DORSEY
DORSEY+WHITNEY LLP

New EEOC Guidance on COVID-19 Vaccinations in the Workplace

June 10, 2021 – Cross-Border Counselor
by Aaron Goldstein and Alyson Dieckman

On May 28, 2021, the United States Equal Employment Opportunity Commission ("EEOC") released new guidance regarding COVID-19 vaccinations in the workplace. The new guidance clarifies some significant issues, including whether employers may require U.S. employees to be vaccinated (at least as a matter of U.S. federal law) and the types of incentives they may provide to vaccinated employees. Employers must also comply with the significant number of new state laws that address these same issues, and in many cases, contradict the EEOC's positions.

I. Mandatory Vaccinations

The EEOC confirmed that employers may require all employees physically entering the workplace to be vaccinated for COVID-19, but with important caveats. The guidance reiterates the requirement that employers comply with the reasonable accommodation requirements under the Americans With Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The guidance also reminds employers to be mindful of whether certain groups of employees may face barriers to receiving vaccinations, and warns employers to ensure vaccination programs do not disparately impact any protected groups.

II. Reasonable Accommodations

Employers requiring employee vaccinations must continue to comply with reasonable accommodation requirements under the ADA and Title VII. Employees may seek accommodation in the form of exemption from a mandatory vaccination policy either because of a disability or a sincerely held religious belief.

If an employee reports that they are unable to receive the vaccination due to a disability, employers should consider the request for accommodation (in the form of not requiring that employee to be vaccinated) and determine whether the unvaccinated employee would "pose a direct threat due to a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable

Related People

- Aaron Goldstein

Related Capabilities

- Canada Cross-Border Transactions

accommodation" using the EEOC's direct threat analysis. If the unvaccinated employee poses an unacceptable direct threat to the health and safety of others, they must assess whether a reasonable accommodation may be made for the employee, such as allowing the employee to work remotely or otherwise in isolation from others.

Likewise, employers must assess whether reasonable accommodations can be made for employees who report that they are unable to be vaccinated due to a sincerely held religious belief.

III. Vaccine Incentives

Many employers hope to incentivize employee vaccination in lieu of a vaccine mandate. The new EEOC guidance clarifies employers' right to incentivize employee vaccinations.

Employers who administer vaccines directly to employees may offer incentives, as long as they are not coercive. Because employers administering vaccines to employees directly must ask certain medical screening questions, there is a concern that using large incentives could make employees feel pressured to disclose protected medical information.

Meanwhile, employers providing incentives to employees for showing proof of vaccination by a third party, but who do not administer the vaccine directly, may provide larger incentives because they do not receive any disability-related information from employees, therefore reducing the risk of pressure to share protected medical information. Employers offering incentives may require proof of vaccination by a third party, either by providing documentation or by certifying their vaccination status.

As with all confidential medical information, employers should take special care to keep vaccination information confidential, including by keeping vaccination information separate from employees' personnel files.

IV. State Law Considerations

Employers should remember that the EEOC's new guidance only covers federal equal employment opportunity laws, and that some state and local laws may restrict employers' ability to mandate vaccinations in the workplace or provide vaccine incentives.

On May 7, 2021, Montana's governor signed House Bill 702, which made Montana the first jurisdiction to recognize an individual's vaccination status as a protected classification. Under the Montana law, employers are prohibited from mandating employee vaccinations or from requiring employees to disclose their vaccination status. Other states are working rapidly to follow Montana's lead.

Likewise, Iowa's legislature is considering legislation that would prohibit employers from mandating vaccination or "otherwise discriminating against" employees who decline the vaccination for any reason. If passed, the law may prohibit employers from offering vaccine incentives as they may be considered discriminatory against unvaccinated employees.

V. Takeaways

Employers may implement mandatory vaccination programs, as long as they provide reasonable accommodations as required by the ADA and Title VII, and no applicable state law prohibits it. The legal landscape at the state level is changing rapidly so employers considering mandating COVID-19 vaccination should frequently check applicable state law and update their policies and programs appropriately. Employers who wish to incentivize, rather than mandate, vaccination may do so, though they should carefully consider whether to administer the vaccine themselves or encourage employees to seek vaccination by a third party.

Employers should consult with a labor and employment attorney before introducing either a mandatory vaccine program or vaccination incentives to ensure that any program complies with applicable federal and state laws.