

The EEOC makes pro-business updates to its COVID vaccine guidance

The EEOC has been at the forefront of issuing guidance about the relationship between covid, vaccinations, and the workplace. However, with things constantly changing, it's hard to keep up — which is why we're here to help. The EEOC recently [updated](#) its guidance on vaccinations and the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). Here's what you need to know.

Background

Two events prompted the EEOC to refine its previously issued guidance:

- The Food and Drug Administration granted permanent approval to covid vaccines, beginning Aug. 23, 2021.
- The Department of Justice put out a [memorandum opinion](#) in which it concluded the Food, Drug and Cosmetic Act doesn't prohibit employers from imposing vaccination mandates.

Mandatory vaccination policies

The EEOC guidance reiterates that you may require all employees who physically enter your workplace to be fully vaccinated against covid-19, subject to the reasonable accommodation provisions of Title VII, the ADA, and other EEO considerations.

If you're going to have a vaccination mandate, you're going to need to know employees' vaccination status and have them present proof of their status. The EEOC says asking employees about their status and requiring them to present proof of it isn't a pretext to asking them to disclose the existence of a disability. But, in accordance with the ADA, you must keep confidential the information employees provide in response to your inquiries.

The EEOC also delineates the limits of Title II of GINA, which prohibits employers from discriminating against employees or job applicants based on their genetic information—but not independent healthcare providers. So Title II wouldn't apply in two key situations:

- When you require employees to present documentation of their vaccination status from a healthcare provider unaffiliated with you.
- When pre-vaccination medical screening questions asked by unaffiliated healthcare providers include questions about genetic information.

Vaccine incentives

A major sticking point since the advent of vaccines has been the EEOC's guidance on wellness-plan incentives, which seems to vary markedly from the IRS' incentives for activity-based wellness plans (i.e., no more than 30% in employees' health premium reductions or, conversely, health premium surcharges for employees who remain unvaccinated).

The EEOC again applies its general rule: Wellness-plan incentives can't be so substantial as to be coercive. It still hasn't refined what *so large as to be coercive* means, which is unfortunate, because some harmony between the tax code and the ADA would be welcome. The EEOC, however, has clarified the following:

- Neither the ADA nor GINA limits the incentives you can offer to encourage employees to voluntarily receive shots or to provide confirmation of vaccination, if the healthcare provider administering the shots isn't your agent.
- GINA doesn't prevent you from offering incentives to employees to get shots administered by you or your agent, provided you don't acquire genetic information in the process. *Bonus:* None of the approved vaccines require inquiring about genetic information.
- Similarly, GINA doesn't limit the incentives you can offer to encourage employees' family members to voluntarily receive shots or provide confirmation of vaccination if the healthcare provider administering the shots isn't your agent.
- You may not, under GINA, offer incentives to employees in return for their family members getting vaccinated by you or your agent.