

Labor & Employment Alert
November 10, 2021

New Technical Assistance Updates from the EEOC

In October, the U.S. Equal Employment Opportunity Commission (EEOC) updated its [COVID-19 Technical Assistance](#)¹, providing additional guidance for employers on the interaction between COVID-19 vaccine workplace policies and federal equal employment opportunity (EEO) laws. Here are key updates to the Technical Assistance:

- a) **Proof of COVID-19 Vaccinations:** The October updates to the Technical Assistance repeat that the EEO laws do not prevent employers from mandating COVID-19 vaccinations, subject to the reasonable accommodation provisions of Title VII and the Americans with Disabilities Act (ADA). Employers can also require their employees to provide documentation or other confirmation of vaccination without violating the ADA or the Genetic Information Non-Discrimination Act (GINA). However, an employer needs to be cognizant that proof of COVID-19 vaccination from an employee is confidential medical information that must be properly and separately stored under the ADA and other relevant privacy laws.
- b) **COVID-19 Vaccination Incentives:** When the employer is *not* the party administering the COVID-19 vaccination to its employees, the employer can offer incentives to encourage employees to voluntarily become vaccinated without violating the ADA.² There is no limit to the incentive. That said, when the employer or its agent *is* the party administering the COVID-19 vaccine to its employees, then the employer will find itself in the position of making disability-related inquiries under the ADA during the vaccine administration process. The Technical Assistance cautions these employers that under the ADA, the value of its COVID-19 vaccination incentive may not be so substantial as to be coercive. In its [Workplace Vaccination Program](#) webpage, the Center for Disease Control and Prevention (CDC) offers the following examples of incentives: cash bonuses, paid time off or vacation days, gift cards, free products, food, coupons for the workplace cafeteria, and other gifts.
- c) **Pregnancy and the COVID-19 Vaccination:** The Technical Assistance warns employers to be mindful of policies that disparately treat pregnant employees in violation of Title VII. Although the Technical Assistance highlights that the CDC recommends that everyone age 12 years and older, including people who are pregnant, become vaccinated, it also provides considerations for when pregnant employees request an exemption from the COVID-19 vaccine. When a pregnant employee seeks such an exemption, employers should make certain that the pregnant employee is not facing discriminatory treatment compared to other employees that are similar in their ability or inability to work. Therefore, if non-pregnant employees, who are similar in their ability or

¹ MHTL previously discussed the EEOC's Technical Assistance's in our [Toolkit of Federal Guidance for Developing a Workplace COVID-19 Vaccination Program](#).

² Group health plans and health insurance issuers are directed to the [Guidance on COVID-19 Vaccine-Related Premium Surcharges and Discounts](#) issued by the Tri-Agency (the U.S. Departments of Labor, Health and Human Services, and the Treasury) on October 4, 2021 for distinct HIPAA considerations beyond the EEO laws covered in the EEOC's Technical Assistance.

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inability to work, have been granted job modifications based on a COVID-19 vaccine exemption, then the pregnant employee may be entitled to job modifications as well.

- d) **Encouraging Vaccinations:** Employers may encourage employees and their family members to receive a COVID-19 vaccination without violating EEO laws by providing employees with information about the COVID-19 vaccines. The Technical Assistance lists some of these resources. It specifically points to the CDC's "tool kit" for employers to use in educating their workforce about how getting a COVID-19 vaccine is particularly useful for all workers and employers. (See the CDC's [Workplace Vaccination Program](#) webpage). The Technical Assistance recommends that employers provide the contact information of a management representative for employees who need to request a reasonable accommodation or to ensure nondiscrimination for an employee who is pregnant.
- e) **Handling Vaccine-Related Religious Accommodation Requests:** The Technical Assistance adds a new section devoted to religious objections to COVID-19 vaccine mandates. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. In the context of religion, Title VII protections will be triggered when either an applicant or an employee requests an exception from the employer's COVID-19 vaccination mandate policy by claiming that it conflicts with their sincerely held religious beliefs, practices, or observances. For employers, the Technical Assistance makes clear the following points:
- First, it is the duty of the employee (or the applicant) to first inform the employer whether they are requesting an exception to an employer's COVID-19 vaccine requirement due to a sincerely held religious belief, practice, or observance. In so doing, the employee (or applicant) is making a request for a "religious accommodation" (also generally known as a "reasonable accommodation") under Title VII.
 - Second, faced with a religious accommodation request, an employer should assume that the request is based on a sincerely held religious belief. Even non-traditional religious beliefs are included within the Title VII definition of "religion." However, if an employer has an objective basis to question the religious nature or the sincerity of the belief, then the employer may make a limited factual inquiry and seek additional supporting information from the employee. Testing sincerity comes down to credibility, is highly factual, and requires an individualized assessment. The Technical Assistance points out that religious protections under Title VII do *not* equate to protections for employees based on social, political or economic views, or personal preferences.
 - Third, employers that demonstrate "undue hardship" are not required to grant an employee's request for a religious accommodation. The Technical Assistance defines undue hardship as requiring an employer to bear more than a "de minimus", or a minimal, cost to accommodate an employee's religious belief. The Technical Assistance

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emphasizes that costs to be considered include not only direct monetary costs but also the burden on the employer's business operations, including the risk of spread of COVID-19, impairment of workplace safety, diminution of workplace efficiency, or an accommodated employee's co-workers having to carry the accommodated employee's share of hazardous or burdensome work. As such, an employer may have some employees that it offers a religious accommodation to based on the circumstances and nature of their work situation, and at the same time deny other employees an accommodation because the circumstances and nature of their work makes the request an undue hardship.

- Fourth, an employer is not required to grant the employee's proposed accommodation as long as the employer institutes a religious accommodation that resolves the conflict without causing an undue hardship.
- Fifth, a religious accommodation may become an undue hardship based on a change in circumstances, and as such, an employer may be permitted to discontinue a previously granted accommodation. The EEOC recommends discussing the matter with the employee to possibly find an alternative accommodation before discontinuing the previously granted accommodation.
- Finally, the EEOC recommends that employers provide their employees and applicants with contact information and any procedures necessary to request a religious accommodation. As a model for this process, the EEOC, in a rare move, shared its own [Religious Accommodation Request Form](#) as a model for employers.

Given the complexities involved in vaccine-related issues, employers are strongly encouraged to consult with legal counsel as they roll out and implement vaccine policies, particularly as they relate to incentives and reasonable accommodation for either disabilities or sincerely held religious beliefs. With respect to accommodations, there is no "one size fits all" and they require an individualized assessment, which includes the interactive process.

This Client Alert was prepared by Brendan Collins and Nan O'Neill and was reviewed by Kier Wachterhauser. If you have any questions, please contact Nan O'Neill, Kier Wachterhauser or the attorney assigned to your account, or call (617) 479-5000.

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