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## EEOC Guidance on Mandatory Vaccination Policies

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued updated guidance regarding the permissibility of mandatory COVID vaccinations under federal equal employment opportunity laws (“EEO laws”), specifically the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended. The EEOC concludes that federal EEO laws do not prevent employers from requiring employees entering the workplace to be vaccinated against COVID-19, provided employers make reasonable accommodations for persons with disabilities or sincerely held religious beliefs that prevent them from being vaccinated.

***Mandatory Vaccinations Do Not Violate EEO Laws.*** With some limited exceptions, the EEOC acknowledges that employers can require employees entering the workplace to be vaccinated against COVID-19.<sup>1</sup> According to the EEOC, “Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination.” However, if an employee cannot be vaccinated because of a disability, an employer cannot require compliance (or discipline the employee for lack of

compliance) unless the employer can demonstrate that the unvaccinated, disabled employee would pose a significant risk of substantial harm to the health or safety of the employee or others in the workplace (a “direct threat”) that cannot be eliminated or reduced by reasonable accommodation.

In assessing whether an unvaccinated employee poses a direct threat to themselves or to others in the workplace, employers should analyze the duration of the risk; the nature and severity of the potential harm to the employee or others in the workplace; the likelihood that the potential harm will occur; and the imminence of the potential harm. In making this assessment, employers may consider such factors as whether the employee works alone or with others; works inside or outside; the quality of ventilation in the work space; the frequency and duration of direct interaction the employee has with other employees and non-employees; the number of vaccinated individuals in the workplace; whether employees are wearing masks or undergoing routine screening testing; and the availability of space for social distancing. The assessment of direct threat should be based on reasonable medical judgment and the most current medical knowledge about COVID-19.

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<sup>1</sup> The EEOC does not address – and has no authority to address – the legality of mandatory vaccination policies under Food and Drug Administration (FDA) rules and regulations. All COVID-19 vaccinations currently available in the U.S. are being utilized under an Emergency Use Authorization (EUA). The question whether the rules and regulations relating to EUA vaccines (or other relevant laws) prohibit employers from mandating the use of those vaccines was not addressed by the EEOC and remains unresolved. This issue is discussed more fully below.

If implementing a mandatory vaccination policy, employers should provide employees with the contact information of appropriate management personnel who can address requests for reasonable accommodations because of disabilities or religious beliefs and who can ensure the policy does not discriminate against pregnant employees.

***Reasonable Accommodations for Disabled Employees Who Cannot Be Vaccinated.*** Employers are required to provide reasonable accommodations to employees who cannot be vaccinated because of a disability. However, employers are not required to grant accommodations when they impose an undue hardship on the operation of the employers' business. Appropriate accommodations will vary depending upon the circumstances but may include requiring unvaccinated employees to wear face masks at work and maintain social distancing from other employees and non-employees, increasing workspace ventilation, modifying the employee's work shift to minimize exposure to co-workers and others in the workplace, requiring periodic COVID testing for unvaccinated workers, permitting remote work, or reassignment to another position, among other options.

Employers can rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship. Employers are prohibited from disclosing that an employee is receiving a reasonable accommodation and from retaliating against an employee for requesting an accommodation.

***Sincerely Held Religious Beliefs.*** If an employee's sincerely held religious belief, practice, or observance prevents

the employee from getting a COVID-19 vaccine, an employer must provide that employee a reasonable accommodation unless it would pose an undue hardship. The reasonable accommodation and undue hardship analysis is similar to that under the ADA.

Employers should be aware that the EEOC interprets the definition of religion very broadly; and the EEOC's concept of "religion" may include beliefs, practices, and observances with which an employer is unfamiliar. According to the EEOC, "an employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance." However, an employer can request supporting information if it is aware of facts that provide an objective basis for questioning (i) whether the belief is of a religious nature, or (ii) the sincerity of a particular belief, practice, or observance. Title VII requires employers to consider all possible reasonable religious accommodations. Unlike the ADA, however, Title VII defines "undue hardship" as having more than a minimal cost or burden on the employer.

***Pregnant Employees.*** Although the EEOC does not consider pregnancy to be a disability, pregnancy-related medical conditions may be disabilities under the ADA and may prevent a pregnant employee from receiving a COVID-19 vaccine. Thus, if an employee requests a reasonable accommodation with respect to the COVID vaccination due to a *pregnancy-related condition*, the employer must consider the request under the usual ADA rules. If employees seek adjustments or exemptions from a vaccination requirement because of *pregnancy* (as opposed to a pregnancy-related medical condition), then, under

the Pregnancy Discrimination Act in Title VII, an employer must “ensure that the [pregnant] employee is not being discriminated against compared to other employees similar in their ability or inability to work.” Thus, pregnant employees may be entitled to job modifications (e.g. telework, changes in work schedules or assignments, leave, etc.) if such modifications are provided for other employees who are “similar [to the pregnant employee] in their ability or inability to work.”

***Discrimination and Disparate Treatment.***

Although mandatory vaccination is lawful under EEO laws, employers should be cognizant of the fact that some individuals or demographic groups may face greater barriers to obtaining a COVID-19 vaccination than others. Employers should take steps to ensure that any vaccination requirement does not disparately impact employees based on their race, color, religion, sex, national origin, or any other protected status. Employers also cannot apply a vaccination requirement to employees in a manner that treats employees differently based on race, religion, sex, pregnancy, sexual orientation, gender identity, national origin, age, disability, or any other protected status.

***Assisting Employees with Vaccination Logistics.***

Although not legally required, employers may wish to assist employees in obtaining a vaccination if the employer (or its agent) is not providing the vaccination or provide employees with

information to encourage employees to get vaccinated. The Centers for Disease Control and Prevention (CDC) offers a communication “tool kit” complete with letters, information sheets, PowerPoint presentations, stickers, FAQs, sample social media messages, and even a comic-book style story to help employers encourage employees to get vaccinated.

Employers should be sensitive to the fact that some employees may not have internet access to identify vaccination locations or schedule appointments and may have issues with transportation. Employers may wish to provide employees with the CDC’s toll-free telephone line that can assist individuals obtain information about vaccination sites (in many languages) and may want to disseminate information to employees about community transportation resources, if any, serving vaccination sites. If transportation is not readily available outside of regular work hours, employers may want to offer time-off to employees to get vaccinations.

Employers may offer incentives (either rewards or penalties) to encourage employees to be vaccinated voluntarily or to provide the employer with documentation or other confirmation that they have received a vaccination. However, in the EEOC’s view, employers cannot offer incentives that are so substantial as to be coercive. Because vaccination requires employees to answer disability-related questions during the pre-screening process, too large an incentive could be coercive and violate the ADA. The limit on incentives does not apply to requests to voluntarily provide documentation or other confirmation of vaccination status because such information is not disability-related.

**Vaccinations by Employers or Their Agents.** Employers may, but are not required, to provide vaccinations to their employees. However, providing vaccinations to employees directly or through an agent involves additional considerations – and risks. If the vaccine is administered by an employer or the employer’s agent, the ADA’s restrictions on disability inquiries applies to the vaccination screening questions because those questions are likely to elicit information about an individual’s disabilities. Under the ADA, when an employer or its agent asks screening questions in conjunction with administering the COVID-19 vaccine to employees, those questions must be job related and consistent with business necessity to pass muster under the ADA. To satisfy the “business necessity” requirement, an employer has to have a reasonable belief, based on objective evidence, that an employee who does not answer the screening questions (and therefore cannot be vaccinated) poses a direct threat to the employee’s health or safety or the health or safety of others in the workplace. The ADA restrictions do not apply when the vaccine is administered by a third party.

If employers conduct a voluntary vaccination of their employees, they do not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. The vaccination, however, must truly be voluntary in this scenario. There can be no pressure applied to employees to get the vaccination and no negative

consequences to employees who do not get vaccinated.

Any mandatory or voluntary vaccination program must be conducted in compliance with EEO laws. That is, employers cannot offer vaccination to certain employees or groups of employees on the basis of protected status.

**Inquiring about Employees’ Vaccination Status.** Employers are not prohibited by EEO laws from inquiring about or requesting documentation that an employee has obtained a COVID-19 vaccine.<sup>2</sup> Any such documentation, however, is confidential medical information and must be maintained in confidence like other medical information.

**Genetic Information Non-Discrimination Act.** Because current vaccination screening questions do not inquire about family medical history or any other genetic information, requiring employees to receive a COVID-19 vaccination does not violate GINA. Similarly, the act of administering a COVID-19 vaccination does not violate GINA because it does not involve the use of an employee’s genetic information to make employment decisions and it does not involve the acquisition or disclosure of genetic information. Similarly, asking for documentation or confirmation that an employee has received a COVID-19 vaccination does not violate GINA because that request does not involve using, acquiring, or disclosing genetic information.

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<sup>2</sup> State and local laws, however, may be different. There is currently no Texas law that prohibits private (non-governmental) employers from inquiring about employees’ vaccination status or requesting documentation regarding same.

It is also not a violation of GINA for employers to offer incentives to employees to provide documentation or confirmation from third parties that the employee and/or their family members have been vaccinated because the fact of vaccination does not reveal information about the manifestation of a disease or disorder in a family member (“family medical history”) or any other genetic information.

However, employers cannot offer employees incentives in exchange for an employee’s family member getting vaccinated *by the employer or its agent*. GINA prohibits employers from collecting employees’ family medical history or providing incentives in exchange for such information. To receive a COVID-19 vaccination from the employer, a family member would have to answer vaccination pre-screening questions, which would provide the employer administering the vaccination with genetic information in the form of family medical history of the employee. This is prohibited under GINA.

Employers may offer an employee’s family members the opportunity to be vaccinated by the employer or the employer’s agent, “if [employers] take steps to ensure GINA compliance.” Such steps could include, but may not be limited to, ensuring that all medical information obtained from family members during the vaccination screening process is used only for the purpose of providing the vaccination and is not provided to any managers, supervisors, or others who make employment decisions for the employees whose family members are vaccinated. Employers should also obtain prior, knowing, voluntary, and written authorization from any family members

before the family member is asked any questions about his or her medical conditions.

***Mandatory Vaccinations and Emergency Use Authorization.*** A question left unanswered by the EEOC’s guidance – and for which there is presently no clear answer – is whether a private employer can legally mandate vaccination of its employees where the vaccine is administered under an Emergency Use Authorization (“EUA”) provided by the Food and Drug Administration (“FDA”).

All of the vaccines currently being administered in the United States are being administered under EUAs, *i.e.* they have not received final approval by the FDA. Under EUAs, the FDA can make a medical product available to the public based on the best available evidence without waiting for all evidence that would be needed for FDA approval or clearance. EUA was established following the September 11, 2001 terrorist attacks to ensure that unapproved but potentially life-saving medical products could be made available to the public during a public health emergency.

At least four lawsuits have been filed challenging the legality of employer-mandated COVID vaccination policies. The lawsuits share a common theme. They assert that employees cannot be “forced” to undergo vaccination with a drug that has not received FDA final approval without their informed consent. In support of this proposition, the plaintiffs cite (i) the statute establishing EUA, 21 U.S.C. 360bbb-3(e)(1)(A) (“Section 360bbb”); (ii) principles of international law derived from the Nuremberg trials following World War II;

and (iii) the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, among others.

Plaintiffs in the lawsuits rely heavily upon language in Section 360bbb-3 that states for medical products administered pursuant to an EUA, the Secretary of Health and Human Services (“HHS”) must establish conditions to ensure that individuals to whom the product is administered are informed “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.”

It is unclear what this provision means because it has never been interpreted by a court. Plaintiffs in the vaccination lawsuits argue that the section prohibits mandatory vaccination with EUA vaccines because individuals must be given the option to refuse such vaccines. Others note that the regulation mandates disclosures that must be made with regard to EUA vaccines, including *the consequences of refusing administration of the vaccine* – the italicized language implying that there can be consequences for refusing an EUA vaccine, such as loss of one’s job. Still others argue that the reference to “consequences” refers only to health consequences of taking the vaccine.

It is also unclear whether Section 360bbb-3, which mandates certain actions by the Secretary of HHS with regard to products given EUA approval, has any application to private employers or creates a cause of action in favor of employees who object to an employer’s mandatory vaccination policy. Plaintiffs

in the vaccine lawsuits have asserted several claims against their employers, including claims that mandatory COVID vaccination

- amounts to forced medical experimentation in violation of employees’ constitutional rights to individual liberty, privacy, and bodily integrity;
- violates international or state law prohibiting medical experimentation on humans without informed consent;
- violates Section 360bbb-3; and
- violates employees’ civil rights.

Plaintiffs have also asserted that firing an employee for refusing to take a COVID vaccine constitutes wrongful discharge and unlawful retaliation.

While an in-depth discussion of the issues raised by the vaccination lawsuits and the merits of the arguments being asserted in the vaccine lawsuits is beyond the scope of this alert, suffice it to say that the answer to whether employers can mandate EUA vaccines is as yet unresolved. Significantly, the current crop of vaccine lawsuits may be rendered moot if and when final FDA approval is obtained for some or all of existing COVID vaccines. Applications for final approval have been filed for both the Pfizer and Moderna vaccines.

This article is a summary of recent legal developments and is provided for informational and education purposes. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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