

EMPLOYMENT LAW BULLETIN



A Monthly Report On Employment Law Issues

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YES OR NO ON MANDATORY COVID VACCINATION?

Employers want to provide safe work places, and it is to the advantage of both the employer and employees to have a COVID-vaccinated workforce. Thus, the natural question is can I, and should I, require mandatory COVID vaccinations for my employees?

The short answer is that most legal scholars believe, including this writer, that an employer can mandate COVID vaccinations for its employees. However, there are legally recognized exceptions to the employer's right to do so. That is, the discrimination laws enable certain employees to request an exception from a company coronavirus vaccine mandate.

The first exception is under Title VII of the Civil Rights Act of 1964, in circumstances where an employee states that taking the vaccine is a violation of a "sincerely held" religious belief. In that circumstance, an employer might have to reasonably accommodate such an employee by exempting him or her from the vaccination mandate.

The second exception is under the Americans with Disabilities Act (ADA). Under the ADA, employees who do not want to be vaccinated claiming medical reasons have the right to request a reasonable accommodation to the mandate. Such an accommodation might include, for example, allowing the employees to work remotely.

There is still another problem in the case of a union employer. The employer may have to negotiate with the union before mandating a vaccine.

Most employers are not mandating vaccination, and they have very sound reasons for doing so. Polls indicate that a large part of the public, even healthcare workers, do not want the vaccination. Some employees may feel their "rights" are being violated, and workers are scarce these days. Most employers do not want to risk the opposition of at least some employees to mandating vaccination.

For this reason, many employers are first providing ready access to COVID vaccination for those employees willing to do so on a voluntary basis. Second, some employers are offering incentives to employees to be vaccinated. At a minimum, employees who get the vaccine won't have their temperature taken, and possibly will not have to wear the same amount of protective equipment. Some employers may consider offering financial perks to employees who accept the vaccine. Another idea is to require employees to undergo some educational program about COVID and the vaccination process in lieu of being vaccinated.

Further, most feel that people are going to be much more willing to take the vaccine after several months of hearing that a significant number have been vaccinated without adverse effects.

If an employer does mandate the COVID vaccine, or even provide it on a voluntary basis, it is unlikely that the company could be held liable should an employee develop adverse side effects. Most believe that any such claims would be considered pre-empted or negated by the workers' compensation pre-emption doctrine.

THE LOGISTICS OF HANDLING COVID-19 VACCINATIONS

Early reports indicate that most employers are more likely to use pharmacies and other third-party providers to administer the COVID vaccination. The vaccines from Pfizer require below-zero temperatures, and there are difficulties in keeping up with who got the first of the two shots required and when those workers need their second dose. Thus, many employers will encourage employees to go to CVS, Walgreens and other distributors that regularly handle such vaccinations. Further, employers could assist in the process by offering work-sponsored vouchers or on-line scheduling programs, as well as providing time off to get the shots.

MORE DREAMERS TO BE AVAILABLE FOR EMPLOYMENT

For undocumented immigrants who came to the U.S. as children ("Dreamers"), a new court decision grants a temporary reprieve from deportation. Recently, a federal district court in New York ordered the Trump administration to reinstate the Deferred Action for Childhood Arrivals (DACA) program — an Obama-era initiative that has allowed around 646,000 immigrants to stay in the country and work legally as long as they meet certain eligibility conditions. *Batalla Vidal v. Wolf*, Civil Action No. 16-CV-4756 (E.D.N.Y. Dec. 4, 2020). An estimated 685,000 additional people may be able to apply for DACA under the new ruling. A DHS spokesperson said the agency will appeal the ruling.

Batalla Vidal is the latest chapter in a years-long legal saga. President Obama frequently stated that it would be unconstitutional for him to issue an executive order granting immigration benefits to Dreamers. Ultimately, however, he issued a very controversial memorandum that allowed Dreamers to remain and be employed in the United States. In 2017, the Trump administration tried to rescind the DACA program. The move was immediately challenged. While the litigation made its way through the court system, previous recipients of DACA were allowed to renew their protections, but new applications were paused. In June, the U.S. Supreme Court held that the Trump administration had violated the Administrative Procedures Act, but the Court did not decide whether the DACA program was constitutional. In July, a federal judge in Maryland told the government to restore the DACA program to its pre-2017 status and start processing new applications. Then, acting DHS head Chad Wolf issued a new memo in which he specifically forbade new applications while the agency conducted a "comprehensive review" of the program. The memo also required DACA recipients to renew their protections every year, instead of every two years, and placed restrictions on their ability to gain permission from the government to travel abroad.

In compliance with *Batalla Vidal*, effective December 7, 2020, U.S. Citizenship and Immigration Services (USCIS) is:

- Accepting first-time requests for consideration of deferred action under Deferred Action for Childhood Arrivals (DACA);
- Accepting DACA renewal requests;
- Accepting applications for advance parole documents;
- Extending one-year grants of deferred action under DACA to two years; and
- Extending one-year employment authorization documents under DACA to two years.

DHS will comply with Batalla Vidal while it remains in effect, but DHS may seek relief from the order. Applications are available at the www.uscis.gov.

A permanent solution to the Dreamers predicament is legislative. President Trump told Congress that he would sign legislation protecting Dreamers, but Congress did not present a bill for signing. Joe Biden has promised to send a comprehensive immigration reform bill to Congress within his first 100 days in office that would include a pathway to citizenship for so-called Dreamers, but Congress has not been able to pass any significant immigration-related legislation in the past two decades under either Republican or Democrat administrations.

EEOC TO ALLOW SEEKING OF OPINIONS ON DISCRIMINATION ISSUES

For many years, the U.S. Department of Labor (DOL) has allowed employers to seek official government opinions on various fact situations in determining legal compliance, such as under the Wage/Hour laws. The right to seek advance government opinions on such issues was suspended during the Obama Administration, but reinstated during the Trump Administration. In December of 2020, the Equal Employment Opportunity Commission (EEOC) announced that the public can now seek its official position on potentially unclear aspects of federal civil rights laws, which can provide a defense to alleged violations.

EEOC Chair Janet Dhillon said in a statement that: "One of my priorities has been for the Commission to provide clear and accurate guidance to the public. . . . The new process for requesting formal opinion letters is a significant step towards allowing the Commission to address areas of the law that may be unclear."

Thus, now members of the public may request an opinion letter from the EEOC in the application of a specific question or factual scenario, but the EEOC will retain the discretion on whether it will respond to these requests.

TRUMP TRIES TO PUSH THROUGH FINAL REGULATIONS BEFORE LEAVING OFFICE

There are a significant number of pending federal regulatory rules that the Administration may try to issue before President Trump leaves office on January 20, 2021. Among the most important is the final rule to make it easier for employers to classify workers as independent contractors rather than employees who are owed minimum wages and overtime pay. Other rules awaiting final release are those promoting more transparent financial reporting from labor unions of their finances, particularly in light of the scandal at the United Auto Workers (see next article in this newsletter). Another proposed rule would eliminate a requirement for employers to hand over workers' personal email addresses, home telephone numbers, and cell phone numbers on a list of eligible voter information that must be provided to unions in advance of union representation elections. In all, there are as many as 88 significant final rules in the pipeline that agencies may attempt to finalize.

It is interesting to note that the White House Office of Management and Budget reports that in fiscal 2020, agencies eliminated \$198.6 billion in overall regulatory costs across the federal government and took 538 deregulatory actions, or a ratio of 5.5 rules cut for every new significant one added.

UNITED AUTO WORKERS SETTLE MASSIVE UNION CORRUPTION ISSUES

The United States Department of Justice (DOJ) has settled massive allegations against the United Auto Workers Union (UAW), exposing what federal prosecutors described as a culture of corruption among its leadership built around kick-back schemes, embezzlement and other illegal activities. The investigation has led to 15 convictions and some union members say the situation has taken away trust in the union's leadership. A proposed settlement

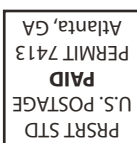
includes a six-year period of independent oversight by a court-appointed monitor. Further provisions in the proposed settlement require a way for union members to potentially change the way it elects its leadership.

The investigation is one of the largest of a major labor union in decades and has led to the convictions of two former UAW presidents. Further investigations are ongoing and there may be future criminal charges. And yet, many considered the proposed settlement a victory for the union, as federal prosecutors say they will not pursue a racketeering lawsuit against the union itself.

The prosecution tied the UAW's leadership to a scheme where hundreds of thousands of dollars in union funds were used to pay for villas, golf outings, expensive meals, cigars and other expenses for labor leaders and their associates. The immediate past UAW president apologized to UAW members and asked for forgiveness.

Everyone Here at Wimberly Lawson wishes you Happy Holidays and a Great New Year!

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