

Federal Law Alerts - May – June 15th

EEOC Updates COVID-19 Guidance

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) updated its [guidance](#) for COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws in the following topics:

- COVID-19 Vaccinations, and EEO Overview;
- Title VII and COVID-19 Vaccinations;
- GINA and COVID-19 Vaccinations; and
- Employer Incentives for COVID-19 Voluntary Vaccinations under ADA and GINA, which is a new section.

The EEOC added the following FAQs under its new section discussing employer incentives and vaccinations:

- **ADA: Employer Incentives for Voluntary COVID-19 Vaccinations**
 - Question 16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? (5/28/21)
 - Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.
 - Question 17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? (5/28/21)
 - Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in Question 16, however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

- **GINA: Employer Incentives for Voluntary COVID-19 Vaccinations**

- Question 18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? (5/28/21)
 - Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.
- Question 19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? (5/28/21)
 - Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See Question 14 for more about GINA and pre-vaccination medical screening questions.
- Question 20. Under GINA, may an employer offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent? (5/28/21)
 - No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of the employee. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

- Question 21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated without offering the employee an incentive? (5/28/21)
 - Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about their medical conditions. If these requirements are met, GINA permits the collection of genetic information.

Of note, these materials were prepared prior to the [CDC's updated guidance for fully vaccinated individuals](#) issued on May 13, 2021, and any supplements. The EEOC is considering any impact of these developments on COVID-19 technical assistance provided to date.

Form I-9 Flexibility Extended to August 31, 2021

On May 26, 2021, the Department of Homeland Security (DHS) and the U.S. Immigration and Customs Enforcement (ICE) announced [an extension](#) of the flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to COVID-19. This temporary guidance was set to expire May 31, 2021, but because of ongoing precautions related to COVID-19, DHS extended the Form I-9 requirement flexibilities to August 31, 2021. Read more from the [ICE newsroom](#).

OSHA Endorses CDC Guidance for Fully Vaccinated Workers and Masks

According to the Occupational Safety and Health Administration's (OSHA) [website](#) providing information about protecting workers against COVID-19 in the workplace, "The Centers for Disease Control and Prevention (CDC) issued new guidance relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of healthcare and a few other environments. OSHA is reviewing the recent CDC guidance and will update its materials on its website accordingly. Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." According to the [CDC's guidance updated on May 13, 2021](#), fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.

Fully Vaccinated People and Masks (Updated)

On May 13, 2021, the Centers for Disease Control and Prevention [announced](#) that people who are fully vaccinated against COVID-19 can:

- Resume activities that they did prior to the pandemic; and
- Do so without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.

According to the CDC, people are generally considered fully vaccinated:

- Two weeks after their second dose in a two-dose series, such as the Pfizer or Moderna vaccines; or
- Two weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

~~However, at this time the Occupational Safety and Health Administration (OSHA) has not changed its guidance about employers' duty to provide a safe and healthy workplace during the pandemic. Per OSHA, employers should implement [COVID-19 Prevention Programs](#) in the workplace and include the following key elements:-~~

- ~~• Conducting a hazard assessment;-~~
- ~~• Identifying a combination of measures that limit the spread of COVID-19 in the workplace (such as face coverings, face masks, social distancing, etc.);-~~
- ~~• Adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and-~~
- ~~• Implementing protections from retaliation for workers who raise COVID-19 related concerns.~~

~~According to OSHA, "It is important to wear a face covering and remain physically distant from co-workers and customers even for those who have been vaccinated because it is not known at this time how vaccination affects transmissibility." Also, Some states have enacted strict laws requiring face masks, but they may be lifted in the near future. For instance, according to a California Department of Public Health [press release](#) from May 3, 2021, the state continues to require the use of face coverings, regardless of vaccination status, in indoor settings outside of one's home.~~