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Client Alert: Why Employers Are Moving Away from Requiring COVID-19 Vaccines

Although the EEOC has issued guidance indicating that generally employers *can* mandate COVID-19 vaccines (see our prior client alert), many employers are continuing to grapple with the question of whether they *should*, in fact, implement a mandatory vaccination policy. And for good reason, as multiple considerations point to the conclusion that for most employers, the approach of strongly encouraging vaccines, instead of mandating them, is the better way to go.

A mandatory vaccination policy can be problematic for several reasons. For one, some employers may underestimate how many, and which, of their employees may object or outright refuse to be vaccinated. Some employees may refuse for legally substantiated reasons – e.g., based on sincerely held religious beliefs protected under Title VII of the Civil Rights Act of 1964, or based on covered health conditions under the Americans with Disabilities Act. But some may balk based simply on feeling “uncomfortable.” If any of the employer’s key employees or a substantial portion of its workforce refuse to be vaccinated, is the employer prepared to act under a “mandatory” vaccination scenario? Consider also, as some employers appropriately have observed, that the vaccines do not offer complete protection against COVID-19, and the currently recommended physical workplace precautions – including masks and social distancing – should continue for the foreseeable future

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consistent with applicable guidance. Other employers candidly have expressed concern about currently unknown, potential long-term health consequences of the vaccines. If the employer takes a categorical stance that requires employees to make the difficult choice between what they believe to be the right health-related decision for them personally and the ability to earn a livelihood, some could argue that the employer should bear some responsibility, and incur some *liability*, should longer-term health consequences arise. Finally, employers may also become subject to state-specific laws that are more restrictive as to employers' rights. Indeed, in direct opposition to the EEOC's clear guidance, multiple states are currently considering legislation to prevent or substantially limit private businesses from mandating the COVID-19 vaccine.

These and other considerations are leading many of our clients to take what we will call the "educate, encourage and assist" approach to vaccines. To *educate*, employers should consider partnering with experts in the medical and vaccine research fields to answer employee questions regarding the vaccine, including how it was developed and why it is considered safe and advisable. Successful employee education efforts maintain an open line of communication between employees and well-qualified individuals who are able to effectively answer any questions or concerns employees may have. At the same time, employers should express and repeat, early and often, that employees are strongly *encouraged* to receive a vaccine as soon as possible. An employer's clear stance on vaccinations is helpful for employees to understand as they make their own decisions. Lastly, vaccination campaigns are likely to be most successful among those employers who appropriately *assist* their employees by making it easy and attractive for them to receive the vaccine. To do so, employers should consider the following options: partnering with a third-party administrator to make vaccines conveniently available to employees when they



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are already at work and free of charge; identifying vaccine administrators in the area; providing paid time off work to get the vaccine and should the employee feel unwell for a day or two after the shot; offering some *de minimus* incentives, e.g., small gift certificates, to those employees who complete their vaccination. Such efforts can be truly impactful in helping to ensure that employees receive vaccinations, while allowing employers to mitigate for potential exposure considerations.

Before vaccines become widely available, now is the time for many employers to decide and iron out the details of their right-fit vaccine strategy and plan, and to map out related employee communications.

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

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