



# Encouraging COVID shots can be tricky for employers



Elizabeth Brown of Southold shows her COVID-19 Vaccination Record Card after receiving her first dose of the vaccine at the SUNY Stony Brook University Innovation and Discovery Center in Stony Brook on Jan. 18. Credit: Barry Sloan

**By Jamie Herzlich**

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How far can an employer go to mandate or encourage its employees to get vaccinated against COVID-19? Federal guidelines leave some room for interpretation and discretion, especially when employee objections are based on religion or an individual's disability.

Recently updated guidance from the U.S. Equal Employment Opportunity Commission (EEOC) said such requirements would not run afoul of existing federal discrimination laws as long as reasonable accommodations are provided where necessary such as for disability and religious beliefs. Employers can also offer incentives to encourage employees to get vaccinated, says the guidance.

Employer rights to mandate vaccinations have already been resisted on legal grounds. "Employees have already filed legal challenges based on the fact that the vaccines currently are only distributed under Emergency Use Authorization (EUA)," says Gerald C. Waters, Jr., a partner at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola.

A federal court in Texas on June 12 dismissed a challenge from employees at Houston Methodist Hospital who faced suspension and ultimately termination for refusing the shots. The employees said they would appeal.

Gerald C. Waters, Jr. partner at Meltzer, Lippe, Goldstein & Breitstone, LLP. Mineola, N.Y., on April 2021.....bzHERZ210628 Credit: Meltzer Lippe

The EUA was enough to get hundreds of millions of doses into Americans' arms to curtail the virus' spread after official reviews declared the vaccines highly safe and



effective. But it is short of a final Food and Drug Administration approval.

The EEOC guidance noted "it is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach." The EEOC guidance focused simply on whether mandating vaccination conflicts with federal civil rights/equal employment opportunity laws like the Americans with

Disabilities Act and Title VII of the Civil Rights Act, said Waters.

Businesses must also comply with state laws like the New York State Human Rights Law that prohibits discrimination, but Waters said he isn't aware of current state law that specifically prohibits employer vaccine mandates.

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## 'Reasonable accommodation'

The federal EEOC guidance states that "federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19" while allowing "reasonable accommodation" for objections based on religion or disability — "unless providing an accommodation would pose an undue hardship on the operation of the employer's business," including excessive costs.

Beyond the mandate issue, the guidance also clarifies incentives can be offered for employees voluntarily showing proof of vaccination.

Yale Pollack, Partner at Campolo, Middleton & McCormick, LLP; photo taken in January 2021.. Credit: Bob Giglione Photography

But it specifies that for an employee who receives a vaccination administered by the employer or its agent, incentives may be offered provided "it's not so substantial as to be coercive," says Seth Kaufman, a partner in Fisher Phillips' New York City office.

The guidance doesn't address any limits on incentives for vaccinations received outside of their employer like at a state-run site or pharmacy, he says. Nor does it lay out parameters on what size incentive might be considered coercive. Kaufman encourages employers to use "common sense."

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Kaufman says some employers are offering incentives, but thinks that number could grow as more people return to the office. Still, offering incentives might "be a slippery slope," says Yale Pollack, a partner at Ronkonkoma-based Campolo, Middleton & McCormick LLP.

## Incentives? Be consistent

For instance, if a company offered an incentive for the first round of employees that were eager to get vaccinated, but now feel they must "up the ante" to encourage those still reluctant, that could pose an issue for those previously vaccinated, he says. Pollack's advice is to be consistent and don't change the incentives that were originally given.

Also consider bad feelings could arise if someone with say a closely held religious belief can't get vaccinated and doesn't get an incentive as a result.

Pollack pointed to Kroger, the supermarket chain, which found a way around this by giving \$100 one-time payment to employees that showed proof of vaccination, but also made it eligible to those that couldn't receive a vaccination for medical/religious reasons if they completed an educational health/safety

course.

Barbara DeMatteo, director of HR consulting at Jericho-based Portnoy, Messinger, Pearl & Associates, Inc., says companies that have been offering incentives have done so either by providing two or four hours of paid time to get the vaccine or holding a lottery drawing with names of those who showed proof of vaccination.

As for mandating the vaccine, she hasn't had any clients do so yet.

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Barbara DeMatteo, Director of HR Consulting Credit: PMP

The biggest hurdle of mandating is "if an employee refuses the vaccine how do you handle that?" DeMatteo says.

## Fast Fact:

Of those employers considering employee incentives to get the vaccine, the two most popular categories include cash/gifts (38%) and paid time off (30%).

Source: *Fisher Phillips*

FILE - In this Dec. 24, 2020, file photo, a COVID-19 vaccination record card is shown at Seton Medical Center in Daly City, Calif. California is offering residents to access a digital record of their coronavirus vaccinations they can use to access businesses or events that require proof of inoculation. The state's public health and technology departments said Friday, June 18, 2021, the new tool will allow Californians to access their record from the state's immunization registry. (AP Photo/Jeff Chiu, File) Credit: AP/Jeff Chiu

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