



# EEOC Updates Employer Vaccine Guidance

On Friday, May 28, 2021, the Equal Employment Opportunity Commission (EEOC) updated [guidance](#) for employers around COVID-19 vaccines. This builds on guidance initially provided on December 16, 2020, when the first two vaccines were granted emergency use authorization (EUA) approval.

**First, the EEOC mentions the various laws which apply to employers in considering whether to require or incentivize vaccines, including:**

- + The Americans with Disabilities Act (ADA)
- + The Rehabilitation Act
- + The Genetic Information Nondiscrimination Act (GINA)
- + Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII)
- + The Age Discrimination in Employment Act (ADEA, applicable to employees age 40+)

The EEOC also notes they are evaluating the May 13, 2021, [guidance](#) from the Centers for Disease Control and Prevention (CDC) exempting fully vaccinated individuals from mask requirements “except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

They also mention they have been asked repeatedly about the legal differences between vaccines granted an EUA vs. full approval from the Food & Drug Administration (FDA), but the EEOC says “it is beyond the EEOC’s jurisdiction to discuss the legal implications of EUA or the FDA approach.” They go on to remind employers that “other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer.” So it’s advisable to seek legal counsel anytime you’re considering a vaccine requirement or incentive.



# Below is our non-legal summary of the updated EEOC guidance on vaccines:

## MANDATORY VACCINATION POLICIES

- + While employers may require a vaccine to physically enter the workplace, they also must inform employees they will engage in an interactive process “on an individualized basis” to provide reasonable accommodations to those with a disability (or pregnancy) or sincerely held religious reason for not getting vaccinated.
- + As part of this interactive process, the employer and employee must identify “direct threats” to the employee and others and determine ways accommodations could be reasonably made without undue hardship to the business operations of the employer. JAN, OSHA, and other resources would ideally be consulted in determining the nature of material work duties and potential accommodations or alternatives.
- + With current data, it’s not sufficient to just assume someone will pose a direct threat to themselves or others when unvaccinated in the physical workplace. Employers must consider a host of factors, such as the vaccination status of other workers around them, whether the individual has already had COVID-19, the level of community spread, air quality/circulation at the workplace, ability to mask and social distance, ability to modify shifts and/or workspaces, requiring routine COVID-19 testing, CDC guidance, the employee’s own health provider’s guidance with the employee’s consent, etc.
- + Mandatory policies should not discriminate against any protected classes, whether intentionally or accidentally.
- + Employer must train managers and supervisors how to recognize someone’s request or need for an accommodation. Employees should not have to use the magic words “I’d like to request a reasonable accommodation.”
- + Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against or otherwise harass an employee for requesting an accommodation.
- + Mandatory vaccine offered at the worksite or by the employer’s agent must ensure pre-vaccination screening questions which might reveal a disability are “job related and consistent with business necessity. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee’s own health or safety or to the health and safety of others in the workplace.”
- + For those with a sincerely held religious reason for not getting vaccinated, the EEOC notes such employee might request outright exemption from the mandatory policy, or request waiting until a vaccine to which they don’t object is made available. The employer must presume the employee’s religious reason is sincere, but if they have objective observations that would cause them to question the religious nature or sincerity of the objection, “the employer would be justified in requesting additional supporting information.”



## VACCINATION INCENTIVES

- + Employers may provide general education from the government and community resources, and connect employees with community partners (such as transportation assistance).
- + Employers are encouraged to provide time off to get vaccinated, particularly in situations where employees cannot reasonably get transportation assistance to get vaccinated outside of work hours.
- + Incentives for employees and their family members are permissible, subject to the following clarifications:
  - When the vaccine *is* obtained via the employer or its agent, the incentive should not be “so substantial as to be coercive” and should only be for the employee, not for any family members (*the employer may allow family members to voluntarily get vaccinated this way with proper written authorization from the family member before engaging these vaccine services, but the employer cannot incentivize family members that opt to participate*).
  - When the vaccine is *not* obtained via the employer or its agent, the employer is not subject to this incentive limit and is permitted to provide incentives to family members (and request documentation substantiating vaccination) without violating GINA.
  - Employers must also pay attention to any other federal, state, or local laws which might limit such incentives, too. As we noted above, the EEOC is always sure to reiterate their jurisdiction is limited to federal EEO laws only.
    - For example, this would be viewed as a health-contingent incentive under HIPAA (as it’s an incentive contingent on meeting a certain health standard), so it should be limited to 30% of the total health insurance premium rate (combined with any other health-contingent incentives already offered), and should have reasonable alternative standards in certain situations to qualify for the same full reward.

## CONFIDENTIALITY

- + While employers may require or request proof of vaccination, it is imperative to safeguard medical information and keep it separate from personnel files.
- + In requesting any proof of vaccination, it is also imperative to not pry further into why someone might not be vaccinated. If the employee wants to request reasonable accommodation for a disability or sincerely held religious reason, that’s when they can volunteer that information to the employer.
- + We would encourage each employer to draft their Covid mask and vaccine policies/incentives in partnership with legal counsel, and to be consistent in following the policies written and communicated to employees.

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IMA will continue to monitor regulator guidance and offer meaningful, practical, timely information.



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