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*Client Advisory*

## Updated EEOC Guidance on Employer-Mandated COVID-19 Vaccinations

In light of the recent FDA approvals and planned rapid rollouts of two COVID-19 vaccines, on December 16, 2020 the U.S. Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance to address certain issues surrounding vaccines in the workplace. However, given the fact that we are only at the very early stages of the vaccination program, it is highly likely that the EEOC and other federal and state agencies will issue additional or revised guidance as the vaccine becomes more widely available, or as new information regarding vaccine safety or efficacy comes to light. Given this fact, and the fact that the vaccine is currently in very tight supply and restricted to only small segments of the population, employers would do well to wait before making final decisions regarding how vaccines, including employee vaccination mandates, should factor into their plans. This being said, the EEOC's newly revised guidance at least provides a much-needed starting point for employers as they begin to consider what role vaccinations will play in their efforts to foster safe workplaces and return to normal operations.

The EEOC's revised guidance first states that the administration of an FDA approved and/or authorized COVID-19 vaccine to employees by an employer, or by a third party contracted by the employer, will not be considered a "medical examination" under the Americans with Disabilities Act ("ADA"). However, there is an additional consideration, which is that the CDC recommends that health care providers ask certain health related questions of potential recipients before administering a vaccination to ensure that there is no medical reason that the person should not receive it. Such questions, if asked by the employer or by a contractor administering a vaccine on the employer's behalf, are "disability-related" inquiries under the ADA. According to the EEOC, this means that such inquiries must be job-related and consistent with business necessity, and that an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. This restriction would not apply to employer-sponsored vaccinations which are purely

voluntary, even if provided directly by the employer or a third-party contracted by the employer. In order to be voluntary, an employee who chooses not to answer the questions, and thus not receive the vaccine, may not be subjected to any retaliation, including exclusion from the workplace.

For employers seeking to require vaccinations, but wishing to avoid the complexity of having to establish the existence of a "direct threat," the EEOC notes that if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a local pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

For employers considering vaccination mandates, but that intend to rely on employees obtaining the vaccination on their own, there is the question of how the employee will prove he or she has been vaccinated. It appears that the EEOC does not object to an employer requiring employees to provide written proof of vaccination, which, according to the EEOC, is not in and of itself a disability-related inquiry. However, in the case an employee has not received the vaccination, if the employer asks additional questions regarding the reason the employee has not been vaccinated, because such questions could reveal information about a disability, such inquiries must be job-related and consistent with business necessity.

Two issues which are certain to arise with employer mandated COVID-19 vaccinations are employees who decline based on claims of disabilities or religious objections. As to disability-based refusals, employers will be required to make individualized assessments regarding whether the employee in an unvaccinated state poses a direct threat in the workplace, and if so, whether such threat can be eliminated or reduced by reasonable accommodation. Even if there is a direct threat, and that threat cannot be reduced to an acceptable level, while the employer may exclude the employee from physically entering the workplace, the employer will need to determine if the employee

is entitled to accommodations such as performing the current position remotely, or to additional leave (such as, but not limited to, FMLA leave). The issue of whether or not a direct threat exists is not only specific to the particular work environment, but also likely to change as more and more of the general population (or, in some cases, the particular workplace population) is vaccinated.

Employees objecting to being vaccinated based on a “sincerely-held religious belief, practice, or observance” are entitled, under Title VII of the Civil Rights Act, to reasonable accommodation for such religious belief, practice, or observance, unless it would pose an undue hardship. The standard for “undue hardship” applied under Title VII is significantly lower than the ADA, and is defined as an accommodation having more than a *de minimis* cost or burden on the employer. Because religion is a broad concept including much more than traditional or common beliefs or practices, employers should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. However, according to the EEOC, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. If an employee refuses to get vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, an employer may exclude the employee from the workplace. Whether or not the employee may be terminated would depend on whether the employee has other rights, such as leave rights, under other federal, state, or local laws.

With respect to reasonable accommodation determinations related to both disability and religious accommodations, employers should be careful to consider working from home as a possible accommodation, especially if, at some point during the pandemic, working from home for the particular position was implemented.

Lastly, according to the EEOC’s present guidance, vaccination mandates imposed by employers will not, in most circumstances, run afoul of the Genetic Information Nondiscrimination Act (“GINA”). Title II of GINA severely restricts employers’ use of genetic information to make decisions related to the terms, conditions, and privileges of employment, or to acquire or disclose genetic information except in six narrow

circumstances. The EEOC has taken the position that requiring employees to receive a COVID-19 vaccine does not violate GINA, even if the particular vaccine at issue uses “mRNA” technology, since, according to the CDC, mRNA COVID-19 vaccines “do not interact with our DNA in any way.”

Pre-vaccination medical screening questions, could implicate GINA if the questions include inquiries relate to genetic information (including family history). At this point, it is not clear what exactly normal pre-vaccination medical screening questions will accompany the different available or future COVID-19 vaccinations. However, employers may wish to avoid this whole issue related to medical inquiries by not conducting or contracting for employee vaccinations, but by allowing employees to seek out their own vaccinations, and simply require employees to provide proof of inoculation.

As with all COVID-19 issues, the situation is constantly changing, and therefore employers should continue to reevaluate their responses as the facts change, and as federal and state authorities implement new laws, regulations and guidance.

If you have questions about COVID-19 vaccinations in employment, or any other employment law issue, please contact any member of Archer’s [Labor and Employment Group](#) in: Haddonfield, NJ at 856-795-2121; Philadelphia, PA at 215-963-3300; Princeton, NJ at 609-580-3700; Hackensack, NJ at 201-342-6000; or Wilmington, DE at 302-777-4350.

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