

EEOC Addresses COVID-19 Vaccinations

The widespread availability of COVID-19 vaccinations has raised many questions regarding employee rights and employer responsibilities to comply with the federal equal employment opportunity (EEO) laws and the Americans with Disabilities Act (ADA). Note that other employee protections may also come into play, including the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, (which was subsequently amended by the Pregnancy Discrimination Act, among others).

The Equal Employment Opportunity Commission (EEOC) devotes an [expansive webpage](#) to all things COVID, and recently updated section K which pertains to vaccines. All information for this article was obtained directly from the EEOC COVID website. HCP members are cautioned that EEOC states on this website that ***individual situations and facts determine compliance with the legal standards presented.***

EEOC's technical assistance on vaccinations is designed to help employees and employers better understand how federal workplace discrimination laws apply during the pandemic. The details are based on the laws, regulations, guidance, and technical assistance enforced by the EEOC. Again, ***“analysis of how it applies in any specific instance should be conducted on an individualized basis.”***

First and foremost: Employees' vaccine status is health information and therefore must be handled with the utmost care regarding confidentiality.

Vaccine Mandates Allowable

Whether obtained in the community or directly from the employer, federal EEO laws allow employers to mandate vaccinations for employees, as long as the rules governing reasonable accommodations for unvaccinated staff are followed. Various laws come into play for ADA and religious exemptions; remember, too, that pregnant employees are explicitly protected from discrimination. HCP members are familiar with work-around procedures for all of these circumstances, which also apply to annual flu shots.

Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity. COVID-19 vaccinations qualify as such a safety-related standard. However, if a particular employee cannot meet this standard ***because of a disability***, the employer cannot require compliance for that employee unless non-compliance would pose a “direct threat” to the health or safety of the employee or others in the workplace. The strict definition of “direct threat” includes the inability to eliminate it with reasonable accommodations. HCP advises members to consult with their counsel regarding appropriate action in these instances. Rules are lengthy and precise, therefore beyond the scope of this article.

Additionally, sincerely held ***religious beliefs***, practices, or observances under Title VII of the Civil Rights Act would give rise to the need for reasonable accommodations for those refusing to be immunized against COVID-19. Remember that EEO laws provide a broad definition for these exemptions, so err on the side of leniency when allowing them. Again, consulting legal counsel is

never bad practice. Interesting to note is that an employee wishing to wait for a particular brand or type of COVID-19 vaccine may fall under the religious exemption and would be processed similarly by the employer.

Vaccine Education Allowable

According to EEOC's technical assistance, employers wishing to educate their workers about the benefits of COVID-19 vaccinations do not risk EEO violations. Employers may also raise awareness about the benefits of vaccination, and address common questions and concerns.

HCP directs members to our [COVID-19 Vaccine Resources](#) for reliable resources to share in the workplace. EEOC recommends CDC's [Workers COVID-19 Vaccine Toolkit](#) which has a wealth of information and downloadable documents.

Vaccine Incentives Allowable

Under ADA and GINA, employers may offer incentives to employees for receiving their COVID-19 vaccinations. Members are cautioned that there are subtle differences, however, depending on whether the vaccine is provided in the community (i.e., the employee obtains it on their own) or provided by the employer.

Community vaccinations (e.g., at a pharmacy, clinic, or mass vaccination site) may be incentivized for both the employee and his or her family without restrictions under EEO or GINA laws.

However, take notice of the cautions for employer-sponsored vaccination opportunities.

Be sure the incentive (which includes both rewards and penalties) is not so substantial as to be considered coercive. The vaccination process requires providing medical information during screening, therefore large incentives may violate ADA by pressuring employees to reveal health details they otherwise would not.

Employees' family members may be vaccinated by the employer or its agent. However, incentives for family members are not permitted in this case under GINA regulations. Because the screening process may reveal health information about a 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. Title II of GINA prohibits employers from providing incentives in exchange for genetic information.

Invite the families, but don't offer them any incentive, and take care to comply with GINA. This means obtaining full written authorization before posing medical questions. And just as with employee health information, family member health information is strictly confidential and is to be used solely for purposes of the immunization. Medical details may not be shared with any staff who are involved with employment decisions regarding the employee.

The Take-Aways

- Continue to offer education to your employees regarding COVID-19 vaccinations, their safety, and importance for ending the pandemic.
- You may offer incentives to employees, and even their family members for being vaccinated by someone other than you or your agent.
- If you are providing the vaccinations or sponsoring a vaccination event, keep your incentives to employees nominal, and do not offer any incentives for family members.

HCP advises all members to consult legal counsel whenever in doubt about employee vaccinations. Contact HCP's Public Policy with any questions about the EEOC guidance: deyoe@nyshcp.org or kerwin@nyshcp.org.