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## KEEPING YOU INFORMED

### What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

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#### Paid Time Off – Can employers treat vaccinated and unvaccinated employees differently when it comes to PTO?

The EEOC has not addressed this question so there is no “official” answer yet. But their guidance can be applied to help employers make decisions.

This type of policy does not appear to implicate any of the Federal equal employment opportunity laws in terms of the impact of this penalty generally on unvaccinated workers. If the policy is not part of a mandatory vaccination policy, but rather a consequence for an employee to consider as one contemplates whether or not to be vaccinated, then the proposed policy may be considered an “incentive” to get employees to choose voluntarily to be vaccinated.

However, the EEOC has not addressed whether a policy to deny paid leave related to COVID-19 to an unvaccinated employee is an incentive, but it is a possible argument.

If this proposal is meant as an incentive, an employer may frame it as a reward or a penalty. Therefore, it may be possible to argue that the potential denial of paid leave if an employee contracts COVID-19 qualifies as an incentive (a penalty).

If the employer or its agent is the entity administering the vaccinations, then as explained the incentive may not be so substantial as to be coercive. But, if the incentive is for an employee to get vaccinated on their own (e.g., by a personal physician, at a local pharmacy or health clinic), then there are no limits on the value of an incentive.

Employers need to be sure to address employees who are unvaccinated because of a disability or sincerely-held religious belief, practice, or observance. For these employees, if an employer denies paid leave if the employee contracts COVID-19, it could be considered discrimination. An employer implementing such a policy should make clear that an employee could request “reasonable accommodation” if the reason for being unvaccinated is a disability or a religious reason. In this instance, it is likely that a reasonable accommodation would be providing paid leave if an employee contracts COVID-19.

Employers should also be aware of any state laws that might be implicated by these policies. Arkansas laws do not seem to prohibit these types of policies, but employers with employees in other states may want to review those states laws related to paid time off.

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