodations for employees who are unable to be vaccinated because of a disability or a sincerely held religious belief, unless providing such an accommodation would impose an undue hardship on the employer's business. Employee accommodations should be addressed on a case-by-case basis but may include requiring an unvaccinated employee to wear a face mask, work at a social distance from others, work a modified shift or get periodic COVID-19 tests, or giving them the opportunity to telework or accept a reassignment. Pregnant employees who choose not to get vaccinated also may be entitled to job modifications, such as telework, changes to work schedules or assignments, or leave, to the extent such modifications are provided for other employees who are similar in their ability or inability to work.

In addition to addressing vaccine mandates, the EEOC advises that employers may offer incentives to employees for receiving COVID-19 vaccines administered by the employer or providing documentation of vaccinations administered by others. Such incentives must not be so substantial as to be coercive. Apart from incentives, employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.

While employers may offer incentives for employees to receive COVID-19 vaccines, the EEOC notes that GINA prohibits employers from offering incentives to an employee in exchange for a family member's receipt of a vaccination from the employer or its agent. Under GINA, an employer may offer employees' family members an opportunity to be vaccinated, but the employer must not require employees to have their family members get vaccinated and must not penalize employees if their family members do not get vaccinated.

Additional rules apply if an employer requires employees to get a COVID-19 vaccination from the employer or its agent. In that case, the EEOC advises, the ADA's restrictions on an employer's making disability-related inquiries or medical examinations of its employees apply to the screening questions that are asked prior to administering the vaccine. Administering the vaccine itself is not a medical examination, but pre-vaccination screening questions may elicit information about disabilities, so the ADA requires that any such questions be job-related and consistent with business necessity when

an employer or its agent administers the vaccine. That means that, before asking the pre-vaccination screening questions, an employer would need to have a reasonable belief that an employee who does not answer the questions and therefore cannot be vaccinated will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. If an employer does not require employees to be vaccinated but offers to vaccinate them on a voluntary basis, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity.

Finally, the EEOC advises that if an employer is not providing vaccinations itself, it may ask employees whether they obtained a COVID-19 vaccine from a third party and may request documentation or other confirmation of vaccination, such as the COVID-19 vaccination record card. Such inquiries and requests are not disability-related inquiries under the ADA, because the employer is not asking a question that is likely to disclose the existence of a disability. However, employees' documentation or other confirmation of their vaccinations is medical information that must be kept confidential and stored separately from employees' personnel files.

Conclusion

The widespread availability of COVID-19 vaccines provides a significant step toward reopening many workplaces. Employers should consider whether COVID-19 vaccine mandates or incentives are appropriate for their workforce. Before implementing any such policies, however, employers should weigh the costs and benefits and be sure to comply not only with the federal laws discussed by the EEOC but also with any state and local laws that may apply. It is also important to continue to follow new developments in this fast-changing area of the law.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Howard Fetner
Counsel

New Haven, CT | (203) 752-5012

hfetner@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com