

## **Monthly Minute Memo: *December 28, 2020 – End of the Year COVID-19 Updates***

### **Families First Coronavirus Response Act (“FFCRA”) Extended**

The FFCRA, which provided mandated paid leave for certain COVID-19 related circumstances, expires on December 31, 2020. The new stimulus package passed by Congress and signed by the President did not extend this mandated FFCRA leave. However, on January 1, 2021, employers may voluntarily provide FFCRA leave and may be able to receive a payroll tax credit for this leave until March 31, 2021. The new bill does not provide any additional FFCRA leave for employees.

### **Updated EEOC Guidance Regarding COVID-19 Vaccines**

As a result of the approved COVID-19 vaccines, the EEOC recently updated the technical guidance allowing employer-mandated COVID-19 vaccinations. While portions of the EEOC guidance apply more directly to healthcare employers, or employers who can administer vaccinations to their employees, the guidance provides certain procedures applicable to all employers that should be taken into consideration when considering a mandatory vaccination policy.

### **What if an employee refuses the vaccine because of a disability?**

Although an employer may be able to implement and maintain a mandatory vaccination policy, an employee may object to or refuse to receive a vaccination due to a stated disability. If an employee refuses the COVID-19 vaccine because of a stated disability, the employer must engage in the interactive process pursuant to the ADA to gather information and determine whether there are any reasonable accommodations available for the employee instead of the vaccine, which would allow the employee to continue to perform the essential functions of his or her position. This interactive process must be done on an individualized basis and is the same process an employer must engage in any time an employee makes a request for an accommodation based on a disability prior to the COVID-19 pandemic. Employers may rely on CDC recommendations and OSHA standards and guidance when deciding on effective reasonable accommodations. Accommodations may include teleworking, providing face masks or other personal protective equipment, staggering workstations to increase distance between workers and workstations, allowing alternative and flexible work hours to limit interaction with others, restructuring job duties to eliminate or reduce face-to-face contact with others, or providing a leave of absence. The EEOC recommends employers consult the applicable OSHA COVID-19 specific resources when evaluating whether a reasonable accommodation is possible and what a reasonable accommodation may encompass. Employers should also review their leave of absence policies.

After engaging in the interactive process, there may be circumstances where a reasonable accommodation is not available (or would result in an undue burden to provide) that would allow the employee to continue to perform the essential functions of the job. If, in these narrow

circumstances, an employer determines that an employee would pose a direct threat to the health or safety of others in the workplace, an employer may be able to exclude the employee from the workplace. Determining whether an accommodation is available and/or whether an employee would pose a direct threat to the workplace if he or she remains employed is a determination that must be made on an individualized basis. We recommend that you contact legal counsel before implementing any vaccine related policies and/or taking any adverse actions based on vaccination refusal.

**What if an employee refuses the vaccine because of a sincerely held religious practice or belief?**

Employees may also object to a vaccination based on a religious practice or belief. Similar to the above analysis when an employee objects based on a stated disability; the employer must engage in the interactive process when an employee requests a religious accommodation as an alternative to receiving the COVID-19 vaccine. Similar to the interactive process under the ADA, the employer must explore possible reasonable accommodations under Title VII, unless it would pose an undue hardship. An undue hardship must be more than a minor cost or burden on the employer and must be reviewed on an individualized basis.

Under the new EEOC guidance, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. However, if an employee requests a religious accommodation, and the employer has an objective basis for questioning the religious nature or sincerity of the religious belief, practice, or observance, the employer is justified in requesting additional supporting information.

**Is an employer administered COVID-19 vaccine considered a medical examination?**

For employer administered vaccines, the employer is not seeking information about an individual's impairments or current health status and therefore, the vaccine is not a medical examination.

**Are employers allowed to ask pre-screening vaccine questions when administering the vaccine?**

For employer administered vaccines (such as for healthcare workers), if the employer asks pre-screening vaccination questions, these questions may implicate the ADA's provision on disability-inquires because they are likely to elicit information about a disability. Therefore, if an employer requires and administers a COVID-19 vaccine, the employer must show that any pre-screening vaccination questions are "job related and consistent with business necessity." The employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the pre-screening questions will pose a direct threat to the health or safety of him or herself or others.

There are two scenarios where pre-screening questions may be asked without implicating the ADA. First, if the COVID-19 vaccine is not required by the employer, the employee may voluntarily answer these questions without implicating the ADA. If the employee chooses not to answer the questions, the employer may decline to administer the vaccine but may not retaliate against the employee for refusing to answer the questions.

The second scenario is when an employee receives an employer-required vaccination from an independent third party, such as a pharmacy or health care provider with no contract with the employer to administer the vaccine. Under this scenario, if the employer (or the company contracted to administer the vaccine) is not asking the pre-screening vaccine questions, this does

not fall under the ADA disability-inquires, as the independent third-party will not disclose the answers to the employer.

**May an employer request proof of a COVID-19 vaccination?**

An employer may request proof from an employee that he or she received the COVID-19 vaccination so long as there is no medical information on the documentation. Employees should request the health care provider to only provide documentation that the vaccine was administered. Additionally, employers should not ask an employee why he or she did not receive the COVID-19 vaccination as this question may be a disability-related inquiry.

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