

NEWS & INSIGHTS

Two key labor regulators clarify rules for employer COVID-19 vaccine mandates and incident reporting

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JUNE 14, 2021



The below information is current as of the publication date listed. Because COVID-19 response measures on all fronts are continually evolving, clients should stay alert to new developments and consult with counsel on any critical questions.

In recent weeks, both the Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health

Administration (OSHA) revised or issued new guidance related to COVID-19. The revisions are intended to encourage vaccination by removing potential liability for adverse outcomes from vaccination from businesses while retaining reporting requirements for work-related COVID-19 infections.

EEOC issues updated guidance regarding vaccinations

On May 28, 2021, EEOC updated its Technical Assistance Questions and Answers with significant new information intended to assist employers in managing workplace COVID-19 vaccination issues. [The updated guidance](#) from the EEOC addresses several topics including mandatory employee vaccination requirements, voluntary workplace vaccination programs and vaccination incentive programs.

As we have advised clients previously, the EEOC now explicitly permits an employer to mandate that all employees physically entering the workplace to be vaccinated for COVID-19. However, this permissible mandate remains subject to an employer's responsibility to oblige individuals who may require an accommodation due to a disability under the Americans with Disabilities Act or a sincerely held religious belief as required under Title VII.

The EEOC provides examples of potential reasonable accommodations for unvaccinated employees, which include, but are not limited to, wearing a face mask, social distancing from co-workers or non-employees, periodic COVID-19 tests, telework and working a modified shift. The updated guidance also identifies a potential necessary accommodation for an employee, who while fully vaccinated, may have a heightened risk of severe illness due to being immunocompromised.

With respect to the question of vaccination incentives, the new EEOC guidance affirms that it is legally permissible for employers to offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a third party. Specifically, such a request is not deemed to be a "disability-related inquiry" prohibited by the ADA.

However, if the employer sponsors the vaccination program, the EEOC noted that any incentive cannot be "so substantial as to be coercive." The EEOC's concerns appear to be that an employee not feel pressured to participate in a "voluntary" employer program. Further, because vaccinations require employees to answer pre-vaccination disability-related screening questions, a significant incentive could make employees feel compelled to disclose ADA-protected medical information. While the EEOC did not provide any examples of what incentives would be considered "so substantial as to be coercive," gift certificates in nominal amounts or limited paid time off would likely be deemed acceptable.

Ultimately, with the increased availability of vaccines, and, in many cases, the end of teleworking arrangements, employers need to remain vigilant with respect to the health of their workforce. Adhering to the new EEOC guidance provides employers with a legal framework within which to ensure employee safety and maintain efficiency of operations.

OSHA changes direction regarding reporting adverse reactions to vaccinations

On April 20, 2021, OSHA issued guidance requiring employers to record adverse reactions to COVID-19 vaccines when an employee's ability to work was affected. Specifically, OSHA's Guidance stated "[i]f you require your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7."

However, on May 22, 2021, OSHA abruptly changed course and suspended the recording requirement until May 2022. OSHA's motivation for suspending the enforcement requirement to record adverse injuries or death from COVID-19 shots appears to be an attempt by the Biden Administration to promote vaccinations. [OSHA's website now states:](#)

DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

Although no longer required to record adverse reactions to COVID-19 vaccinations, COVID-19 can still be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are true:

- The case is a confirmed case of COVID-19;
- The case is work-related (as defined by 29 CFR 1904.5); and
- The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).

Employers should continue to closely monitor OSHA's future guidance with respect to this issue. However, at least until May 2022, employers do not need to track and record employee adverse reactions to COVID-19 vaccinations. Employers should also recognize that such employees may be entitled to additional benefits under other federal and state laws.

For legal issues related to COVID-19 or mandated vaccinations, seek professional legal advice

Although both OSHA and EEOC's guidance is becoming clearer as it relates to the COVID-19 vaccine, ultimately, the circumstances of each situation differ, and employers should weigh cautiously any employment decisions when mandating a COVID-19 vaccine. In addition, as always, employers should remain aware that further guidance may be issued by either the EEOC and/or OSHA.

Saxton & Stump attorneys [Richard L. Hackman, Esq.](#) and [Stephen J. Fleury Jr., Esq.](#) are available to further discuss

how to cost-effectively ensure your organization's compliance with these new EEOC and OSHA requirements and how our [Labor and Employment Group](#) can help develop internal best practices designed to minimize the risks to employers.

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