

Publication

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Client Alert: EEOC Guidance Sheds Light on COVID-19 Vaccines for Employers

On December 16, 2020, on the heels of the FDA providing its emergency use authorization of the Pfizer-BioNTech COVID-19 vaccine, the Equal Employment Opportunity Commission ("EEOC") issued its much anticipated guidance concerning COVID-19 vaccines for employers. Although it may still take some months before vaccines become widely available, the EEOC's guidance sheds light on some of the questions with which employers have been grappling, particularly with regard to the impact of various federal employment laws on employers' vaccine-related policies and practices.

Resolving months of speculation, the EEOC's guidance confirms that, generally speaking, employers may require employees to be vaccinated prior to returning to the workplace due to the ease with which COVID-19 spreads in confined environments. As the guidance puts it: "If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination." In other words, neither the administration of the vaccine in and of itself, nor an employer's inquiry into whether an employee was in fact vaccinated, constitutes a "medical examination" or a "disability-related inquiry" under the Americans with Disabilities Act ("ADA"). The ADA also allows an employer to require that individuals do "not pose a direct

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threat to the health or safety of individuals in the workplace," and the recent guidance from the EEOC confirms that a mandatory vaccination policy constitutes a permissible measure to prevent "direct threats."

Employers must keep in mind, however, that the ADA requires employers to reasonably accommodate employees' covered disabilities, and that Title VII of the Civil Rights Act of 1964 ("Title VII") requires employers to reasonably accommodate employees' religious beliefs. Practically speaking, this means that once an employer is on notice that an employee's disability status or sincerely held religious belief prevents the employee from receiving the vaccination, the employer must, at a minimum, engage in the interactive process to determine if a reasonable accommodation can be made without posing an undue hardship on the employer.

In addition, employers should be cognizant of the fact that pre-screening vaccination questions, which elicit information concerning an employee's disability status or family medical or genetic history, may implicate the ADA and/or even the Genetic Information Nondiscrimination Act ("GINA"). Thus, prior to making such inquiries, employers must determine that doing so is "job-related and consistent with business necessity." If not, employers should refrain from delving into an individual's family medical or genetic history. Furthermore, any information elicited from such inquiries must be kept as a confidential medical record per the terms of the ADA. Namely, such information must be kept separate and apart from an employee's personnel file, and be accessible strictly on a need-to-know basis.

Mandating that all employees be vaccinated is not required by law, and may not be desired or appropriate in many workplaces. Many employers are debating both the practical administrative considerations and potential long-term ramifications and exposures that mandatory vaccinations may entail. All employers, however, should



strongly consider taking proactive steps to encourage their employees to be vaccinated, including, e.g., by assisting employees in easily accessing vaccines once they become available, covering related costs, and/or offering other appropriate incentives. While we have some time before vaccines become widely available, now is the time for employers to think through and plan their vaccine-related strategy and related communications.

If you have any questions about employer rights or obligations when it comes to COVID-19 vaccinations, please contact Sonya Rosenberg, Corey Biller, Alissa Griffin or your Neal Gerber Eisenberg attorney.

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