

CLIENT ALERT: EEOC Issues Additional Guidance Addressing COVID-19 Vaccines

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued expanded [guidance](#) on the COVID-19 pandemic relating to employer obligations under the Americans with Disabilities Act (“ADA”), the Rehabilitation Act, and other equal employment opportunity laws. Section K of the updated guidance specifically addresses questions related to the administration of COVID-19 vaccinations to employees. See MBJ’s prior client alerts dated [March 20, 2020](#), [May 11, 2020](#), and [June 15, 2020](#) for our analysis of prior updates to this EEOC publication.

This updated guidance provides valuable insights and assistance to employers related to COVID-19 vaccinations and how they can be properly administered and reviewed as a condition of employment. The guidance further contemplates how and when employers can consider the taking of the vaccine by employees mandatory or voluntary. However, the guidance stops short of providing definitive clarification on whether an employer can mandate the vaccine while it remains permitted solely under the U.S. Food and Drug Administration’s (“FDA”) Emergency Use Authorization (“EUA”).

The new section of the guidance provides as follows:

COVID-19 Vaccination Does Not Constitute a Medical Examination

The guidance clarifies that administration of a COVID-19 vaccine is not a “medical examination” for the purposes of the ADA when the vaccine is administered to an employee by an employer. This also applies to a third party with whom the employer contracts to administer the vaccine. A medical examination is any “procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” Because the vaccine provides protection against contracting COVID-19, it is not a medical examination as long as the employer is not seeking information about an individual’s impairments or current health status as part of the administration of the vaccine. This clarification permits employers who merely arrange for administration of the vaccine to avoid the stricter rules concerning employer-mandated medical exams.

Pre-Screening Questions May Implicate the ADA

Nevertheless, the EEOC warns that pre-screening vaccination questions may still constitute disability-related inquiries under the ADA, where such inquiries are likely to elicit information about a disability. Where an employer administers the vaccine, it must show that its pre-screening questions to employees are “job-related and consistent with business necessity.”

To meet this threshold, an employer needs 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.” Alternatively, employers can avoid satisfying the “job-related and consistent with business necessity” requirement by (1) offering the vaccine to employees on a voluntary – as opposed to mandatory – basis, thereby allowing employees to voluntarily answer pre-screening questions or (2) providing the vaccine to employees through a third party which does not have a contract with the employer, such as direction of the employee to a pharmacy or health care provider.

Proof of Vaccination May Be Required

Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry, so it does not automatically trigger ADA protections. However, follow-up employer questions, including asking why an individual did not receive a vaccination, could prompt information about a disability which would be subject to the pertinent ADA standard that such inquiry be “job-related and consistent with business necessity.”

As a best practice, the EEOC recommends that if an employer requires proof of COVID-19 vaccination, an employer should warn an employee not to divulge any medical information in connection with providing such proof.

Reasonable Accommodations Based on a Disability or Sincerely Held Religious Belief

The EEOC guidance also addresses how employers that choose to mandate COVID-19 vaccination should respond to employee requests for accommodation where an employee is unable to receive the vaccine based on a disability and/or sincerely held religious belief.

The ADA permits employers to exclude employees that pose “a direct threat to the health or safety of individuals in the workplace.” However, to exclude an employee who cannot be vaccinated due to a disability from physically entering the workplace, an employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

To determine whether an individual poses a direct threat, and therefore may be excluded from the workplace, employers should conduct an individualized assessment of the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If an employer determines an employee does pose a direct threat, the employer should then assess whether the employee can be provided a reasonable accommodation that would eliminate or reduce the risk, without causing an undue hardship.

Similarly, “[o]nce an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the COVID-19 vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.” Under Title VII, an “undue hardship” is defined as “having a more than a *de minimis* cost or burden on the employer.”

Employers and employees should engage “in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship.” The EEOC advises that employers may rely on the Centers for Disease Control and Prevention (“CDC”) recommendations when deciding whether an effective accommodation which would not pose an undue hardship is available.

Even where an employer may exclude an employee from the workplace, the EEOC guidance emphasizes that such determination does not mean that an employer may automatically terminate the employee, and employers will need to review the applicability of other EEO laws as well as pertinent federal, state, and local authority for further guidance.

Genetic Information Nondiscrimination Act (GINA) Impact

The EEOC guidance states that Title II of the Genetic Information Nondiscrimination Act (“GINA”) is not implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they have received a COVID-19 vaccination. This assessment includes vaccinations that use messenger RNA (mRNA) technology, such as the Pfizer-BioNTech and Moderna vaccines.

Pursuant to GINA, “employers cannot (1) use genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquire genetic information except in six narrow circumstances, or (3) disclose genetic information except in six narrow circumstances.” Thus, if administration of the COVID-19 vaccine requires pre-screening questions that ask about genetic information, such as family members’ medical histories, those inquiries may violate GINA.

Where the pre-vaccination questions include questions about genetic information, the EEOC recommends that employers who want to ensure that employees are vaccinated request proof of vaccination rather than administering the vaccine to employees directly. While GINA does not prohibit an individual employee’s own health care provider from asking questions about genetic information, it does prohibit an employer, or a doctor working for the employer, from asking such questions. If an employer chooses to require proof of a COVID-19 vaccination from an employee’s health care provider, the employer may consider warning the employee not to provide genetic information as part of the proof to reduce its risks under GINA.

Guidance on Emergency Use Authorization (EUA) of COVID-19 Vaccines

As the EEOC guidance points out, some COVID-19 vaccines may only be available to the public for the foreseeable future pursuant to an EUA. A vaccine which is approved for emergency use differs from a vaccine traditionally licensed by the FDA in the non-emergency use context. Specifically, an EUA allows the use of unapproved medical products during public health emergencies. For vaccines granted an EUA, the guidance states that the FDA has an obligation to:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, *that they have the option to accept or refuse the vaccine*, and

of any available alternatives to the product.

The EEOC guidance does not directly address an employer's ability to mandate that employees receive an EUA-approved COVID-19 vaccine, focusing instead upon the factors that employers should consider if they do determine to require such vaccination. While there is historical and legal precedent to support an employer's decision to require certain vaccinations, such as influenza vaccines for healthcare workers, the fact that COVID-19 vaccines have, thus far, received only EUA-approval rather than a formal FDA licensure presents novel questions and considerations for employers in determining whether an employee COVID-19 vaccination policy should be mandated or voluntary.

The forgoing summarizes the EEOC's COVID-19 vaccination guidance as of the date of this publication. Employers should be mindful that these issues remain fluid and should ensure that decisions are made based on the most up-to-date information available. Employers with questions about their equal employment opportunity responsibilities and the risks of implementing a mandatory COVID-19 vaccination policy should consult with their MBJ attorney.

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