



ACCNJ LEGAL & INSURANCE UPDATE

EEOC Updates Vaccine Guidance

On May 28, the EEOC [updated vaccination guidance in the agency's FAQ resource](#). All updates can be found in Section K of the publication. The updates add clarity to some previously unanswered issues and reaffirms a handful of the agency's previous positions. Chief among them, employers are still permitted to mandate the vaccine subject to reasonable accommodations for disabilities and sincerely held religious beliefs. Additionally, the new guidance adds some clarity to incentivized programs.

Below, we have highlighted main additions to the EEOC guidance, but we encourage members to read the new FAQs in their entirety. In addition, it is important to remember the EEOC's guidance relates to the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA). Other federal, state, and local laws can impact workplace directives, such as the most recent wave of [Executive Orders from Governor Murphy](#) and New Jersey's Law Against Discrimination (NJLAD).

Key additions to EEOC vaccine guidance (May 28):

- ***The EEOC adds a comment regarding “disparate impact” (FAQ K1) -*** Previously absent from the EEOC's guidance was any discussion about disparate impact as it related to vaccines. Now, the EEOC highlights that employers may need to address disparate impact claims because *“some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, [and] some employees may be more likely to be negatively impacted by a vaccination requirement.”* This addition seems odd since vaccines are widely available and free to everyone. Later in the guidance, the EEOC refers to an individual's access to transportation and information (i.e., reliable internet) as potential barriers (see FAQ K3). If you suspect this is the reason an employee has not gotten vaccinated, employers should remember that [New Jersey has the “VAXRIDE” initiative](#) to support New Jerseyans in their efforts to reach clinics. As for information – this should not be a barrier. There are plenty of resources you can share with employees: [NJ COVID-19 Vaccine Information](#).
- ***Incentive limitations do not apply if you are merely asking employees to provide proof of vaccination, as opposed to administering the vaccine yourself (or through an agent). (FAQ K16 and K17) –*** There was previously significant confusion over permitted incentives. Generally speaking, substantial incentives are not allowed because they become coercive and render the program involuntary. The EEOC's new guidance now makes clear that this incentive limitation only applies if the employer (or its agent) is administering the vaccine program directly. It will not apply if employees obtain a vaccine from a third party (i.e., a pharmacy) and provide proof of vaccination to claim the incentive. As a result, it appears larger incentives can be used if you plan to only require proof of vaccination.
- ***The EEOC specifically mentions wearing a face mask as a potential***

reasonable accommodation. Also mentioned was telework. (FAQ K2) - Note that on June 4, [Executive Order 243](#) will rescind the New Jersey directive to accommodate telework. This does not however, remove telework as a possible reasonable accommodation under the ADA (so long as it does not cause the employer an “undue hardship”).

- ***If an employee provides confirmation of vaccination (i.e., a vaccination card), that information is confidential and should be stored separately from the employee’s personnel files. (FAQ K4).*** For purposes of the ADA, requesting proof of vaccination is not a disability-related inquiry. (See FAQ K9)
- ***Additional clarity is added regarding what is a “direct threat.” (FAQ K5)*** – If a particular employee cannot receive the vaccine because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. This determination can be broken down into two steps: (1) determining if there is a direct threat and, if there is, (2) assessing whether a reasonable accommodation would reduce or eliminate the threat. The guidance makes clear that the “direct threat” standard can change overtime. For example, the “threat” may be lower if most of your workforce is already vaccinated and community spread continues to decrease. Ultimately, the determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19 (i.e., guidance from the CDC).
- ***To request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation” (FAQ K6).*** Supervisors should be trained to identify accommodation requests.
- ***Voluntary programs that are employer-administered do not have to show that pre-screening questions are job-related and consistent with business necessity (FAQ K8)*** – Conversely, if the program is mandatory and administered by the employer (or its agent), as opposed to a third party (i.e., a pharmacy), the “consistent with business necessity” standard must be complied with.
- ***If a person is fully vaccinated, but they still consider themselves at high risk from COVID, you must still perform the interactive process for a potential reasonable accommodation. (FAQ K11).*** You may seek confirmation of the “disability” from a medical provider with the employee’s consent.
- ***The EEOC acknowledges that none of the pre-screening questions performed for the current COVID vaccines elicit genetic information, and therefore, GINA will not be implicated in most circumstances. (FAQ K14 and K19).***

Please feel free to contact the Association with any questions about the new guidance.

Rising Construction Costs – Upcoming Webinars

We continue to hear from members regarding the material price escalation crisis. This is a major obstacle for our industry that will require a concerted effort among all parties in the contractual chain. On June 15, BCA Insurance will be presenting on the topic of Builders Risk, Cyber and Common-Underinsured Scenarios. However, BCA Insurance will kick things off with a few comments on material price escalation to provide a risk management perspective on the current problem.

On June 29, Peckar & Abramson, P.C. will host a webinar that focuses on how to deal with these obstacles from a contractual and business standpoint. We will be evaluating options for existing contracts and discuss strategies for future agreements. To help scope the content of the presentation, ACCNJ previously asked members to share their experiences thus far with the price escalation crisis. If you would like to provide examples, please share them with Michael Regina (mregina@accnj.org).

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

Upcoming installments of ACCNJ's Legal and Insurance Webinar Series include:

- (1) Material Price Escalation (Risk Management Perspective), and (2) Builders Risk, Cyber and Common Underinsured Scenarios – **June 22**
- Legal Strategies For Dealing With Rising Construction Costs – **June 29**
- Insurance Market Forecast – Causes Behind the Hardening Market – Date TBD

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