

# 4 Takeaways from the EEOC's Latest Guidance on COVID-19 Vaccines

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**T**he U.S. Equal Employment Opportunity Commission (EEOC) recently updated its guidance on workplace COVID-19 vaccination policies. Although some compliance questions remain unanswered, the agency provided clarification for employers that require or encourage employees to get vaccinated.

Employers have been anticipating such guidance ([www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-look-for-clarity-on-covid-vaccination-incentives.aspx](http://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-look-for-clarity-on-covid-vaccination-incentives.aspx)) from the EEOC, and the Society for Human Resource Management's president and CEO, Johnny C. Taylor, Jr., SHRM-SCP, recently requested ([www.shrm.org/hr-today/news/hr-news/pages/shrm-ceo-asks-eEOC-to-give-employers-pandemic-guidance-.aspx](http://www.shrm.org/hr-today/news/hr-news/pages/shrm-ceo-asks-eEOC-to-give-employers-pandemic-guidance-.aspx)) that the EEOC provide guidance on vaccine incentives at an April 28 hearing.

The EEOC issued 21 updated FAQs (<https://www.eEOC.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>) on May 28. "The guidance notes that employers may request proof of vaccination status and that employers may offer incentives to encourage employees to obtain a vaccine or to provide proof of vaccination status," explained John Lomax, an attorney with Snell & Wilmer in Phoenix. But employers should note that some limitations apply.

"Be mindful that this guidance is not legal advice or a one-size-fits all answer for every company on how to handle things," said Adam Kemper, an attorney with Kelley Kronenberg in Fort Lauderdale, Fla. "Look at your current operations, the laws in your jurisdiction, as well as this guidance." Guidelines, rules and employee sentiments will continue to change, he said, so companies should be prepared to adjust their policies as the pandemic plays out.

Here are some key takeaways for employers from the EEOC's most recent guidance.

## 1. Explore Reasonable Accommodations

Businesses generally may require workers who enter a physical worksite to receive a COVID-19 vaccination, without running afoul of the federal workplace anti-discrimination laws that the EEOC enforces: the Americans with Disabilities Act (<https://www.eEOC.gov/publications/ada-your-responsibilities-employer>) (ADA), the Genetic Information Nondisclosure Act (<https://www.eEOC.gov/genetic-information-discrimination>) (GINA) and Title VII of the Civil Rights Act of 1964 ([www.shrm.org/hr-today/public-policy/hr-public-policy-issues/pages/titleviiofthecivilrightsactof1964.aspx](http://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/pages/titleviiofthecivilrightsactof1964.aspx)). However, employers must consider reasonable accommodations for workers who refuse a vaccine for religious or disability-related reasons, unless such accommodations pose an undue hardship on the employer's operations.

The EEOC specifically addressed pregnancy-related accommodations in its most recent guidance. Patrick Dennison, an attorney with Fisher Phillips in Pittsburgh, said a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave, to the extent such modifications are provided for other employees who are similar in their ability or inability to work.

He noted that an employee does not need to cite EEO laws or use the phrase "reasonable accommodation" to prompt an employer to engage in an interactive dialogue to explore accommodations. But an employee who opts not get vaccinated for a protected reason must let the employer know that he or she needs an exemption or work adjustment.

"As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy," the EEOC said.

## 2. Carefully Consider Incentives

"Importantly, the EEOC confirmed that employers may, indeed, offer incentives to employees receiving vaccines," observed Jason Habinsky, an attorney with Haynes and Boone in New York City. "However, there are some differences an employer must understand depending on whether an employee received the vaccination on his or her own or through the employer."

Requesting proof that employees received a vaccination on their own is not a disability-related inquiry under the ADA, and therefore an employer may offer an incentive to employees to provide such proof, according to the EEOC.

If an employer administers the vaccination to its employees or contracts with a third party to administer the vaccinations, then any incentive the employer offers with the vaccination must not be so substantial as to be coercive. "The reason for this rule is because administering the vaccine requires prescreening medical questions that are prohibited under the ADA unless the medical questions are voluntary," explained Tina Bengs, an attorney with Ogletree Deakins in Valparaiso, Ind. "If the incentive is too substantial, then answering the medical screening questions would not be considered voluntary."

The EEOC underscored that "a very large incentive could make employees feel pressure to disclose protected medical information."

Unfortunately, the agency did not provide examples or bright-line tests for what might be considered coercive, Lomax noted. So employers have more latitude on incentives if they merely request a voluntary confirmation that the employee received a vaccination from an outside provider.

"An employer will be forced to engage in some tight-rope walking for the time being," Habinsky said. "Without further guidance, the safest course would be for an employer to determine the measures which will just cross the line of actually incentivizing employees but without being too generous." For example, gift cards and small bonuses may be appropriate.

Bengs said the best strategy for most employers is to "keep it simple."

Another important takeaway from the guidance is that employers may offer incentives—without violating GINA—to employees who provide proof that a family member received a vaccination from an outside provider. Critically, however, an employer may violate GINA if it offers an incentive to employees when a family member gets the vaccination from the employer instead, Habinsky noted.

### 3. Beware of Disparate Impact

Even though mandatory vaccination policies may be permissible, employers should be mindful of any disparate impact that a mandate may have on particular groups of employees, Kemper noted.

"Disparate impact" means that a seemingly neutral policy is discriminatory in practice based on age, national origin, race, color, religion, sex or another protected category.

"Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement," the EEOC cautioned.

### 4. Treat Vaccination Records Confidentially

The ADA requires employers to keep employee medical information confidential. The EEOC's guidance confirms that even though requesting proof of vaccination is not a medical inquiry, the information that the employee provides about vaccination status, such as a copy of a vaccination card, is considered medical information that must be maintained confidentially in a file separate from an employee's regular employment file, Bengs explained.

#### Practical Tips

As employers create and revise their vaccine-related policies, Dennison said, they should make sure the language used adequately reflects the employer's intent and makes certain whether the employer is making the vaccine mandatory or voluntary, since the EEOC has made it clear that voluntary vaccination policies do not carry the same restrictions as mandates.

All vaccine policies should include clearly defined procedures for providing reasonable accommodations for those who cannot get vaccinated because of medical or religious reasons, he added. "Furthermore, if employers plan to provide incentives, a best practice is to make the incentive voluntary and tied solely to the employee's proof of vaccination. Employers with voluntary vaccine policies should also steer clear of any entanglement with vaccine providers in any way which could make them an agent of the employer."

Employers also should note that the Occupational Safety and Health Administration and state and local authorities may have different requirements.

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