

Blog Post

New Federal Guidance: Employers May Offer Incentives for Vaccination

June 2, 2021

An employer may offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community, according to new guidance issued by the EEOC on May 28, 2021.

This is important news for employers who were attempting to navigate the challenges of incentivizing their workforce to be vaccinated, while not running afoul of the EEOC's Proposed Rules for incentives for wellness programs sponsored by employers. Those Proposed Rules were issued on January 7, 2021, but frozen by the new Biden Administration. The Proposed Rules would have limited incentives to a "*de minimis*" standard. Examples of some clearly permissible incentives under those Proposed Rules would have included offering a bottle of water or a \$5 gift card, but not airline tickets or gym memberships. The new EEOC vaccine guidance makes clear an employer may offer an incentive to employees for voluntarily receiving a vaccination *administered by the employer or its agent* as long as it is not so substantial as to be coercive. However, importantly, that incentive limitation *does not apply* if an employer offers an incentive to employees to voluntarily provide confirmation that they received a

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COVID-19 vaccination *on their own from a third-party provider that is not their employer or its agent.*

The new vaccine guidance, in the form of Frequently Asked Questions, provides additional clarity for employers not only with respect to incentives, but also regarding COVID-19 vaccine policies and the interplay with federal equal employment opportunity laws such as Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act (Title VII).

Below are the highlights of the new EEOC vaccine guidance for employers.

Employers may require their workforce receive the COVID-19 vaccine (with exceptions):

- An employer may require their employees physically entering the workplace to be vaccinated for COVID-19 so long as the employer provides a reasonable accommodation to employees who have a disability, a sincerely held religious belief, or pregnancy, unless providing that accommodation would pose an undue hardship on the employer's business. The EEOC noted that if an employer has a policy requiring all employees to be vaccinated, employers should be prepared to respond to allegations that such policies disproportionately impact groups of employees based on their protected class, such as race, sex, religion, or age. An employer should carefully analyze whether an accommodation poses an undue hardship to the company and whether a mandatory vaccination policy will have a disparate impact on a protected class of employees before implementing mandatory vaccine policies.
- An employer with a mandatory vaccination program will need to meet the requirements of the ADA. An employer may require a COVID-19 vaccine as a qualification standard for the safety of its workforce, where such a standard is job-

related and consistent with business necessity. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, *the employer cannot require compliance unless it can demonstrate that the individual would pose a “direct threat”* to the health or safety of the employee or others in the workplace, i.e., one that poses a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. To make that assessment, an employer must first determine if there is a direct threat, and if so, whether there is a reasonable accommodation would eliminate the threat or reduce it to an acceptable level.

- The EEOC recommends employers who have a COVID-19 vaccination policy to notify their employees that they will consider requests for reasonable accommodations based on disability on a case-by-case basis. The EEOC guidance provides examples of reasonable accommodations for unvaccinated employees which might include: wearing face masks, social distancing from coworkers or non-employees, modifying work shifts, having periodic COVID-19 tests, teleworking, or reassignment.
- Employers should also consider accommodations for employees who are pregnant and those with objections based on sincerely held religious beliefs.

Employers may encourage employees to receive the COVID-19 vaccine:

- Employers may provide employees and their families with information to educate them on receiving the COVID-19 vaccine by providing resources and answering employee questions without violating federal EEO laws.

Employers may offer incentives to employees for voluntary COVID-19 vaccinations:

- As set forth above, employers may offer incentives to employees who voluntarily receive the COVID-19 vaccine administered by the employer (or its agent) or who receive the vaccine on their own from a pharmacy, public health department, or health care provider.
- In circumstances where the employer administers the vaccine to its employees, the incentive (including rewards and penalties) cannot be “so substantial to the workforce as to be coercive for employees.” While the EEOC does not provide much detail on what is considered “coercive,” the guidance states that very large incentives may be considered coercive because they can place pressure on employees to disclose protected medical information during the pre-vaccination screening questions process. However, as noted above, this incentive limitation does not apply if the incentive is provided to employees who voluntarily provide documentation or other confirmation of a vaccination on their own from a third-party provider that is not the employer or agent of the employer.
- An employer may offer an incentive to employees to provide documentation or other confirmation that they or their family members received the COVID-19 vaccine on their own from a third-party provider. The new vaccine guidance noted that employers may ask employees to submit vaccine documentation or confirmation showing that they or their family members were vaccinated without violating GINA under the rationale that such vaccination confirmation information does not disclose the manifestation of a disease or disorder in a family and is not any other form of genetic information.

Employers may not offer an incentive to an employee in return for an employee’s family member getting vaccinated by the employer or its agent:

- While an employer may offer vaccinations to an employee's family members, employer's cannot offer an incentive to an employee in exchange for a family member's receipt of a vaccination from the employer or the employer's agent. Providing such an incentive would allow the employer or its agent to potentially receive genetic information commonly shared in pre-vaccination medical screening questions. GINA prohibits employers from providing incentives in exchange for genetic information.
- Employers cannot require their employees' family members to get vaccinated and cannot penalize employees if their family members choose not to receive the COVID-19 vaccine. If an employer receives medical information from family members who voluntarily choose to receive the vaccine, this information must be kept confidential, and cannot be provided to managers, supervisors, or other individuals who make employment decisions for employees. Employers must ensure that they have obtained prior, knowing, voluntary, and written authorization from the family member before asking questions about his or her medical conditions.

While the new EEOC vaccine guidance provides clarity on vaccine policies and incentives under federal law, employers should ensure their policies do not violate any state or local laws where their workforce is located. For example, in Montana, employers are barred from requiring employees to disclose their immunization status and in other states, other restrictions apply. As the law and the EEOC guidance is changing every day in this area, we recommend that employers consult with their Akerman labor and employment counsel for assistance to ensure compliance with federal, state, and local laws.

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