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EMPLOYEES AND THE COVID-19 VACCINE: GUIDANCE FOR EMPLOYERS

As more employees become eligible for the COVID-19 vaccine, employers are weighing considerations relating to return-to-work plans while ensuring safety protocols continue to be followed. Many employers remain in a “wait-and-see” mode as to how COVID-vaccine related workplace issues will be addressed while the vaccination process continues. The U.S. Equal Employment Opportunity Commission (EEOC) has provided some guidance for employers on this topic; however, how these issues will be dealt with by employers as a practical matter has yet to be fully determined.

Mandatory COVID-19 Vaccine Policy

A frequently asked question has been whether an employer can require its employees to get a COVID-19 vaccine. The short answer to this question is yes, but with exceptions. Employers trying to maintain a workplace as safe as possible from COVID-related exposure may seek to implement a mandatory COVID-19 vaccine policy for all of its employees who work on site or otherwise access the physical workplace (as opposed to employees who work remotely full-time). According to the EEOC, such mandatory policies are permissible, but must also account for employees who object to getting the COVID-19 vaccine for legally protected reasons, including medical and disability reasons or due to religious based objection. If an employer intends to implement a mandatory COVID-19 vaccine policy, such a policy must notify employees of their right not to get the vaccine for disability, medical or religious based reasons, and detail the process by which that objection will be addressed with the employer.

- Medical / Disability Based Objection to Mandatory COVID-19 Vaccine Policy

If an employee raises a medical or disability based objection to an employer-mandated COVID-19 vaccine policy, the employer should engage in an appropriate interactive dialogue with the employee similar to that required by the Americans with Disabilities Act (ADA), and require documentation from the employee’s health care provider which confirms the medical or disability-related reason for exclusion from the mandatory vaccine policy. In such a case, if the employer intends to implement a return-to-work plan or otherwise seeks to revisit safety protocols for physical presence in the workplace, the employer would need to consider any request for accommodation made by the employee, which could include permitted or continued remote work, or work in a designated area with COVID-related safety protocols of mask wearing and social distancing. As with any request made for accommodation, the employer would balance the request against any undue hardship created for the employer as a result of the accommodation. If the employee was permitted to work remotely prior to the implementation of a return-to-work plan, an employer would likely not be able to support a position rejecting a remote work accommodation by claiming undue hardship.

An employee can be excluded from the workplace only if the employer can show that the employee is a “direct threat to the health or safety of other individuals in the workplace” and that the direct threat cannot be reduced by way of accommodation. According to the EEOC, the presence of a “direct threat” requires an employer to evaluate: (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. Thus, with regard to an employee who refuses to get an employer mandated COVID-19 vaccine, the

employer would have to evaluate the risk that an unvaccinated employee would expose other employees to the coronavirus. In the event of such a determination, prior to excluding the employee from the workplace altogether, the employer would have to consider the potential for accommodation of the employee with COVID-related safety protocols as indicated above.

A premature or unsubstantiated employment action by an employer to discipline or terminate an employee for failure to comply with a mandatory COVID-19 vaccine policy could result in legal action. Therefore, employers that seek to implement a mandatory COVID-19 vaccine policy should tread carefully and evaluate employee objections to the policy on a case-by-case basis with the assistance of legal counsel.

- Religious Based Objection to Mandatory COVID-19 Vaccine Policy

The EEOC further provides that an employee may object to a mandatory COVID-19 vaccine policy for reasons related to sincerely held religious beliefs or practices. Upon notification of such an objection by an employee, the employer must take the same measured approach as it would for an employee with a medical or disability-based objection, and proceed carefully to determine accommodation and mitigate liability risk.

- Objection to COVID-19 Vaccine Policy Based on Personal Preference

Some employees may object to getting the COVID-19 vaccine for reasons unrelated to medical, disability, or religious grounds. These employees may simply object to the vaccine based on their own personal perceptions of it or refuse to receive it for any number of personal reasons. While the EEOC does not speak to this objection, employers need to consider how taking employment action against such an employee may be perceived by other employees, particularly if accommodation measures exist for the employee. The employee may contend that their refusal to get the vaccine presents no further threat to others in the workplace, as long as they follow COVID-related safety protocols of mask wearing and social distancing in the workplace. All situations involving objections to a mandatory COVID-19 vaccine policy must be evaluated on a case-by-case basis.

Due to the potential issues that may arise as a result of implementing a mandatory COVID-19 vaccine policy, many employers are leaning toward having a voluntary COVID-19 vaccine policy or position, in which they will encourage employees to get the vaccine, but will not require it, and will require and enforce COVID-19 related safety measures of mask wearing and social distancing for any employees who opt out of getting the COVID-19 vaccine.

Voluntary COVID-19 Vaccine Policy

In a voluntary COVID-19 vaccine policy, the employer encourages employees to get the vaccine as soon as it becomes available to them, and provides them with information to facilitate a voluntary decision, such as advising them of state based resources for registering or getting the vaccine if the employee is so inclined. As an incentive, some employers are providing paid time off to further encourage employees to get the vaccine whenever they can obtain an appointment to do so, even if during business hours, as well as paid time off to recover from any vaccine-related side effects, provided the employee provides proof of vaccination. Any such voluntary policy should reiterate that employees who opt out of getting the COVID-19 vaccine will not be retaliated against, but will be required to follow continued COVID-19 safety measures if present in the workplace. This required compliance with continued safety protocols would also apply to employees who are waiting to get the vaccine, and even after vaccination, pending further guidance from the CDC and federal and state government sources regarding the continuing pandemic.

The EEOC does permit an employer to ask an employee whether they have received the COVID-19 vaccine, and further permits the employer to ask for proof of the COVID-19 vaccination from the employee if received, provided that the requested proof does not seek further medical information about an

employee, and the employer does not otherwise inquire about any medical/disability related reason why an employee has not, or will not, be vaccinated, since such questions would potentially violate the ADA.

In conclusion, although the COVID-19 vaccine is still in early phases of distribution, employers are encouraged to formulate a vaccine strategy as to its employees in advance of the vaccine becoming more widely distributed to other groups of individuals. Employers will basically have three options: (1) have a mandatory COVID-19 vaccine policy, which will require specific policy language and training guidance subject to the EEOC's parameters; (2) have a policy encouraging employees to get the COVID-19 vaccine; or (3) have no COVID-19 vaccine policy at all. The Firm's employment attorneys remain available to assist employers and provide counsel with regard to the preparation of COVID-related policies and any other COVID-related considerations and concerns.

To discuss any of this please contact one of the attorneys below:

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