

PRESENTATION TO JFNA

JEWISH TOGETHER: REOPENING CONSIDERATIONS

June 1, 2021

Welcome + Introduction



Jessica Golden Cortes

Partner, Labor + Employment Practice Group

Davis+Gilbert LLP

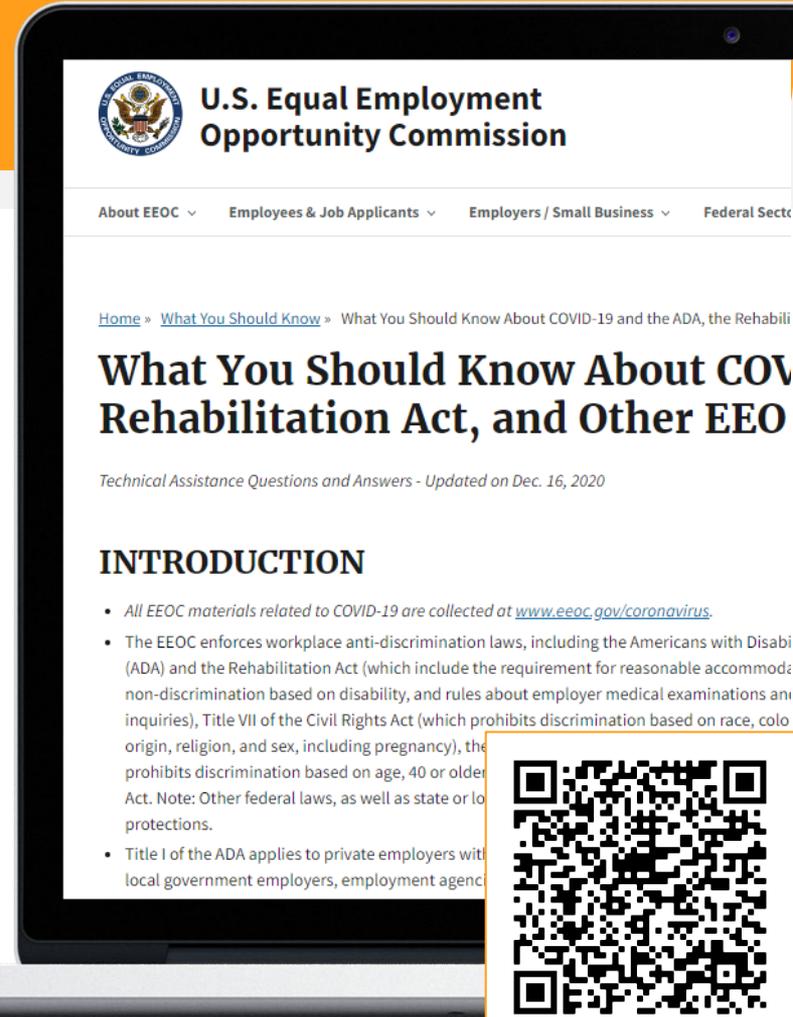
212 468 4808

jcortes@dglaw.com



VACCINE MANDATES AND RELATED ISSUES

- In December 2020, the EEOC issued guidance discussing the potential legal issues surrounding the COVID-19 vaccine – Updated May 28, 2021
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - This addresses federal laws – be mindful of state and local guidance



CAN EMPLOYERS REQUIRE EMPLOYEES TO BE VACCINATED? GENERALLY YES

- The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19
 - Subject to reasonable accommodations for religion and disability
 - Subject to disparate impact analysis
- Under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines:
 - *If* not so substantial as to be coercive; and
 - Employees voluntarily share documentation of vaccination
- Information about an employee's COVID-19 vaccination is considered confidential medical information under the ADA
 - Keep confidential and store separately

WHETHER TO HAVE MANDATORY VACCINE POLICY

- **Prevailing View:** to “strongly encourage” rather than “mandate” in typical *office* setting
 - Morale
 - Avoid ADA risks
 - Avoid discrimination risks
- **Consider:**
 - Frequency of third party interactions
 - Type of job/exposure



VACCINATION PROOF

- Requesting proof of receipt of a COVID-19 vaccination generally ok
 - not likely to elicit information about a disability and, therefore, not considered a disability-related inquiry that would be prohibited by ADA
- **BUT** subsequent employer questions, such as asking **why** an individual did not receive a vaccination, may elicit information about a disability and needs to be “**job-related and consistent with business necessity**”
 - same standard applies to conducting COVID-19 test at work or as prerequisite to return to work)
- If employer requires employees to provide proof of COVID-19 vaccination from a pharmacy or their own health care provider, tell employees not to provide any medical information as part of the proof in order to avoid implicating the ADA

PAID TIME OFF FOR VACCINATION

- Families First Coronavirus Response Act – Voluntary Extension to September 2021
 - Employers are not obligated to comply, but get tax credits for doing so
 - Valid reasons to take leave expanded to include getting vaccinated/recovering from vaccine
 - Replenishes sick leave banks
 - Employees can take EFMLA for EPSL reasons (not just childcare due to school closure)
 - EFMLA payable for full 12 weeks (not 10)
- Several states like New York, California and Illinois have VPTO laws as well, requiring paid time off to get vaccinated separate and apart from paid sick time and general paid time off.

THE PANDEMIC AND ADA REQUIREMENTS

- **Americans with Disabilities Act (15+ employees)**
- Pandemic Preparedness in the Workplace Guidance Highlights:
https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf
 - Health questions employers are permitted to ask during pandemic – including if employees have been diagnosed with or tested positive for COVID-19 or have been in contact with others who have
 - ADA permits employer to require symptomatic employees to leave the workplace
 - ADA permits employers to require COVID-19 testing before permitting entry to workplace and periodically thereafter
 - Employer may deny entry to employee refusing to answer COVID-19 questions

COVID-19 and the Americans with Disabilities Act (15+ employees)

- Employer may screen candidates for employment for COVID-19 symptoms
- Employer may withdraw offer if job start is time-sensitive and individual cannot start due to COVID-19 illness/exposure
- Employer may not postpone or withdraw offer to high risk candidate (over 65 or pregnant)
- Employer may not require antibody tests as prerequisite to workplace entry per CDC guidelines – ADA medical examination
- Continued remote work may be a reasonable accommodation
- Accommodate mental health issues exacerbated by COVID-19
- Employers still required to engage in interactive process even during remote work



- CDC Guidance for Fully Vaccinated (non-healthcare):
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>
- Fully vaccinated people can, among other things:
 - Resume activities ***without wearing masks or physically distancing***, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, ***including local business and workplace guidance***
 - Employers permitted to create own protocols
- Employers are permitted to have differing policies for vaccinated and unvaccinated employees



AMERICAN RESCUE PLAN
ACT OF 2021



ARPA Impact on COBRA

The American Rescue Plan Act of 2021 COBRA Subsidy

- President Biden signed the American Rescue Plan Act of 2021 (ARPA) into law on March 11, 2021. In addition to direct payments to certain taxpayers and extending unemployment benefits, **APRA also provides for the federal government to pay 100% of the cost of COBRA premiums for the period beginning April 1 through September 30 (the “subsidy period”)**
- The federal government will pay for the COBRA subsidies by providing certain tax credits
 - For most single employer plans, the employer will be eligible to take the credit
 - For fully-insured medical plans that are **not** subject to federal COBRA requirements, the credit will be taken by the insurer

COBRA Subsidy under APRA Eligible Individuals

- To be eligible for the subsidy, an individual must be eligible for COBRA as a result of an **involuntary termination** of employment (except for termination for gross misconduct) or reduction of hours, and the individual's maximum COBRA coverage period falls within the subsidy period
- The COBRA subsidy is generally **not available** to individuals who are eligible for coverage under:
 - Another group health plan
 - Medicare
- Ineligible individuals who claim a subsidy will be subject to a penalty

COBRA Subsidy under APRA Special Enrollment Period

- ARPA also provides an **extended COBRA election period** for individuals who are still within their COBRA maximum coverage period (generally, 18 months) **and**:
 - Were eligible for COBRA continuation coverage during the subsidy period but did not initially enroll, **or**
 - Elected COBRA continuation coverage that was discontinued before the subsidy period

Note: ARPA does **not** extend the maximum COBRA coverage period available to an individual

COBRA SUBSIDY UNDER APRA Notice Requirements

- Notice of COBRA subsidy
 - COBRA election notice sent to qualifying individuals must now include information regarding the COBRA subsidy
 - If an individual became entitled to COBRA continuation coverage before the start of the subsidy period, the plan administrator must provide a new notice containing information about the subsidy within 60 days after the start of the subsidy period
- Notice of expiration of the COBRA subsidy must be provided between 15 and 45 days before the COBRA subsidy is set to expire
- The DOL issued model notices that can be used
- **Next Steps:** Reach out to your COBRA administrators to confirm that they updated their procedures to comply with the requirements under ARPA

ADDITIONAL RESOURCES

CDC

<https://www.cdc.gov/coronavirus/2019-ncov/community/workplaces-businesses/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>

EEOC

<https://www.eeoc.gov/newsroom/eeoc-examines-connections-between-covid-19-and-civil-rights>

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

OSHA

<https://www.osha.gov/coronavirus/safework>

<https://www.osha.gov/coronavirus/guidance/industry>

<https://www.osha.gov/coronavirus/faqs>

Questions?

Jessica Golden Cortes

Partner

Davis+Gilbert LLP

212-468-4808

jcortes@dglaw.com