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EEOC Provides Updated Technical Guidance Addressing COVID-19 Vaccinations

Throughout the COVID-19 pandemic, the Equal Employment Opportunity Commission (EEOC) has continued to provide guidance for employers regarding how to handle various workplace situations. The EEOC updated its [technical assistance questions and answers](#) on December 16, 2020 to address concerns related to COVID-19 vaccinations that have recently become available.

One of the first questions employers are asking as the COVID-19 vaccines become available is whether or not they can mandate their employees receive the vaccine. Generally speaking, the EEOC guidance suggests that an employer may be able to mandate the vaccine or require proof of vaccination, but it will need to consider whether it is best to do so in light of a variety of both practical and legal considerations unique to each workplace.

As the EEOC explained, mandatory vaccines or requiring proof of vaccination are not considered medical examinations or disability-related inquiries, which generally must be “job-related and consistent with business necessity” under the Americans with Disabilities Act (ADA). However, the EEOC noted pre-screening questions may implicate the ADA and the Genetic Information Nondiscrimination Act (GINA). According to the updated EEOC guidance, employers that directly administer the vaccine to employees must be aware that the pre-screening questionnaire required by the vaccine likely would be a disability-related inquiry, which an employer may make only if it meets certain criteria, including that it is job-related and consistent with business necessity, and that it does not require employees to disclose genetic information about themselves or their families. Employers will want to be careful not to ask any questions that exceed these restrictions and may prefer to avoid administering the vaccine directly for that reason. Due to the legal concerns under the ADA and GINA stemming from pre-screening questionnaires, the EEOC has suggested employers may want to consider requiring that employees submit proof of vaccination, instead of the employer administering the vaccination, in order to avoid asking questions that are considered disability-related inquiries or questions that run afoul of GINA. If an employer chooses this option, it would want to direct employees to provide proof of vaccination from an outside party and avoid providing any additional medical information.

Under the ADA and comparable state law, individuals may also have the right to a reasonable accommodation from an employer-mandated vaccine requirement if the employee has a medical condition or disability. Requests for such accommodations require an individualized analysis and interactive process. Before excluding an individual from the workplace, the employer must consider whether the unvaccinated person poses a direct threat to the health and safety of individuals in the workplace, taking into account the duration of the risk, nature and severity of the potential harm, the likelihood the harm will occur, and the imminence of the potential harm. The employer also must consider whether an accommodation to a vaccination requirement, such

as remote work or leave, poses an undue burden on the employer, before an employee could be terminated. Given the lack of data regarding the long-term effects of the vaccine, a high number of accommodation requests are anticipated.

In addition, individuals may claim a sincerely held religious belief, practice, or observance which requires an accommodation to a vaccination requirement under the religious protections of Title VII of the Civil Rights Act of 1964 (Title VII).

Practical considerations in determining whether to mandate the vaccine include the high demand and limited availability of the vaccine at this time, the costs associated with employer-administered vaccinations, and the interplay with collective bargaining agreements and individual contracts. Employers also will want to consider how they will enforce a vaccine mandate against employees who are unwilling to take it for personal reasons, but who may not qualify for an accommodation under the ADA or Title VII.

Given the legal and practical considerations with mandating vaccines, the EEOC has suggested that an alternative is to encourage employees to receive the vaccine voluntarily, with pre-screening questions voluntarily answered.

Deciding whether or not to require employees to be vaccinated will be a discussion unique to each employer. In order to ensure that all considerations are taken into account, you should have a full discussion with your Buelow Vetter attorney.

If you have additional questions or wish to discuss these options please contact Claire Hartley at chartley@buelowvetter.com or 262-364-0260 or Lauren Burand at lburand@buelowvetter.com or 262-364-0258 or your Buelow Vetter attorney.