

Publications

EEOC Issues Guidance on Mandatory Vaccine Policies and Vaccine Incentive Programs (Part 1)

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Robert A. Harris

Daniel J. Clark

Jennifer Bibart Dunsizer

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its “What you should know about COVID-19” Frequently Asked Questions, providing some long-awaited guidance about COVID-19 vaccination policies and incentives. This alert is part one of a two-part series highlighting key takeaways from the EEOC’s new FAQs. This edition describes the employment law considerations of vaccine policies. To read part 2, [click here](#).

Can Employers Ask About Vaccine Status?

The EEOC guidance confirms that employers may ask employees whether they are vaccinated and may require proof of vaccination. However, employers should avoid additional questions that could elicit disability-related or genetic information (such as, “Why have you not gotten vaccinated?”). Further, employers may require documentation of vaccination from a doctor, pharmacy, or other third party. Employers must maintain the confidentiality of any provided documentation and store it separately from the employee’s personnel file.

Can Employers Require Vaccination?

The EEOC also confirms that employers may require all employees physically in the workplace to be vaccinated for COVID-19, subject to the requirement to provide a reasonable accommodation. ***Employers may need to provide reasonable accommodations to employees who do not get vaccinated due to disability, religious belief, or pregnancy.***

An employee who does not get vaccinated due to a disability (under the ADA) or a sincerely held religious belief (under Title VII) may be entitled to an accommodation that does not pose an undue hardship on the operation of the employer’s business. A reasonable accommodation might include wearing a face covering, working at a social distance from coworkers or non-employees, working a modified shift, getting periodic tests for COVID-19, teleworking, or finally, accepting a reassignment. Employees who are not vaccinated because

of pregnancy also may be entitled to necessary workplace adjustments if the employer makes modifications or exceptions for other employees similar in their ability or inability to work.

May Employers Exclude Unvaccinated Employees from the Workplace?

Although an employer *may* require a COVID-19 vaccination for all employees entering the workplace, the employer must allow an exception for an employee who is unable to get a vaccine due to a disability, religious conflict, or pregnancy. This rule applies unless the employer can demonstrate that allowing a non-vaccinated employee into the workplace would pose a “direct threat” to health or safety. This requires an individualized assessment that includes a number of prescribed factors to determine the employee’s present ability to safely perform the essential functions of the job. Even if the individual poses a direct threat, the employer must then determine whether an accommodation that does not cause undue hardship to the employer would reduce or eliminate that threat.

Conclusion

The EEOC’s FAQs provide helpful guidance for employers considering vaccination policies. “As a best practice, an employer introducing a COVID-19 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 [or religious conflicts] on an individualized basis.”

Employers also must be cognizant of state and local laws that may impact vaccination policies. For example, Montana recently enacted a law that recognizes vaccination status as a protected characteristic under the state’s civil rights laws, prohibits employers from requiring disclosure of vaccination status, and prohibits requiring employees to receive certain types of vaccines. In Texas, 117 employees sued Houston Methodist Hospital over the Hospital’s requirement that they be vaccinated against COVID-19, claiming the hospital is “forcing its employees to be human ‘guinea pigs’ as a condition for continued employment.”

Contact your Vorys lawyer if you have questions about vaccination policies and other issues associated with your workforce in a (mostly) post-COVID workplace.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).