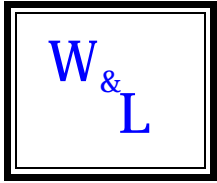


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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DEVELOPMENTS SINCE BIDEN'S MANDATORY VACCINATION-TESTING DIRECTIVES

Many developments have occurred since President Biden on September 9, 2021 issued certain announcements and executive orders to require either mandatory COVID vaccinations or weekly testing. Some of the announcements concern what requirements may be issued regarding mandatory vaccination or weekly testing of employers of 100 or more employees.

What the Federal Rules May Require

One of the first issues addressed by the government came from government announcements that requirements of private employers are likely to apply to those of a 100 or more employees, rather than locations having 100 or more employees. Later, a guidance was issued in early October from the Safer Federal Workforce Task Force suggesting federal contractor policies that may be adopted by Occupational Safety and Health Administration (OSHA) when it issues its proposed Emergency Temporary Standard (ETS). The federal contractor guidance indicates that employers do not need to provide on-site vaccinations. A particularly controversial portion of the guidance suggests that proof of vaccination will take more than an employee's word, as some sort of documentation of the vaccination will be required. This vaccination documentation might include a COVID-19 vaccination record card from a health department or documents from a healthcare provider or pharmacy. The records would have to include the type of vaccine, when the shots were given, and the name of the healthcare professional administering the vaccine. The guidance also requires employees to certify under penalty of perjury that the documentation they are submitting is true and correct. Acceptable formats for copies include a digital photograph, scanned image, or PDF. Under current OSHA rules, employers will have to maintain these records for the period of employment plus 30 years. A recent positive COVID-19 antibody test will not be acceptable.

Regarding weekly testing, it appears that contractors may use any viral test that has been authorized by the FDA such as a PCR or antigen test. The federal contractor guidance also treats at-home and remote employees the same way as if they came into the workplace daily, with the same requirements.

Vaccination Requirements Meet Immediate Challenge from Texas and Florida

Following the federal announcements, the governors of Texas and Florida rejected the requirement of mandated vaccinations. Texas Gov. Greg Abbott issued an executive order forbidding any private entity to require its employees or customers to get vaccinated. A day later, Florida Gov. Ron DeSantis proposed a law to shield all workers from being fired for not getting COVID-19 vaccines. Southwest Airline pilots sued to temporarily block the airline from carrying out federally mandated vaccines until a lawsuit over the issues is resolved. In response, Southwest announced it will follow President Biden's mandate even if inconsistent with the executive order from the Texas governor blocking such actions.

Also in early October, the Biden Administration reiterated in guidance that employers can legally offer healthcare premium discounts to people who get COVID-19 vaccinations.

Responding to Employees Who Refuse COVID-19 Vaccination

It is first important to remember that while the executive order for federal contractors mandates vaccination, the proposed OSHA ETS is not a vaccine mandate as employers will have the option to require employees to either be vaccinated or tested for COVID-19 at least weekly. Many employers are choosing to issue requirements independent of government mandates, many in anticipation of the proposed federal OSHA ETS. Statistics suggest that currently at least 20% of employers have a vaccine mandate. Almost half of employers are planning or considering making vaccination a requirement. There is a general "guesstimate" that by the end of the year, slightly over half of US employers may have some type of COVID-19 vaccine requirement. Some employers are in the process of providing vaccine incentives. Approximately 17% offer financial incentives, while another 14% are planning or considering doing so. The most common incentives are cash payments of between \$100 and \$200. Only 2% of employers currently offer a discount on insurance premiums to vaccinated employees, or impose a surcharge on premiums for those not vaccinated.

In implementing the vaccine mandate among federal employees, government guidance suggests that federal workers will have to prove they are vaccinated by November 8 or face an unpaid suspension followed by termination. Employees who have not received their final dose of a one- or two-shot vaccine by then will be given a five-day grace period to start their vaccination process. Workers who fail to receive a shot by that point will generally face suspension without pay of up to 14 days, followed by termination. In the private sector, if the employer has a vaccine mandate with appropriate written policies, that allow religious or medical exemptions, the employer appears to be on good legal grounds to terminate an employee, at least if they have not applied for religious or medical exemption; however, it is likely that OSHA will leave the issue of discipline to the employer. Union employers have more issues as the union must be given prior notice of the mandate, and there may be bargaining obligations prior to the implementation of such policies.

The main concern about implementing vaccine mandates is that estimates are that employers will lose between 2% and 8% of their employees due to such mandates, either because they quit or because they are terminated for non-compliance. There is a question mark as to whether the OSHA ETS will ever become law, because it might be overturned in the courts. Further, there will be delays even following the issuance of the ETS, as there will likely be a "break-in" period and there may be a lengthy time period while approximately 21 states work out their own version of the ETS.

Employers will also have to address whether "fully vaccinated" means to include booster shots or not, if not already required by the OSHA ETS. Tracking when employees will do a booster shot is particularly difficult.

Handling of Exceptions to a Workplace Vaccine Policy

While not legally mandated, as a practical matter employers should have a written policy that may be a part of an overall accommodation policy or a separate policy applicable to mandatory COVID-19 vaccinations. Such a policy should have a procedure for an employee to use to request such an exemption, including an appropriate person or office to which such request should be made. It is far better that such requests be made to a centralized source, as allowing such requests to each and every supervisor creates undo risks.

It would also assist the employer in having a form for the employee to fill out requesting such an exemption, and certain questions can be listed based on the type of exemption requested. This would facilitate employee fairness and provide better defenses to the employer should controversies arise.

In the case of a religious accommodation request, the request must be based on a sincerely-held religious belief. The subject is more complicated than it might first appear, as the definition of "religion" is quite broad and may include certain beliefs employers may not consider "religion" or may be contrary to the general religious tenants of a particular faith. Generally, personal philosophies or beliefs about vaccines would not qualify, however. In questionable situations, the employer legitimately may ask for more information or questions about the claim for religious belief. Ultimately, however, there is not simple analysis to determine the outcome of a particular religious exemption request. The employer can thus protect itself by engaging in an interactive discussion with the employee to determine whether or not an exemption is merited and documenting the results of this discussion and the resulting conclusion.

Possible questions might include identification of the religion on which the religious exemption is based and the duration of adherence. Questions like whether the claim of religious belief prohibits the vaccine or vaccination generally is also appropriate, but the employee's personal religious beliefs are more important rather than the general tenants of the religion.

While it is not illegal to make exceptions to such policies, in addition to applying the religious and health-related exemptions, various risks occur with such exceptions, particularly if they are subjective. If similarly-situated employees are treated differently, there may be discrimination issues if exceptions are not made for those of a different race or sex. Some also worry about the message to the workforce of safety risks being treated differently based on the perceived importance of an employee.

Unforeseen Laws May Affect Vaccine and Testing Requirements

A few other unforeseen laws have emerged having possible effects on COVID testing and vaccination mandates. First, regardless of what the federal rules are, some states may mandate that employers reimburse workers for job-related expenses which may include COVID-19 tests. These states will likely include California, Illinois and possibly other states. The testing may cost around \$150.00 for each COVID-19 test. State reimbursement requirements may also apply in other states, arguably including states like Iowa, Montana, New Hampshire, and North Dakota. States like Kentucky, New Jersey, and Pennsylvania prohibit employers from charging employees or applicants for medical testing. On the other hand, the upcoming OSHA rule might allow for at-home testing to minimize such costs.

It is unknown at this point whether the Department of Labor will take the position that the time it takes for a work-related test has to be paid under federal Wage-Hour law. It is also possible that state wage laws could require payment for testing even if the federal Wage-Hour law does not.

There will also be issues as to whether employers may use refundable tax credits available for employees' paid time-off to get tested, and whether health insurers will cover the cost of weekly testing.

The issue has at least been raised by commentators as to whether vaccine mandates may have the effect of creating an adverse impact against certain minority groups, since Black and Latino individuals overall have lower vaccination rates. Of course, complying with mandates by the government may serve as a defense to such alleged adverse impact discrimination claims.

Employers must also be careful about gathering such medical information on vaccination status prior to making a conditional offer of employment. The practice could also conflict potentially with protections of people with disabilities or sincerely held religious beliefs.

EMPLOYEE WINS A \$137 MILLION JURY VERDICT IN SINGLE PLAINTIFF DISCRIMINATION CASE

A Tesla factory worker in California in early October won a \$137 million race discrimination verdict. The plaintiff was employed by a temporary staffing agency at the Tesla factory, and he claimed that he was regularly subjected to racially

offensive terms and graffiti, including the "N" word, derogatory images of African-Americans and swastikas, which he claimed led to sleepless nights and weight loss. He also claimed the company ignored his complaints.

The jury verdict include \$6.9 million for emotional distress and \$130 million in punitive damages. Tesla argued that it never intended to disregard Plaintiff's rights and those of workers placed by the staffing agency at the plant and that all the incidents reported by the Plaintiff were investigated and resolved.

The outcome shows the danger in these type cases. To show a legal violation, harassment of this nature must be deemed to be "severe" or "pervasive" enough for a lawsuit to have enough merit to be allowed to be submitted to a jury. Cases have differed as to whether racially charged language or graffiti is sufficient to meet that standard. For example, the U.S. Supreme Court in May left in place a lower court ruling that threw out a worker's case because his allegations of racist graffiti, offensive verbal abuse, and swastikas did not satisfy the severe or pervasive standard.

Apparently the jury disbelieved many of the employer's defenses that the incidences in question simply did not happen. A member of the jury stated afterwards that some jurists considered that Tesla used contract employees as a way to mitigate their own responsibility for the culture within the factory. This juror expected Tesla to take at least the most basic preventive measures and precautions which he deemed they had neglected to protect employees within the factory.

Many refer to verdicts like this as coming from a "runaway jury." It is because of cases like this that many employers have instituted individual employment agreements containing either jury trial waivers or mandatory arbitration provisions, so that legal claims go to an arbitrator rather than to a court. Employers desiring information on these approaches should contact Wimberly & Lawson.

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