

LABOR AND EMPLOYMENT

ALERT

JUNE
2021

New EEOC Covid-19 Guidance on Employer-Sponsored Vaccine Mandates and Incentives

By Jo Bennett and Brian M. Wallen

Throughout the Covid-19 pandemic, the U.S. Equal Employment Opportunity Commission (“EEOC”) has maintained a Q&A page providing guidance to employers on specific issues that arise under federal anti-discrimination laws. On May 28, 2021, the EEOC issued long-awaited guidance regarding **employer-sponsored vaccine mandates and vaccine incentives**.¹ The EEOC has explicitly stated that employers may maintain mandatory vaccination programs and vaccine incentive programs without violating any applicable employment laws.

According to this guidance, employers may establish a vaccine mandate in the workplace without violating federal anti-discrimination laws. However, employers may have to exempt employees from this mandate – namely, employees unable to receive vaccinations due to medical conditions or sincerely held religious beliefs. Reasonable accommodations to mitigate the risk to the employee or the worksite in these situations might include requiring an unvaccinated employee to wear a mask at work or work from home until the Covid-19 infection risk has subsided. According to the EEOC, all information collected about vaccination status through mandatory vaccination programs is confidential medical information under the Americans with Disabilities Act (“ADA”). Because the EEOC has limited jurisdiction, this guidance only deals with ADA and Title VII² compliance.

While mandates are permissible, many employers have opted for incentive programs instead. The EEOC

has clarified that incentive programs are allowed, but there is still significant uncertainty regarding the appropriate level of such an incentive. The guidance addresses two types of programs: (1) an incentive program where employees are vaccinated by a third party; and (2) an incentive program where employees are vaccinated by the employer or its agent. The EEOC has not provided any limitations to incentives under the first type of incentive program. Incentives to participate in programs that fall under employer-sponsored programs must not be so substantial an incentive that the program is coercive. There is no guidance regarding what this means. Because of the uncertainty regarding the scope of any incentive, employers should proceed very carefully when establishing an incentive program.

While employers should be mindful of and review the EEOC’s position on vaccine incentives and mandates, employers, as a best practice, should still consider preparing a checklist of issues to evaluate before implementing any vaccination program. By way of example, an employer might want to determine:

- How to enforce a mandate;
- Applicable exceptions to any mandate, including, as legally required for employees with ongoing medical conditions or sincerely held religious beliefs;
- Whether an employee who is unable to be vaccinated due to medical reasons poses a direct threat to the employee or the worksite;
- Whether there is an obligation to engage in collective bargaining with a union over a vaccine program;

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² Title VII of the Civil Rights Act of 1964.

- How the employer will store medical information collected as a result of the program;
- Whether time spent undergoing vaccination is compensable time under state and federal wage and hour laws;
- Whether the jurisdiction in which the employee works provides additional paid vaccine leave or permits employees to use statutory sick leave time to receive a vaccination;
- The value of any applicable incentive;
- Who will be responsible for vaccinating employees;
- Specific deadlines or goals of such a program; and
- Whether local and state fair employment practices laws impose any additional obligations.

These are complex issues and employers should consider retaining competent labor and employment counsel before establishing a vaccine mandate or an incentive program. ◆

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's Covid-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

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