

EEOC Guidance Provides Small But Odd Change to Vaccine Practices in the Workplace

Description

As demonstrated by the recent update to the EEOC's Technical Assistance Questions and Answers relating to COVID-19 ("EEOC Guidance"), Employers with any sort of vaccine policy should pay close attention to how the law is evolving to avoid any technical missteps. PS&H partner, Alicia Samolis, was recently interviewed regarding the current status of employer's rights with respect COVID-19 vaccinations for a Providence Business News article titled *In [the] workplace, COVID-19 vaccine issues are complex* (June 11, 2021).

The latest EEOC Guidance was in most part uneventful, confirming what employers should already know: employers can ask for vaccine status, get proof of vaccination, use vaccination status as a requirement to return to work, avoid mask wearing policies or award incentives and, most importantly, outright mandate vaccines (subject to the usual disability and religious accommodation exceptions).

As Alicia pointed out, "[t]he issues surrounding vaccinations are more business issues than legal issues." Alicia explained, "many employees oppose mandated vaccinations in the workplace because they see it as an infringement on their rights," even though under the current laws, it is not. And employers now, more than ever, have a real business interest in avoiding implementing unnecessary policies that may result in employee and candidate dissatisfaction. This is because recruitment and retention are increasingly challenging as there is a segment of the population happy not working and collecting both a higher unemployment benefit and getting free COBRA.

Alicia highlighted one part of the EEOC Guidance that should not be missed, which has some legal implications. Despite the EEOC's continuing recognition that vaccines available to the public are not protected medical treatments under the Americans with Disabilities Act ("ADA") and that inquiries or policies regarding those vaccines are not disability-related inquiries covered by the ADA, under the new guidance the EEOC states that the information and documentation received by the employer disclosing an employee is vaccinated must be treated as medical information protected by the Americans with Disabilities Act ("ADA") "like all other medical information." Historically, however, only specific sorts of medical information are subject to ADA confidentiality requirements, such as information received pursuant to a specifically authorized ADA medical inquiry or information obtained through the interactive process. While Alicia recognized that the EEOC's reasoning simply "doesn't make any sense", she advises that unless and until the guidance is changed, disclosing an employee is vaccinated without their permission "could expose employer to potential lawsuits".

Luckily, employer disclosure of vaccine status is easy to avoid outside a few potential pitfalls. One would be if clients of the employer require vaccine information in order for the employer's employee to go on site at the client. In such case, authorization must be obtained (and potentially might not be given if the client is difficult to work with). Another would be if a business that runs a raffle for vaccinated employees wants to announce the winner. Before sending out the announcement of who won, the employer would need to verify it has obtained permission to release the winner's name (and, if not, get the worker's authorization prior to making the announcement). Similarly, employers who are requiring masks for unvaccinated workers in jurisdictions without a corresponding mask order should be abundantly clear that vaccinated workers can choose to wear masks if they wish (to avoid outing their vaccination status by not wearing a mask).

One of the biggest take homes from the guidance is that even though many of the COVID-19 rules have been around for some time, the details of such rules are likely to continue to evolve. Employers should be careful to check in with their employment counsel periodically to ensure the practices they have adopted are consistent with the most recent legal interpretations.

The full article as published in *Providence Business News*, can be viewed [here](#). (Subscription required).

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