

## **CLIENT ALERT: EEOC Issues Updated Guidance Addressing Mandatory COVID-19 Vaccines**

On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) issued additional **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. Specifically, the EEOC updated Section K of its guidance to address questions related to the administration of COVID-19 vaccinations to employees. See MBJ’s prior client alerts dated **March 20, 2020**, **May 11, 2020**, **June 15, 2020**, and **December 21, 2020**.

The updated EEOC guidance clarifies its position on whether employers can mandate COVID-19 vaccines for its employees and under what circumstances. The EEOC has now advised that employers can mandate vaccinations for employees, with certain exceptions, and can offer incentives to employees to receive such vaccinations in certain circumstances.

Some highlights of the updated guidance include:

### **Employers Can Mandate COVID-19 Vaccinations**

The EEOC has now opined that employers can require all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA.

As detailed in prior guidance, employers should engage in the interactive process with employees who request an accommodation pursuant to Title VII or the ADA. A reasonable accommodation can include, but not be limited to, wearing a face mask, working at a social distance from coworkers or non-employees, working a modified shift, getting periodic tests for COVID-19, being given the opportunity to telework, and/or accepting a reassignment. Moreover, employees who are fully vaccinated, but have concerns about a continued heightened risk of severe illness, may be eligible for a reasonable accommodation.

The EEOC has also cautioned employers who are offering employer-sponsored vaccination programs that the pre-screening questions necessary for the COVID-19 vaccination may constitute a disability-related inquiry. Therefore, any pre-screening questions must be “job related and consistent with business necessity.” Employers who offer a voluntary vaccination policy need not comply with this standard.

### **Employers Can Offer Incentives for Vaccinations**

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Employers may also provide incentives to employees to receive a COVID-19 vaccination and provide proof of such vaccination.

The EEOC notes that if the vaccination is received through an employer-sponsored vaccination program then employers may still offer incentives to employees, although such incentives cannot be so substantial as to be coercive. Furthermore, the Genetic Information Nondiscrimination Act ("GINA") prohibits employers from offering employees incentives to have their family members become vaccinated in an employer-sponsored program because the pre-screening questions may constitute an unlawful request about an employee's genetic history. However, employers can make an employer-sponsored vaccination program available to an employee's family member(s) without offering an incentive so long as the employer takes steps to comply with GINA.

### **Employers Should Keep Other EEO Considerations In Mind**

The new guidance reminds employers that there are other equal employment opportunity considerations to keep in mind, including whether a mandatory vaccination program would have a disparate impact on, i.e., disproportionately excludes, employees in a protected category and whether employees have equal access to vaccinations. Employers should also be careful not to apply a vaccination requirement in a way that treats employees differently based on a protected category, including individuals who are pregnant, unless there is a legitimate, non-discriminatory reason.

The foregoing 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 who are considering or have already implemented a mandatory or voluntary vaccination program and who have questions about their equal employment opportunity responsibilities and the risks of implementing such a policy should consult with their MBJ attorney.

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