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EEOC Updates Technical Assistance Questions and Answers on Mandatory Vaccinations and More

Authors: Donna M. Glover, Martha L. Boyd

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) posted updated and expanded technical assistance related to the COVID-19 pandemic. The May 28 update replaces Section K, Vaccinations, with a new version that also addresses incentives under the Americans with Disabilities Act (ADA) and the Genetic Non-Discrimination in Employment Act (GINA).

The updated Technical Assistance Questions and Answers (Technical Assistance) were prepared prior to the CDC's new guidance for fully vaccinated individuals issued on May 13, 2021, and do not specifically address that new guidance. The EEOC notes on its website that it is considering any impact of the CDC's new guidance on its Technical Assistance.

The expanded Technical Assistance provides new information about how the ADA and GINA apply when an employer offers incentives for employees to provide documentation or other confirmation of vaccination when an employee gets a vaccine in the community or from the employer or its agent. The Technical Assistance answers COVID-19 questions only with respect to federal equal employment opportunity (EEO) laws. Employers in states that have issued more restrictive state regulations or guidance should follow their state laws.

The key updates to the Technical Assistance are summarized below.

Mandatory Vaccinations

The updated Technical Assistance explains that federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, provided that employers comply with the reasonable accommodation provisions of the ADA (disability accommodations) and Title VII of the Civil Rights Act of 1964 (Title VII, accommodations based on a sincerely held religious belief), and other EEO considerations. The EEOC gives examples of accommodations for an unvaccinated employee entering the workplace such as wearing a face mask, working at a social distance from coworkers or non-employees, working a modified shift, getting periodic tests for COVID-19, being given the opportunity to telework, or finally, accepting a reassignment. Significantly, the EEOC did not suggest an unpaid leave of absence as a possible accommodation, although certainly a limited duration leave of absence is generally considered a reasonable accommodation where other accommodations would not be effective or would impose an undue hardship on the employer. While the EEOC's failure to mention a leave of absence may or may not be intentional, we do believe that employers should tread carefully when offering an unpaid leave, ensuring that they have exhausted every other idea for an accommodation that would enable the employee to remain on the job in some capacity.

The EEOC makes note of the possible disparate impact of a vaccine requirement on employees based on their race, color, religion, sex, or national origin under Title VII or age under the Age Discrimination in Employment Act (ADEA). In that regard, the EEOC cautions that employers should keep in mind that certain employees

may be more likely to be negatively impacted by a vaccination requirement because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others.

The EEOC also repeats its prior guidance regarding mandatory vaccination programs and the direct threat analysis. The EEOC explains that to "determine if an employee who is not vaccinated due to a disability poses a 'direct threat' in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job." The primary factors to be considered are:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm

Other factors include current medical knowledge about COVID-19 and the type of work environment (e.g., whether the employee works alone or with others or works inside or outside).

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer then must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat.

The EEOC recommends that as a "best practice" an employer introducing a COVID-19 mandatory vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability and sincerely held religious belief on an individualized basis. The EEOC also recommends that "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." We believe this is sound advice for employers, and easy to follow. As part of your mandatory vaccine policy rollout, having a brief training for managers or presenting them with a one-pager with bullet-point advice for responding to employee requests might prevent managers confronted with such requests from unintentional gaffes that could result in liability later on.

Whether the employer's vaccination program is mandatory or voluntary, the updated Technical Assistance states that *even if an employee is fully vaccinated*, employers cannot ignore reasonable accommodation requests related to COVID-19. As an example, "some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals." Accordingly, employers must not assume that fully-vaccinated individuals are not entitled to request accommodations such as continuing to work remotely, having a private office, or being moved to a job or a location where they have limited interaction with the public. An employer may not be required to grant such requests but should consider them and should engage in the individualized analysis of such requests as set forth above.

Requiring Proof of Vaccination, Confidentiality, and Incentives

The updated Technical Assistance makes clear that information about an employee's COVID-19 vaccination is confidential information under the ADA. This clarification was helpful because the EEOC had earlier stated that vaccines were not "medical examinations," which enabled employers to ask about them. One interpretation of that earlier guidance was that the results of that inquiry – the status itself – might not be subject to the confidentiality requirements that normally accompany employee medical information under the ADA. Thus, based on this new guidance, employers must maintain the confidentiality of all information and documentation

"or other confirmation of COVID-19 vaccination" gathered from employees. Employers should centralize collection of proof of vaccination in human resources, if possible, or within some other central resource so that supervisors and managers do not have access to the information and documentation collected.

Of course, if an employee remains unvaccinated, the supervisor would have a need to know that fact to ensure that the employee is complying with state, local, and/or employer policies governing COVID-19 safety in the workplace; however, the supervisor should not be privy to the details about why the employee remains unvaccinated. We recommend that human resources personnel provide supervisors with lists of employees who are required to continue wearing masks rather than listing employees who remain unvaccinated – while a nuanced distinction, we believe it may add a protective layer to the confidential vaccine information.

Regarding incentives, because requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination is not a disability-related inquiry covered by the ADA, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination.

Vaccines and Incentives

The updated Technical Assistance provides that employers may offer incentives to employees to get vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, the EEOC reasons that a significant incentive could make employees feel pressured to disclose protected medical information.

The EEOC, however, indicates that providing an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent is not permissible under GINA. The Technical Assistance explains "[p]roviding such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of the employee."

Employer-Provided Vaccination Education

The updated Technical Assistance explains employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination. The Technical Assistance highlights federal government resources available to those seeking more information about how to get vaccinated.

Employers should review the EEOC-recommended resources as part of their vaccination education programs. Employers generally should not recommend the vaccine (or one vaccine over another) or categorize obtaining a vaccine as the "right thing to do," as such statements could lead to potential liability. We suggest that employers rely on information from the CDC's website to couch vaccination education pitches and that they retain printouts of that CDC-published information in case they later need to prove where they got their guidance.

Because the COVID-19 pandemic continues to be a factor in the workplace, employers should consider the updated Technical Assistance when developing their vaccination programs. Employers with vaccination programs currently in place should ensure that their programs align the revised Technical Assistance.

If you have any questions, please reach out to one of the authors or any member of Baker Donelson's [Labor & Employment Team](#).