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Client Advisory

Vaccines and the Workplace: What Can Employers Require or What Incentives Can They Offer Employees?

As workplaces nationwide are returning to in-person operations, two important questions have been raised about COVID-19 vaccines: (1) can employers require that their employees be vaccinated in order to return to work? and (2) can employers offer incentives to encourage employees to receive the vaccine? The federal Equal Employment Opportunity Commission (EEOC) just recently issued important guidance, which updates its prior guidance and provides employers with a roadmap as to both questions. Although the EEOC guidance is not completely determinative, as state and local laws can require more than the EEOC, the EEOC's position is the best guide for employers to follow at this time.

Vaccine Mandate

The EEOC in late 2020 had previously stated that employers could legally mandate the COVID-19 vaccine for its employees, without running afoul of any disability- discrimination laws, due to the direct threat posed by the pandemic. The newest EEOC guidance confirms that, but provides more specifics and details.

First, employers may mandate vaccines for its workers, subject to the potential accommodations that may be required due to a disability. The EEOC gave these examples of potential accommodations: wearing a face mask, social distancing, modified shifts, periodic COVID-19 testing, telework, or a reassignment. The EEOC also emphasized that the scope and nature of an accommodation varies with each workplace, but also varies depending on the COVID circumstances in the community at the time of the request (implying that a region with high vaccination rates and low community spread may require greater accommodations than other regions). In addition, the EEOC recognized that each employer could avoid an accommodation if it posed an undue hardship, although it also reiterated the high burden on an employer of showing that. Finally, the EEOC noted that an accommodation may have to be reevaluated over time, as conditions change in the community and the workplace, such that a high percentage of vaccinated employees may require more flexibility in the accommodations necessary to comply with the law.

Second, the other exceptions to a vaccine mandate are: (1) if it disproportionately impacts a protected class of employees, such as due to race or gender; or (2) due

to a religious objection. On the latter, employers must accept an employee's religious objection unless there is an objective basis to question either the religious tenet cited or the employee's own religious beliefs. As with any religious accommodation, that objective evidence should be firm and not just based on suspicion. Lastly, although the EEOC listed the same accommodation examples as with disability accommodations, it reaffirmed the principle that employers can more easily show an undue hardship in a religious accommodation setting than with a disability accommodation.

Third, the EEOC again stated that asking employees if they are vaccinated does not violate any medical privacy laws. Employers would only face a more stringent privacy issue if the employer themselves were actually providing the vaccine. If all employers do is ask for proof of a vaccine by a third party, merely asking the question is not a violation of the law. However, as with all medical information, information as to whether each employee is vaccinated must be kept strictly confidential and should not be shared with co-workers or anyone outside of the limited group of persons within management or administration who need to know that information.

Finally, the EEOC addressed the issue of pregnant employees and vaccines – somewhat. That is, the EEOC reaffirmed the general principle that pregnant employees should not be treated differently than other employees, so that it would be discriminatory to provide accommodations to unvaccinated employees, but not to unvaccinated pregnant employees. But, the EEOC did not address whether pregnant employees – generally – should be allowed to avoid a vaccine mandate merely due to their pregnancy (i.e., without a doctor's note). At the present time, the best advice is to require a doctor's note from pregnant employees seeking an accommodation, and then act accordingly.

Vaccine Incentives

The most recent EEOC guidance also gave more direct authorization for employers who wish to instead offer incentives to encourage its employees to get the COVID-19 vaccine. The new guidance states that incentives may be offered as long as they are "not so substantial as to be coercive." Unfortunately, the EEOC gave no further specifics as to what level of incentive would constitute being "coercive." The EEOC only

stated that “a very large incentive” would be improper because it would pressure employees into disclosing if they are vaccinated.

Despite the uncertain nature of this new guidance, it is significant that the EEOC referred to “very large incentives” as problematic. This is because the EEOC’s prior proposed rule (issued in January 2021, but later withdrawn) stated that incentives were not lawful unless they were “de minimis.” So, it seems the EEOC is giving the green light to greater incentives than previously thought, given that “de minimis” is not contained in the newest guidance.

One remaining open question on incentives is whether the Internal Revenue Service, or other federal agency, will issue stricter guidance because vaccine incentive programs are wellness programs, which can also limit the level of incentives. For that reason, employers should use caution before offering significant financial incentives to encourage workers to get vaccinated. Nevertheless, it does seem relatively clear that employers can at least offer a financial incentive that compensates employees for their time or expense in receiving the vaccination, such as the out-of-pocket cost (if any) of the vaccine and missed pay if the vaccine was received during work hours. And, a financial incentive beyond that, such as a gift card or small stipend, also seems permissible.

Lastly, as with all wellness incentives, employers must provide the ability for employees who cannot take the vaccine to receive a reasonable alternative. For example, employees with disability-related or religious restrictions may be entitled to accommodations allowing them to receive the incentive, or an alternative incentive, even without receiving the vaccination.

The complexity of these laws and ever-changing nature of these laws, as well as the case-by-case analysis often necessary, should encourage employers considering vaccine mandates or incentives to consult with counsel before implementation to minimize legal risks. And, employers stay tuned for further guidance on vaccines.

If you have any questions regarding COVID-19 vaccination mandates or incentives, please contact [Peter Frattarelli](mailto:pfrattarelli@archerlaw.com) at 856-354-3012 or pfrattarelli@archerlaw.com, or any member of Archer’s [Labor & Employment Group](#) in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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