

What We Know

ARTICLES & INSIGHTS

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Six Takeaways for Employers from EEOC's Updated Guidance on Reopening Businesses Post-COVID

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Now that many of us have been vaccinated, what should employers be doing to prepare for returning to a pre-COVID workplace? Throughout the pandemic, the federal Equal Employment Opportunity Commission (EEOC) has provided valuable guidance to businesses in this regard. Just before the Memorial Day holiday, on May 28, 2021, the EEOC updated its Technical Assistance Questions and Answers (Q&A) in order to address vaccination status within the context of various federal laws prohibiting discrimination in the workplace. These laws include the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), and the Genetic Information Nondiscrimination Act (GINA). While this updated EEOC guidance provides welcome clarification to employers, determination of the appropriate path forward requires employers to additionally perform a multi-layer analysis, including review of state and local laws and ordinances, which is beyond the scope of this summary.

Below are some of the key takeaways from the May 28 updates to the Q&A:

Takeaway #1

Employers may mandate that employees get vaccinated as a condition of returning to the workplace, so long as they engage in the interactive process for providing reasonable accommodation to eligible employees under the ADA and Title VII.

It is important for employers to recognize that some employees may face greater barriers to vaccination and to therefore be prepared to respond to allegations that a vaccination mandate has a disparate impact on certain protected classes. If an employer mandates vaccination, it should notify employees that it will consider requests for reasonable accommodation on the basis of disability or sincerely held religious beliefs that do not impose an undue hardship on the employer, give clear guidance regarding how to request such an accommodation, and train responsible personnel on how to recognize and process such requests. Notable in the Q&A is a reminder that this

analysis applies equally to fully vaccinated employees who may request accommodation based on a continuing concern for heightened risk of severe illness from a COVID infection, perhaps because the employee is immunocompromised. Employers should not assume that they are not required to provide a requested accommodation to such employees simply because they have been vaccinated. The Q&A encourages employers to rely on recommendations from the Centers for Disease Control and Prevention (CDC) and the Job Accommodation Network when deciding whether an effective accommodation is available that would not pose an undue hardship. The Q&A provides examples of accommodations that should be considered, including the wearing of face masks, working in a socially distanced location, working modified shifts, receiving periodic COVID testing, teleworking, and reassignment of duties.

Takeaway #2

Employers who require vaccinations that the employer or its agent administers have additional hurdles to overcome as they may need to justify as job-related under the ADA pre-vaccination questions which are likely to elicit information regarding a disability.

In order to meet this standard, employers must have a reasonable belief, based on objective evidence, that an employee who does not answer pre-vaccination questions and who cannot be vaccinated poses a “direct threat” to the safety of the employee or others in the workplace.

Takeaway #3

Employers may inquire about vaccination status.

Asking whether an employee has been vaccinated by a third party and requesting documentation of such vaccination is not a disability-related inquiry prohibited by the ADA, nor is it an improper request for genetic information under GINA. All such details should be retained in a confidential file separate from personnel files.

Takeaway #4

Employers may offer incentives – either penalties or rewards — for voluntary vaccination by third parties without running afoul of disability statutes.

Takeaway #5

However, employers who offer vaccinations in-house should be careful not to offer incentives that are “so substantial as to be coercive” as a “very large” incentive may have the effect of pressuring employees to disclose protected medical information.

The Q&A does not define what constitutes “substantial” or “very large” incentives that would be deemed inappropriately coercive.

Takeaway #6

Employers may provide published educational information on vaccinations to their employees.

Whether an employer determines that it is appropriate to mandate or to simply encourage its employees to receive a COVID vaccine, the EEOC guidance is helpful in determining appropriate parameters. Employers are encouraged to be prepared with the implementation of a policy and a communications plan for the reopening of business. Employers are further encouraged to keep updated as the EEOC plans to further update its Q&A to address recent guidance published by the CDC regarding fully vaccinated individuals.

If you have questions about this EEOC guidance or any other employment-related matter, please call [Connie Carrigan](tel:9192502119) at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

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