

Employer COVID-19 Vaccine Mandates are Withstanding Legal Challenges, but Obstacles Persist

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Late last year the question started to creep up: can employers require their employees to receive the COVID-19 vaccine as a condition of employment? We have since learned that the answer to that question is generally yes, but it is complicated.

As the inoculation rate grew late last spring, so did the amount of litigation surrounding employer and higher education vaccine mandates.

In Indiana, several students brought a challenge to the University of Indiana's policy that required students to either be vaccinated or wear masks and be subject to regular testing. The Seventh Circuit Court of Appeals upheld the university's policy and the Supreme Court declined review of the case. In Texas, more than 100 employees at the Houston Methodist Hospital challenged a similar vaccine mandate implemented by their employer. The federal district court dismissed the suit.

Like both of these cases, other failed challenges to vaccine mandates were predicated on the Food and Drug Administration's (FDA) emergency authorization for the vaccine—challengers often dubbed the vaccine as "experimental." However, with the FDA approving the Pfizer vaccine in August and the other brands moving toward full approval later this year, the success of future legal challenges is now more dubious.

An employer's vaccine mandate, however, is not bullet-proof if it does not conform with certain requirements prescribed by state and federal law. The following are the primary considerations for employers to keep in mind:

Disability Accommodation

This accommodation is sometimes referred to as a "medical exception." Under the Americans with Disabilities Act (ADA), an employer must provide reasonable accommodations to employees who have a disability that prevents them from receiving the COVID-19 vaccine. In response to an accommodation



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request, the employer should engage in an interactive process with the employee to determine whether there is a reasonable accommodation. Reasonable accommodations may include wearing additional personal protective equipment, remote work or alternative duties. An employer is not required to grant an accommodation that

creates an undue hardship to the employer or that poses a direct threat to the unvaccinated employee or others in the workplace. Employers should maintain detailed recordkeeping throughout this process.

Religious Accommodation

Under Title XII of the Civil Rights Act, an employer must provide a reasonable accommodation to an employee whose sincerely-held religious belief prevents them from receiving the COVID-19 vaccine unless doing so would pose a direct threat to the employee or others in the workplace or create an undue hardship on the operations of the employer. A personal or political objection to the vaccine is not the basis for a religious accommodation. However, discerning whether an employee's belief is religious or personal can be difficult. Unless the employer has an objective basis to doubt the sincerity of the employee's belief, an employee's proffered religious belief should be accepted as true even if it does not align with the formal teachings of the religion.

Collective Bargaining

Employers who have unionized employees face a special hurdle if they want to implement vaccine mandates. A mandatory vaccine policy for union-represented employees is a mandatory subject of bargaining—meaning that the employer must negotiate the policy with the union before implementing it. There is a split among union positions with some taking the position that the vaccine mandates are important for economic recovery and worker safety and others challenging vaccine mandates that side-step the negotiating table.

Confidentiality

In accordance with state and federal law, employers should maintain their employee's medical information as confidential, including documentation of an employee's vaccination status and documentation about an accommodation. Such safeguards include keeping vaccination records and accommodation documentation stored in a separate file from personnel files and limiting who has access to confidential files.

Oregon-Specific Issues

While some states have taken action to limit employer vaccine mandates, Oregon is moving in the opposite direction. The Oregon Health Authority has issued temporary rules requiring employees in schools, school-based programs and healthcare settings (which are defined broadly) to be fully vaccinated or have an exception by October 18, 2021, to continue working. OHA has published forms that employees must use to request a medical or religious exception. The medical form must be signed by a healthcare provider and state the precise medical condition that prevents them from receiving the vaccine. The religious exception form requires the employee to describe their sincerely-held religious belief and how it prevents them from receiving the vaccine.

The final obstacle that employer vaccine mandates may face is Oregon's law that prohibits wrongful discharge in violation of public policy. An employee who is fired for refusing a vaccine may claim that being forced to take the vaccine or be fired runs afoul of public policy. Although, it is still unclear as to how these claims will fair in court.

Employers who see the vaccine as a tool to mitigate the concern of workplace COVID-19 infections are legally permitted to implement a vaccine mandate, but navigating the various federal and state rules can be difficult. It is a good idea for employers to consult with counsel before conditioning employment on, or before offering, withholding or changing benefits based on vaccination status.

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