

A&E Quarterly Regulatory Round Up

Q3 2021

EEOC Issues Guidance on Employer COVID-19 Vaccine Policies

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) posted updated technical assistance guidance related to employer policies on COVID-19 vaccinations, and the impact of EEO laws including the Americans with Disabilities Act (“ADA”), the Genetic Information Nondiscrimination Act (“GINA”), and Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (“Title VII”).

This article provides a high-level summary of the EEOC guidance, with references to the relevant numbered questions for more information on a particular point. The guidance is detailed and addresses employer practices in responding to and evaluating accommodation requests, which are beyond the scope of this article.

As A&E firms begin to bring employees back to the office or off-site at clients, they should review this guidance and their policies with employment counsel. Keep in mind this guidance is limited to federal EEO laws. State and local laws, along with collective bargaining and other employment agreements, may impose further restrictions.

Confidentiality of COVID-19 Vaccination Information

The guidance states that under the ADA, an employer is required to “maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination,” regardless of whether an employee’s vaccination is obtained in the community or directly from the employer.

Therefore, if an employer collects or retains documentation of an employee’s vaccination, this documentation must be kept confidential and stored separately from the employee’s personnel files, like all medical information under the ADA. [K.4]

Mandatory Employer Vaccination Programs

Federal EEO laws do not prohibit an employer from requiring employees to be vaccinated before physically entering the workplace, as long as the employer complies with the reasonable accommodation provisions of the ADA and Title VII [K.1, K.2] for an employee who does not wish to be vaccinated due to:

- ▶ Disability, [K.5, K.6]
- ▶ Pregnancy, [K.13] or
- ▶ A sincerely held religious belief. [K.6, K.12]

The guidance provides examples of reasonable accommodations, including:

- ▶ wearing a face mask,
- ▶ working at a social distance from coworkers or non-employees,
- ▶ working a modified shift,
- ▶ getting periodic tests for COVID-19, or
- ▶ given the opportunity to telework. [K.2]

As with any employment policy, an employer should be attentive to whether its vaccination requirement has a disparate negative impact on employees covered by a protected category, such as situations where accessibility barriers make it difficult to obtain a vaccination. [K.1]

The guidance also clarifies:

- ▶ If an employer **requires employees to provide documentation of their vaccination from an unrelated third party** in the community (such as a pharmacy, personal health care provider, or public clinic) this generally will not raise issues under EEO laws, assuming a reasonable accommodation exists for employees who cannot be vaccinated due to disability, pregnancy, or a religious objection. [K.9, K.15]
 - For purposes of the ADA, merely requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry. GINA is not implicated, because the employer is not asking the employee any medical screening questions (rather, the employee's own health care provider is asking those questions).
- ▶ If an employer **requires employees to get a vaccination from the employer or its agent** (for example, from an onsite nurse or a workplace clinic), the pre-vaccination medical screening questions are likely to elicit information about an employee's disability.
 - This raises ADA issues, as an employer can only require an employee to answer such questions if they are "job-related and consistent with business necessity." To meet this standard, an employer would have to assert that an employee's refusal to answer (and therefore failure to receive the vaccine) would pose a direct threat to the health and safety of the employee or others in the workplace. Therefore, when an employer requires that

employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA. The guidance provides further information on evaluating these situations. [K.5, K.7]

- However, GINA would not be implicated as long as the pre-vaccination medical screening questions did not include questions about the employee's genetic information, such as asking about the employee's family medical history. The pre-vaccination medical screening questions recommended by the Centers for Disease Control and Prevention ("CDC") as of May 27, 2021, do not ask about family medical history or any other genetic information. [K.14]

Employers may not require employees to have their family members vaccinated and must not penalize employees if their family members decide not to get vaccinated. [K.21]



Voluntary Employer Vaccination Programs and Incentives

Voluntary vaccinations provided by the employer

An employer may wish to facilitate the vaccination process by making vaccinations available to employees and/or family members. This means the employer or its agent will have to ask the employee and/or family members to answer pre-vaccination medical screening questions.

Unlike a mandatory program (described above), the guidance makes clear if an employer offers to vaccinate its employees on a voluntary basis (meaning the employees can choose whether to get the COVID-19 vaccine from the employer), the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. Therefore, if the employee is voluntarily answering the CDC-recommended pre-vaccination medical screening questions in this context, this doesn't trigger concerns with the ADA or GINA. [K.8, K.14, K.19]

For an employee's family member, the employer must take extra steps to comply with GINA. For example, the family member must give a voluntary written authorization before answering medical condition questions, and the employer must keep the family member's medical information

confidential and inaccessible to any individual who makes employment decisions for employees. [K.21]

An employer who offers voluntary vaccinations also must comply with federal employment nondiscrimination laws. For example, it would not be permissible to exclude certain employees from the opportunity to be vaccinated based on national origin or another protected basis under the EEO laws. [K.10]

RESOURCES Section K, Vaccinations of the EEOC's "What You Should Know About COVID -19 and the ADA, the Rehabilitation Act, and Other EEO Laws" is found at <https://www.eeoc.gov/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Employee Retention Credits for Architectural & Engineering Firms

Architectural & Engineering ("A&E") firm owners may be eligible for the Employee Retention Credit ("ERC") if they experienced a full or partial suspension of operations during 2020 and 2021 due to the COVID-19 pandemic or are suffering significant declines in gross receipts as compared to 2019. The ERC is a refundable payroll credit of up to \$5,000 per qualified employee in 2020 and \$7,000 per qualified employee per quarter in 2021 (\$28,000 per employee over the course of 2021). Cherry Bekaert's ERC Team is helping many A&E firms qualify for this credit.

The A&E industry is experiencing significant growth opportunities which are expected to escalate as the new Administration supports greater energy efficiency in new construction and renovated real estate. The ERC provides A&E firm owners with much needed cash that can be used to hire new employees, expand R&D, and invest in new or improved products or services. This article helps A&E firm owners decide the easiest and most beneficial way to monetize the ERC.

The **ERC** is a beneficial stimulus to small business, but only if the credits immediately provide cash flow to the employer. Understanding this, the government provides four different ways to enable an eligible employer to realize the benefits: an advance credit, an immediate benefit, a quarterly benefit, and a benefit realized through an amended employment tax return. Small businesses should evaluate these different methods and use the one that is the easiest and most advantageous.



An Advance Credit

Small eligible employers can realize the benefits of an ERC even before qualifying wages are paid by filing Form 7200 and claiming a credit of no more than the average quarterly wages paid during 2019. Employers need to reduce employment tax deposits in anticipation of the credit before requesting an advance.

An employer's average quarterly wages are defined as an employer's Social Security wages determined without regard to the Social Security wage base. The amount is determined by averaging the amount reported on line 5c of all Forms 941 filed for 2019 and dividing that amount by four. Special rules apply for seasonal employers and for employers not in existence in 2019 or who were not in existence for the entire quarter during the period used for the calculation. An employer determines the average quarterly wages on an aggregated employer basis.

The Form 7200 is faxed to the Internal Revenue Service ("IRS"). Once received, it is processed with other tax forms and takes at least 30 days for a check to be sent to the employer. Form 7200 is due prior to the end of the quarter for which the credit is being claimed and the amount of the credit claimed on the Form 7200 will be reported on the Form 941 for that quarter. This advance credit may be in excess of the ERC to which the employer will be entitled for the quarter.

The quarterly Form 941 is used to reconcile an employer's payroll tax liability, deposits made and credits claimed, in some cases resulting in the employer being required to repay amounts to the government at the end of a quarter.



An Immediate Credit

The quickest and recommended way to monetize the ERC is to reduce federal payroll tax deposits the employer would otherwise make. Thus, as employee pay is determined and federal income and employment tax withholding and payments would otherwise be deposited through EFTPS, the Electronic Funds Tax Payment System, the employer should reduce those deposits for the amount of credit earned on wages paid or to be claimed as an advance credit.

This results in an immediate cash flow benefit equal to the amount that would otherwise be paid to the IRS. Note that even though the ERC is a refundable credit based on wages which offsets an employer's Social Security or Medicare taxes,

the offset can be for all taxes that would otherwise be deposited. The quarterly Form 941 is used to reconcile an employer's payroll tax liability, deposits made and credits claimed.



A Quarterly Benefit

Some eligible employers choose to determine the amount of credit to which they are entitled, taking into account gross wages and allocable health care costs that are not used for CARES Act PPP loan forgiveness before claiming the credit. Those employers can use either the Form 941 of the Form 7200 to claim the credit.

Form 7200 is due prior to the end of the quarter for which the credit is being claimed and the amount of the credit claimed on the Form 7200 will be reported on the Form 941 for that quarter. Form 941 allows employers to choose whether to get a refund of any overpayment or apply the refund as a credit to the following quarter's employment tax returns. If the overpayment is claimed as a credit on the subsequent quarter's employment tax return, the employer can reduce payroll tax deposits that would otherwise be made during that subsequent quarter, resulting in an immediate tax benefit.



An Amended Employment Tax Return

If an employer has already filed its Form 941 for a calendar quarter, the employer has at least three years to file a Form 941-X, an amended Form 941, to claim the credit. Form 941-X can be filed any time before expiration of the refund statute of limitations for that year's quarterly employment tax returns. In general, the statute of limitations for a quarterly Form 941 expires, absent an agreement by the taxpayer and the IRS to extend the statute, on April 15th, three years after

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the year following the due date for the quarterly Form 941's. The American Rescue Plan of 2021, enacted March 11, 2021, extended this period to five years for credits claimed on wages paid after June 30, 2021, and before January 1, 2022.



Penalty Relief

Allowing taxpayers a myriad of ways to claim the ERC and realizing that taxpayers and their advisors may inadvertently misapply the rules, Congress specified that penalties for failure to deposit payroll taxes should be waived. Notice 2020-20 applies to 2020 ERCs and Notice 2021-24 extends this credit to 2021 ERCs. These notices eliminate the penalty if the amount of taxes not timely deposited is less than or equal to the employer's anticipated ERC reduced by credits available for emergency paid sick and FMLA leave, as long as the employer did not seek an advance credit for the same amount.

Contact Us

Cherry Bekaert is ready to assist you in claiming the ERC. We have a proprietary technology platform that allows us to provide an audit-ready deliverable in which we document your status as an Eligible Employer, calculate the credit from your wage data, maximize the wages treated as Qualified Wages, and allocate PPP loan forgiveness proceeds across the eligible payroll quarters. For questions or guidance, contact your Cherry Bekaert tax advisor or **Martin Karamon**.

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