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# EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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## WITH THE OSHA VACCINATION MANDATE GONE, WHAT HAPPENS NEXT?

Let's first review where we are on the vaccination mandate issue. The U.S. Supreme Court decided in a 6-3 ruling on January 13, 2022 that the Occupational Safety and Health Administration (OSHA) was not empowered by Congress to issue a regulation of such vast significance. At the same time, the high court in a 5-4 ruling indicated that a separate vaccination requirement for about 10 million health-care workers at Medicare- and Medicaid-participating hospitals and other health-care settings could go forward. There is also a separate federal mandate for most federal workers.

Yet to be finally decided by the courts is the separate mandate for federal contractors, which is currently stayed but in which appeals are pending in at least four circuit court of appeals, some of which relate to a nation-wide injunction against the measure from a Georgia federal court. Larry Stine of Wimberly & Lawson led a group of trade associations in obtaining this injunction, currently on appeal, to the Eleventh Circuit. The federal contractor mandate is important even though it cannot currently be enforced while the litigation proceeds, as it would apply to approximately a quarter of the U.S. workforce.

In response to the ruling, President Biden has urged the states and private businesses to nevertheless move ahead in requiring American workers to get Coronavirus shots. The courts have generally ruled that businesses are free to require vaccines for their workers, and the Supreme Court ruling suggests that such mandates are possible at the state level. There is also language in the Supreme Court ruling suggesting that OSHA could promulgate an emergency regulation that would survive judicial review, if such a regulation was "occupation-specific" based on a worker's job at the workplace, such as high-hazard industries. However, promulgating such an industry-specific regulation would be difficult and take a lot of time. In any event, industries previously designated by OSHA as high-risk industries, like meat and poultry processing, manufacturing and warehousing, restaurants, supermarkets and others, will be targeted for enforcement through July 7, 2022 under OSHA's revised National Emphasis Program for COVID-19.

According to a Gallup poll in December, about 36% of workers say their employers are mandating vaccination. Gallup estimates that 25% of U.S. workers remain unvaccinated, and only about 5% of those say they plan to get vaccinated. While many employers already impose vaccination requirements, about 1 in 3 plan to do so only if the OSHA rule took effect. Those employers must now decide what to do in light of the ruling. Some employers, like Boeing and General Electric, have announced they will not implement their vaccination mandate in light of the Supreme Court ruling. A new idea expressed is to apply a "light" approach allowing employees to self-report their COVID test results rather than requiring such oversight.

Many employers face state and local laws that may require vaccine mandates, prohibit vaccine mandates, or require broader religious or medical exemptions. The Supreme Court suggested that states have broader rights to regulate public safety including vaccine mandates. On the other hand, the federal government takes the position that any state or local rules that contradict federal rules on vaccination are pre-empted under the Supremacy Clause of the U.S. Constitution. Issues may also arise in various states, which have their own OSHA laws and standards. At least two of those states have announced they are suspending their vaccination mandates in light of the Supreme Court ruling.

Further, dozens of lawsuits have been filed against vaccine mandates from private employers, although private employers are winning those cases under their management rights to set forth their own safety standards. One area of vulnerability, however, might be lawsuits accusing employers of unlawfully failing to accommodate workers whose religious beliefs or disabilities prevent them from becoming vaccinated. Boeing reported receiving thousands of religious exemption requests. Some commentators have suggested that regular COVID-19 testing could potentially be an accommodation option for such persons. In any event, most employers appear to be liberally granting such exemptions.

It should also be noted that the Supreme Court rulings do not discontinue OSHA's other COVID-19 initiatives, including the issuance of workplace hazard citations under the general duty clause. Further, some employers have been the subject of negligence suits alleging wrongful death or other liabilities to employers for not providing broad and strong protection to employees. Most legal experts believe that while such litigation can be expensive, it is unlikely to succeed on the merits. Workers' compensation pre-emption may preclude most of the claims, although plaintiffs are arguing exceptions to such pre-emption such as deaths or illnesses because a worker allegedly brought COVID-19 home. Plaintiffs would also presumably have to prove that negligence caused the employee's illness and that the virus was not contracted from another source.

In any event, employers have every incentive to comply with health and safety protocols. Employers should consider the implementation of portions of the standard that are practical, although particular state and local laws may limit their efforts. While the federal standard was in effect, it took precedence over state and local restrictions, but without that standard, state and local limits on masks and vaccination mandates could have impact. Many employers will undoubtedly proceed to adopt a written Coronavirus policy, using masking and social distancing as practical.

The Supreme Court ruling is significant in another respect, in that it suggests limits on what has been called the "administrative state." The Court's ruling suggests that courts will be less likely in the future to defer to an agency's interpretation of ambiguous law in regulating a very important issue, or even go further in applying the non-delegation doctrine which forbids Congress from giving agencies the authority to write legislation, a task reserved to Congress.

## CAN A WORKER BE FIRED FOR A POSITIVE COVID-19 TEST AND/OR ASKING FOR LEAVE TO QUARANTINE?

Suppose an employee tests positive for COVID-19 or asks for leave to quarantine. One could argue that a worker who tests positive for COVID-19 is a "direct threat" to the workplace because of the contagious nature of the disease. One could also argue that granting leaves to large numbers of persons creates an "undue hardship" for the employer. Although common illnesses such as the cold and the flu are not disabilities under the Americans With Disabilities Act (ADA) because they are temporary and minor, the EEOC and the courts are currently grappling with whether COVID-19 is a disability and if so, how it fits within the ADA framework, including the direct threat and undue hardship principles.

When facing issues relating to COVID-19 and related illnesses, employers should first remember that the FMLA is still around, and if the employee has been employed for a year and worked the requisite number of hours, and if the employer is of sufficient size, the generally applicable rules under the FMLA apply. Addressing COVID-19 under the ADA, however, is not as clear cut. In December of 2021, the EEOC issued guidance stating that not every person with COVID-19 will qualify for ADA protection, but some will.

The EEOC Guidance makes clear that each case must be considered individually and that employers should begin by considering whether a particular person fits within one of the ADA’s three prongs of the definition of a disability. Under the ADA, a person has a disability if (1) they have a physical or mental impairment that substantially limits a major life activity; (2) an employer regards the individual as having a disability; or (3) the individual has a record of having a disabling impairment. More specifically, a person is regarded as having a disability if they have or are regarded as having an impairment, regardless of whether the employer regards the impairment as substantially limiting a major life activity, unless the impairment is objectively transitory (lasting or expected to last less than six months) and minor. Although the "regarded as" prong of the ADA definition is rarely used, it will likely become more common in COVID-19 cases, with employees arguing an employer took an action against them because the employer regarded the employee as being disabled.

Employers will argue that the virus is transitory and minor and, therefore, the employer could not have regarded the individual as having a disability. Employers will likely also argue that because COVID-19 is highly contagious it poses a direct threat in the workplace and/or that allowing an employee to work would impose an undue hardship on the employer. All this shows that employers are left with a great deal of uncertainty. Despite this uncertainty, cautious employers will focus more on trying to resolve the problem an employee is facing due to COVID-19 through the interactive process rather than debating the legal issue of whether COVID-19 is a disability. Doing so is especially important since "long-haul" COVID symptoms can last a long time and thus cannot be considered temporary and minor. Further, in today's market, employers desperately need to retain employees and doing so requires that employers respect their workforce and are perceived by workers to be fair.

## FEDERAL CONTRACTORS NOW SUBJECT TO "BAN THE BOX" RULES

Effective December 20, 2021, a new rule in the National Defense Authorization Act took effect in which federal contractors can no longer inquire about an applicant's criminal history before extending a conditional job offer to work on a government contract. A new federal rule is expected to be issued in the near future to encourage and explain how to comply. The concept comes from job applications often have a "box" inquiring into an applicant's criminal record, which some believe can have a discriminatory effect. The new federal restrictions for government contractors do not preclude criminal history inquiries later on in the process after a conditional offer of employment has been extended to the worker. The Equal Employment Opportunity Commission (EEOC) has issued guidance on how employers can address issues relating to criminal history and inquiries into criminal history during the application process.

The new requirements on federal contractors are important since they apply to approximately 25% of the country's workforce. However, most large employers have already been subject to similar limitations since at least 16 states already have such restrictions in place.

## ARTIFICIAL INTELLIGENCE FACING INCREASING SCRUTINY UNDER DISCRIMINATION LAWS

More and more employers are using artificial intelligence (AI) in the hiring process, and as a result, the government and civil rights groups are both interested and concerned about the practice. One might argue that the use of artificial intelligence is helpful in ensuring non-discrimination, since hiring decisions would be unaffected by the personal bias of hiring officials. According to EEOC Chair Charlotte Burrows, as many as 83% of employers are using some automated tools to screen or rank hiring candidates. For companies that get many thousands of applications and resumes, some form of AI may expedite the process. AI uses bots to screen for certain words and look through qualifications, scoring and ranking candidates. The theory behind these tools is that the AI can predict how successful a job candidate will be in a position by comparing how well that person matches incumbent top performers in the position. At the present time, certain commentators believe that there is a general lack of knowledge as to whether the AI hiring tools work or whether they lead to bias and discrimination against applicants.

The EEOC has announced that it is reviewing artificial intelligence tools and how they might contribute to bias, including both for hiring and employee surveillance. A law has been passed in New York City that takes effect at the beginning of 2023, banning the use of automated employment decision tools to screen job candidates unless the technology has been subject to a "bias audit" conducted a year before the tool is used. The District of Columbia has recently proposed legislation that would address "algorithmic discrimination" by requiring employers to submit to annual audits of their technology.

The EEOC's interest in the impact AI has and will continue to have during the application process will create some difficult issues during EEOC investigations. The EEOC may be encouraged to compel employers to produce proprietary algorithms, the data sets used to train the algorithms, and the applicant data from individual employers reflecting the impact of the algorithmic output. In addition to seeking this information from employers, the EEOC may seek this information from

employers' vendors so the EEOC can conduct statistical tests to determine whether the algorithms disparately impact protected individuals.

Employers considering using AI in the hiring process should discuss these issues with vendors during contract negotiations. For example, employers may want to do "due diligence" to determine themselves whether an AI tool under consideration for use in the hiring process will pass muster under the employment discrimination laws, either because they do not adversely affect minorities, or because they are "job related" in the sense that they accurately predict good performers. Additional issues may need to be addressed such as whether the vendor will cooperate in any subsequent investigation into whether the AI is non-discriminatory. Some employers may also want to negotiate indemnification provisions with the vendor in the event the AI is challenged as discriminatory.

While some say the use of AI for hiring is currently unregulated, that is not totally accurate. Employer screening devices for hiring are normally considered to be employment "tests" under EEOC guidelines, and almost any such test is subject to what the law calls "disparate impact" analysis. Such an analysis addresses whether the use of the hiring tool or test disqualifies a significantly higher portion of protected groups from hiring. The statistical test to make this determination is actually quite complicated, but many years ago the EEOC came up with a rule of thumb called the "80% rule." This concept means that if the hiring criteria or test results in a protected group having a hiring ratio of less than 80% of a favored group, it has an "adverse impact" on that protected group. The fact that a test has an adverse impact does not conclusively prove that its use is discriminatory, but it does shift the burden of proof to the employer to show the use of the test is "job related" and that "business necessity" justifies using the test. There are various ways of showing job relatedness, with one being proof that the test accurately identifies candidates who are more likely to be good job performers. In other words, an employer may then have the burden of proving the validity of the test.

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