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## CLIENT ALERT

### MANDATORY COVID-19 VACCINATION POLICIES IN THE WORKPLACE

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The phased distribution of COVID-19 vaccines is gaining momentum, slowly but surely. The broad implementation of vaccinations has been largely perceived as essential to enabling employers to resume normal business operations, including returning all employees to the workplace in a safe manner. In anticipation of widespread availability of, and broader access to, the vaccine, employers are beginning to consider whether they can and should mandate employee vaccinations as a condition of employment.

The U.S. Equal Employment Opportunity Commission (“**EEOC**”) has provided guidance on this issue, indicating that employers are in fact permitted to require employees to be vaccinated as a condition of employment, subject to certain important limitations and exceptions. The EEOC guidance further discusses how federal equal employment opportunity laws, including the Americans with Disabilities Act (“**ADA**”), Title VII of the Civil Rights Act (“**Title VII**”), and the Genetic Information Nondiscrimination Act (“**GINA**”) apply to employers who want to administer and/or mandate COVID-19 vaccines for their employees. A link to the EEOC guidance is included at the end of this Client Alert.

This Client Alert summarizes the key components of the EEOC’s COVID-19 vaccination guidance and addresses many important legal and practical issues for an employer to consider in determining whether to (a) adopt a policy requiring its employees to receive a COVID-19 vaccination (a “**Mandatory Vaccination Policy**”) or (b) administer COVID-19 vaccinations to its employees (directly or by contracting with a third party) (an “**Employer Administered Vaccination**”).

If you have questions concerning this Client Alert or a Mandatory Vaccination Policy, please contact Jennifer Deakin ([jdeakin@bswlaw.com](mailto:jdeakin@bswlaw.com)) at (203) 772-2600.

#### **Is an employer allowed to adopt a Mandatory Vaccination Policy?**

Yes, but with important limitations and exceptions. The EEOC guidance permits employers to adopt a Mandatory Vaccination Policy. Implementation of that policy is, however, subject to certain legally protected exceptions for employees with disabilities under the ADA or with sincerely held religious beliefs, practices or observances under Title VII.

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**When deciding whether to adopt a Mandatory Vaccination Policy, what legal and practical factors should employers consider?**

In addition to the legal considerations implicated by the federal equal employment opportunity laws discussed in more detail below, employers should consider:

- Employee Relations – Employers should be prepared for potential pushback and employee morale issues that may result from mandating vaccinations.
- Wage and Hour Laws – Employers should consider whether they have an obligation to pay their employees for the time spent getting a vaccine.
- Liability Concerns – Employers should consider the possibility that their employees may seek to hold them liable if they get sick from the vaccine, giving rise to workers’ compensation and/or other possible claims.
- Cost-Benefit Analysis – Given that the vaccine is in no sense a quick fix, employers should consider whether a mandate is necessary for its business since continued mask wearing, physical distancing, remote work and other practices that are currently being utilized to prevent the spread of COVID-19 in its workplace can be expected for the foreseeable future.
- Employment Agreements – The terms and conditions of any collective bargaining or other agreement with a union or any other individual or collective agreement with employees might limit an employer’s right to unilaterally adopt and/or enforce a Mandatory Vaccination Policy against certain employees. Employers should also review their employee handbooks to determine if any changes are necessary in connection with the implementation of a Mandatory Vaccination Policy.
- Protected Concerted Activities – In both union and non-union settings, employers may need to allow for certain “protected concerted activities” under Section 7 of the National Labor Relations Act, such as a group of employees discussing a Mandatory Vaccination Policy among themselves or organizing to oppose vaccination.
- Supervisor Training – Employers should train their managers and supervisors who are responsible for communicating with employees about compliance with a Mandatory Vaccination Policy on how to recognize an accommodation request from an employee with a disability or for a seriously held religious belief. Employers should also designate a single employee to whom managers and supervisors may refer such requests.

**If a Mandatory Vaccination Policy is adopted, what action should the employer take when an employee cannot be vaccinated due to a disability?**

The EEOC guidance establishes that employers are permitted to implement a Mandatory Vaccination Policy only so long as they provide reasonable accommodations to employees who cannot be vaccinated due to an ADA protected disability. Accordingly, an employer with a Mandatory Vaccination Policy must engage in an interactive dialogue with any employee who claims to be unable to be vaccinated for disability-related reasons. The employer may not exclude that employee from the workplace unless the employer can prove that by virtue of



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remaining unvaccinated the employee poses a “direct threat” to the workplace. A direct threat means a significant risk of substantial harm to the health or safety of the employees or others that cannot be eliminated or reduced by reasonable accommodation(s).

In determining whether a direct threat exists, an employer must 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. In the context of the pandemic, a determination that there is a direct threat may, as an example, include the conclusion that an unvaccinated employee will expose others to COVID-19 at the workplace. In considering such risk, the EEOC guidance also notes that an employer should consider the number of employees in the workplace who have received the vaccine.

### **What if an employer determines that a direct threat exists?**

Even if an employer determines that an employee who cannot be vaccinated due to disability poses a direct threat at the workplace, the employer cannot exclude the employee from the workplace, or take other adverse action, unless there is no way for the employer to provide a reasonable accommodation that eliminates or reduces the direct threat posed by the unvaccinated employee. If the direct threat cannot be eliminated or reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace.

The employer, however, cannot take other adverse action, such as terminating the employee, without first determining if any other rights apply under the equal employment opportunity laws, other federal and state laws, or the employer’s policies and practices. As part of this undertaking, the employer may need to engage in a secondary interactive process with the employee to identify whether a reasonable accommodation is possible that does not constitute an undue hardship. For example, if an employer excludes an employee from the workplace based on the employer’s inability to accommodate a disability-related request for exemption from a Mandatory Vaccination Policy, the employee may be entitled to a reasonable accommodation that permits the employee to perform the duties of the employee’s position remotely for a period of time. This analysis is essentially the same inquiry that an employer must make when physically excluding an employee from a workplace due to the employee having a COVID-19 diagnosis or exhibiting symptoms. The employee may be entitled to telework or, if not, may be eligible to take leave under applicable federal or state law or under the employer’s policies.

### **How does an employer evaluate if reasonable accommodations can be made?**

The employer must engage in a discussion with the employee to identify whether a reasonable accommodation is possible that does not impose an undue hardship on the employer. Under the ADA, an undue hardship means a significant difficulty or expense. The types of factors that an employer may consider include (1) the nature of the employer’s workforce, (2) the employee’s position and job duties, (3) the work conditions and environment in which the employee



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operates, (4) the prevalence in the workplace of employees who already have been vaccinated, (5) the amount of contact with others whose vaccination status may be unknown and/or who are at increased risk of severe illness from COVID-19, and (6) the recommendations and guidance of the CDC and OSHA.

It is important to note that it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting a reasonable accommodation.

### **If an employee is unable to comply with a Mandatory Vaccination Policy because of a sincerely held religious belief, practice or observance what process must the employer follow?**

Generally, the process is very similar to the one outlined above related to a disability situation. An employer should ordinarily assume that a request for a religious accommodation is legitimate and based on a sincerely held religious belief unless the employer has an objective basis for believing otherwise. Only if an employer has such a basis for questioning either the religious nature or the sincerity of the belief, may the employer request additional supporting information from the employee. Note that for purposes of the required reasonable accommodation analysis under Title VII, “undue hardship” means more than a *de minimis* cost or burden to the employer (as opposed to the “significant difficulty or expense standard” that applies under the ADA).

### **If an employee cannot be vaccinated due to a disability or a sincerely held religious belief and there is no reasonable accommodation that eliminates the direct threat posed by that employee, can that employee be excluded from physically entering the workplace?**

Yes, however, the employer may not automatically terminate the employee. The employee may still be entitled to a reasonable accommodation if one exists that eliminates the risk posed and is not unduly burdensome to the employer. Depending on the employee’s position, examples of such a reasonable accommodation might include allowing the employee either to perform his job duties via telework for a period of time or requiring the employee’s continued use of social distancing practices and personal protective equipment in the workplace even after such practices are no longer required of vaccinated employees. In the absence of a reasonable accommodation that permits continued work, among other rights to consider, the employee may be eligible to take a leave of absence under federal or state law and/or under and pursuant to the employer’s policies.

### **What steps can an employer take for an employee who declines to comply with a Mandatory Vaccination Policy for reasons other than a disability or religious beliefs?**

The employer may exclude the employee from the workplace and take other actions, including terminating the employee. An employer must be careful to evenly enforce a Mandatory



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Vaccination Policy or risk exposure to claims for discrimination or other violations of employment laws.

### **Is an employer allowed to disclose that an employee is receiving a reasonable accommodation, including an exemption from vaccination under a Mandatory Vaccination Policy?**

No. This information is confidential and should not be disclosed.

### **Is an employer required to maintain the confidentiality of employee medical information obtained in the course of a vaccination program?**

Yes. Employers must keep any employee medical information obtained in the course of a vaccination program confidential. Under Connecticut law, such medical information should be maintained as separate from an employee's personnel file information.

### **What legal considerations are implicated by Employer Administered Vaccinations?**

If an employer administers the vaccine, whether directly or via a third party with whom the employer contracts, certain provisions of the ADA and/or GINA may be implicated.

#### ADA

The ADA generally precludes employers from making “disability-related inquiries” to employees unless the inquiries are “job-related and consistent with business necessity”. In its guidance, the EEOC observes that if an employer mandates employee vaccinations and the vaccinations are administered by the employer, then any pre-vaccination screening questions will most likely be considered “disability-related inquiries” under the ADA. The EEOC guidance notes that pre-vaccination screening questions, by their nature, elicit information about a disability. As such, the questions, if asked by the employer, are “disability-related” under the ADA. Accordingly, if the employer requires an employee to receive the vaccination administered by the employer, the employer must demonstrate that the disability-related screening questions are “job-related and consistent with business necessity.” An employer can meet this standard only if, based on objective evidence, the employer can demonstrate that the 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 herself or others. The direct threat analysis is discussed above.

#### GINA

Title II of GINA precludes employers from (1) using genetic information to make decisions related to the terms, conditions, and privileges of employment, (2) acquiring genetic information except in six narrow circumstances, or (3) disclosing genetic information except in six narrow



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circumstances. The EEOC guidance confirms that requiring employees to get vaccinated does not violate GINA's prohibitions on using, acquiring or disclosing genetic information.

Pre-vaccination screening questions, however, may elicit information about “genetic information”, as such term is defined under the statute. Whether pre-screening questionnaires actually implicate GINA will depend on the contents of the questionnaire. If, for example, the pre-vaccine screening questions ask about family history or genetic information of the employee, then such questions will implicate GINA.

### **How can an employer avoid the ADA and GINA implications for “disability-related inquiries”?**

The disability-related inquiry analysis under the ADA can be avoided if (a) an employer does not mandate vaccination but rather offers it on a voluntary basis (even if administered by the employer or by a third party contracted by the employer) or (b) the vaccine (even if mandated) is administered by a third party without a contract with the employer, such as an employee's primary healthcare provider or a neighborhood pharmacy.

To completely avoid any risk of implicating GINA, employers should refrain from administering the vaccines directly or through a contracted vendor, and instead opt to require proof of vaccination from the employee while cautioning employees not to provide genetic information as part of that proof.

Under both the ADA and GINA, the safest route for employers who seek to impose a Mandatory Vaccination Policy is to require that employees receive a vaccine from their primary healthcare provider or a neighborhood pharmacy.

### **Can an employer require an employee to show proof of vaccination?**

Yes. Requiring documentation of a COVID-19 vaccination does not constitute a disability-related inquiry under the ADA or qualify as genetic information under GINA. An employer, however, is cautioned not to ask an employee why she did not receive a vaccination, or other follow up questions, as those questions may in fact elicit information about a disability or genetic information, implicating provisions of the ADA or GINA. Further, if an employer requires or requests that its employees provide proof of vaccination from a pharmacy or the employee's own health care provider, the employer should tell the employee not to provide any medical or genetic information to the employer as part of the proof.

### **Conclusion**

Any policy concerning vaccines (whether mandatory or voluntary) should be carefully drafted to ensure compliance with applicable legal requirements while taking into consideration the interests of the employer and its employees. Regardless of whether employers decide to make



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vaccinations voluntary or mandatory, employers will be well served to consider steps they can take to encourage their employees to get vaccinated, including promoting education about the safety, efficacy and benefits of vaccination, furnishing information about where and when employees can receive the vaccine, providing paid time off for employees to get the vaccine and/or recover from any side effects from the vaccination.

The EEOC guidance can be found here (see Q&As contained in Section K):

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.