

COVID-19 Vaccinations and the Workplace: Critical Updates

March 25, 2021

In our previous alert on vaccinations and the workplace, we addressed the threshold question of whether employers can require their employees to get vaccinated and other related COVID-19 vaccine issues. At that time, however, the vaccine was just starting to become available and only to front-line medical workers. Now that the vaccine rollout is in full swing, with three different authorized vaccines, more and more Americans have access to a vaccine. That means, of course, more and more employers are facing difficult vaccination questions. This alert provides an update on employee vaccination guidance from key federal agencies and other new developments since the first vaccine was approved in December 2020.

Can Employers Still Require Employees to Get Vaccinated?

The Equal Employment Opportunity Commission (EEOC) has not issued any new guidance on employee vaccination issues since its previously released guidance on December 16, 2020. As a reminder, this guidance strongly suggests that employers can require employees to get vaccinated. However, most major employers have not adopted mandatory vaccination policies to date. Instead, they have adopted either an "educate and encourage" or an "educate, encourage and incentivize" approach. Any employer seeking to make vaccines mandatory for its employees should still be cautious and consult with labor and employment counsel.

Updated OSHA and CDC Guidance

On January 29, 2021, the Occupational Safety and Health Administration (OSHA) issued additional guidance on several COVID-19 workplace issues. Notably, the guidance includes a disclaimer that OSHA's recommendations are "advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." While the guidance largely focuses on how to protect workers from COVID-19 in the workplace, it also addresses some key vaccination issues. Specifically, the guidance states that employers should (1) continue to require vaccinated employees to wear masks and maintain social distance, (2) provide information regarding "the benefits and safety of vaccinations," and (3) not distinguish between vaccinated and unvaccinated employees.

On March 5, 2021, the Centers for Disease Control and Prevention (CDC) issued its most recent guidance on workplace vaccination programs. While the CDC guidance is also non-binding, it is far more direct in advocating for employers to provide any and all options for employees to obtain a vaccine. The CDC urges employers to work with their local health departments to set up on-site vaccination programs and also recommends that employers provide information to employees on the benefits of vaccination. The guidance does, however, make clear that "Whether an employer may require or mandate COVID-19 vaccination is a matter of state or other applicable law." The CDC guidance also cites EEOC guidance and states that employees may qualify for "exemptions" from vaccine programs based on medical or religious grounds. Because the CDC has no responsibility for enforcing or administering employment laws (unlike OSHA and the EEOC), employers should not blindly follow CDC guidance and should consult legal counsel.

What About Incentives?

Employers considering vaccine-related incentives should consult legal counsel and consider a variety of legal compliance issues. In January of this year, the EEOC issued proposed rules governing incentives offered in connection with voluntary wellness programs for employees. Under those proposed rules, most wellness program participation incentives would have to be "de minimis" (very small), such as a participation sticker, a water bottle, or a gift card of similar value. These proposed limitations were designed to ensure that employees would not feel coerced into participating in a wellness program — something that is prohibited by both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) for a wellness program that involves any disability-related inquiry. In February, however, the EEOC withdrew its proposed rules, leaving employers once again without meaningful guidance on how much of a wellness-related incentive they can offer to employees as part of a wellness plan without running afoul of the ADA and GINA.

How does this recent rule change affect employers interested in offering incentives for employees to get a COVID-19 vaccine, such as extra paid time off or cash incentives? The answer largely depends on how a vaccine-related wellness initiative is structured. A plan under which an employer either administers the vaccine itself or contracts with a third party to administer the vaccine could trigger ADA and GINA obligations, because pre-vaccine screening questions could be considered a disability-related inquiry. In that scenario, any incentives should probably remain "de minimis" — at least until the EEOC clarifies its position. However, if an employer offers incentives for employees to get vaccinated on their own (for example, at a pharmacy that has no connection to the employer) and does not administer the vaccine through its own health plan that includes a wellness component, then the ADA and GINA limitations discussed above might not apply because the employer is less likely to be making a disability-related inquiry such as pre-vaccine screening questions. An employer might still be found to be making disability inquiries, however, if it gathers medical information from employees in the course of confirming vaccination or granting disability-related

accommodations as part of an incentive program, so an employer should be thoughtful about whether to require the provision of medical data beyond simple proof of vaccination itself. In addition, given the uncertainty around the EEOC's position on incentives, being modest with the amount of the incentive may reduce risk.

Although the EEOC's February withdrawal of its proposed rules has created considerable uncertainty, at least one requirement for vaccination incentives remains clear. Employers who offer incentives for vaccinations should be prepared to offer employees who cannot get vaccinated because of their religious beliefs or a disability an alternative path to receive the incentive.

What Vaccine Documentation Should Be Required?

Whether in connection with or apart from an incentive program, employers are increasingly interested in whether they can require documentation of the COVID-19 vaccination status of employees, as well as that of vendors and customers. In particular, many employers are concerned that HIPAA prohibits requiring such documentation or makes it problematic. HIPAA (the Health Insurance Portability and Accountability Act of 1996) is a federal law that protects identifiable patient health information from disclosure without the patient's knowledge or consent. However, HIPAA does not generally apply to information provided by an employee (or individual vendor or customer) directly to an employer or business that is not acting as a health care plan or provider. While HIPAA likely applies when an employer self-administers or self-insures its group health plan or a wellness plan that constitutes or is part of a group health plan, HIPAA, does not otherwise prohibit an employer from requiring and receiving medical documentation from the individual who is the subject of the information in its capacity as an employer. Employers planning to offer vaccination incentives who administer or ensure their own health plans will want to consult counsel for nuanced analysis and advice on potential HIPAA obligations before implementing an incentive program. For other individuals such as vendors and customers a business will not be prohibited by HIPAA from requiring proof of vaccination or setting that as a condition of the business relationship. Other laws, however, such as disability discrimination laws and state privacy laws generally require an employer to treat medical data as confidential and to store it in a separate secure location, separate and apart from primary personnel files.

Employers should also consider possible ADA and GINA implications of any documentation requirement they impose. The EEOC has stated in its vaccine Guidance that requiring proof of vaccination is generally permissible, reasoning that this alone would not be a "disability-related inquiry" that would need special handling under the ADA. The EEOC Guidance also warns, however, that the ADA may be implicated if disability-related medical data is gathered. Specifically, the Guidance states: "If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to *warn the employee not to provide any medical information* as part of the proof, in order to avoid implicating the ADA." Moreover, an employer should generally avoid



asking employees why they are not vaccinated or won't get vaccinated. Such questions could elicit disability information and transform the handling of proof of vaccination into a much more complex proposition.

New Religious Accommodation Issues

New questions about religious accommodations have been raised with the introduction of the Johnson & Johnson (J & J) vaccine. Because the J & J vaccine is made from cloned cells derived from a fetus aborted in the 1980s, some religious leaders have recently issued public statements on the use of this particular vaccine. The U.S. Council of Catholic Bishops, for example, has recommended avoiding the J & J vaccine "if possible." By contrast, the Vatican has indicated that it is morally acceptable to take vaccines such as the J & J where the research and production have involved use of fetal cell lines.

Depending on the particular religious belief expressed by an employee in the vaccine context, including one based on one of these Catholic leadership statements or a variation of them, an employer may need to consider whether it can reasonably accommodate the employee's belief. The most readily available accommodation for a vaccine-mandating employer in many cases might be to require the employee to receive one of the other available vaccines, which are not susceptible to the same fetal cell-based objection, assuming this approach does not run afoul of some broader religious opposition the employee has to vaccines. This accommodation would not likely impose an undue hardship on the employer, provided alternative COVID-19 vaccines are reasonably available to the employee. However, if no alternative to the J & J is readily available to an objecting employee, the possibility of reasonable accommodation may be more difficult, requiring the employer to consider whether other creative options might be available. In addition, if an employee has a sincerely held religious belief against *any* vaccine, an employer will have to further consider whether and how it might accommodate that belief.

What Should You Do?

Now that vaccines are more widely available, most employers are no longer putting off developing plans and policies related to the impact on employees. Employers should have a clear stance on vaccinations and be prepared to respond to objections from employees who do not want to get vaccinated. Employers must also think about the overall health and safety of their workplace, which will now consist of many employees who are vaccinated, but others who are not. These issues are rapidly evolving, so consultation with experienced labor and employment counsel will be critical to managing these concerns.

For more information, please contact Mark Mathison or your regular Lathrop GPM contact.