

Can Employers Make COVID-19 Vaccinations Mandatory?

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Now that the vaccines for COVID-19 are widely available in the United States, many schools are preparing for in-person instruction in the fall and more workplaces are starting to move away from remote work and bring their employees back into the office. Of course, many essential workers have remained in their workplaces throughout the pandemic. In order to protect their employees and customers from the pandemic virus, many employers in both the public and private sectors are requiring employees to get vaccinated before returning to work or as a condition of remaining at work. New York City has announced that all government employees need to get vaccinated by September 13, 2021, or else be subject to weekly COVID-19 testing. President Biden announced a similar mandate - vaccine or testing - for federal government employees and contractors on July 29, 2021. The proliferation of employer vaccine mandates across the country has spawned a number of legal challenges by employees who want to keep their jobs but do not want to get vaccinated, and by unions who do not think such changes should be implemented unilaterally by employers. This blog explores some of the legal issues that federal and state courts will be addressing as these cases proceed.

Claims based on right to refuse “unapproved” COVID-19 vaccines

Plaintiffs in several lawsuits have argued - thus far unsuccessfully - that employers cannot impose vaccine mandates because the COVID-19 vaccines have only received Emergency Use Authorizations from the Food and Drug Administration, thus rendering the vaccines “unapproved” and “experimental.” Employees at Houston Methodist Hospital in Texas (*Bridges v. Houston Methodist Hospital*), Dona Ana Detention Center in New Mexico (*Legaretta v. Macias*), and Los Angeles County schools in California (*California Educators for Medical Freedom v. Los Angeles Unified School District*) have all argued that their employers’ requirements that they get the COVID-19 vaccine or face termination amounts to compelling them to participate in a medical experiment in violation of their rights under federal law.

Plaintiffs in all three cases point to 21 U.S.C. § 360bbb-3, a law governing the Secretary of Health and Human Services’ ability to grant Emergency Use Authorization to drugs or medical devices that have not received full approval from the FDA. The law says that the HHS Secretary must establish conditions to ensure that anyone who administers a product under an Emergency Use Authorization must inform patients “of the option to accept or refuse administration of the product, [and] of the consequences, if any, of refusing administration of the product,” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). The plaintiffs claim that this law gives them a right under federal law to refuse the vaccine, and that any employer mandate to the contrary is unenforceable. Some of the plaintiffs point to other sources of law to claim a right

to refuse vaccination. For instance, the New Mexico plaintiffs pointed to *Griswold v. Connecticut* and *Roe v. Wade*, two famous Supreme Court cases holding that the constitution recognizes a right to privacy that encompasses access to contraception and abortion. They argue that this same right prohibits the Dona Ana Detention Center from terminating their employment if they refuse the vaccine. The California and Texas plaintiffs pointed to the Nuremberg Code of 1947, international laws adopted in the wake of the Holocaust that prohibit forced medical experimentation without informed consent. The plaintiffs basically have argued that the employers' vaccine mandates are tantamount to the horrifying medical experiments conducted by Nazi doctors on concentration camp prisoners.

There is little chance that these arguments will be met with any sympathy by courts. Contrary to the claims of the plaintiffs, the Centers for Disease Control and Prevention and the Equal Employment Opportunity Commission both recognize that federal law does not prevent employers from imposing vaccine mandates. The [CDC website](#) says: "The Food and Drug Administration (FDA) does not mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law." Similarly, the EEOC says that "The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19," so long as employers allow for legally required reasonable accommodations for employees with disabilities or religious beliefs that do not allow for vaccinations. Furthermore, the Supreme Court first held more than 100 years ago, in its 1905 decision in *Jacobson v. Massachusetts* upholding a state law requiring smallpox vaccination, that the Constitution does not provide a right to opt out of vaccine mandates in the midst of a public health crisis. Accordingly, lower courts are unlikely to hold that there is a constitutional right to opt out of employer vaccine mandates in the midst of the COVID-19 pandemic.

The only court to weigh in on one of these cases has shown no patience for these arguments. On June 12, 2021, the United States District Court for the Southern District of Texas dismissed all of the claims brought against Houston Methodist Hospital, bluntly stating that the plaintiffs' efforts to portray themselves as unwilling participants in medical experiments misstate the facts, and that any analogy to Nazi experimentation in concentration camps is "reprehensible." Looking at Section 360bbb-3, the Court held that the statute only regulates the conduct of the HHS Secretary and does not create any rights that a private individual can enforce in a lawsuit. Furthermore, the Court noted that none of the plaintiffs are actually being coerced into taking the vaccine. Rather, the Hospital gave them the option to refuse the vaccine and told them the consequence of their refusal, namely, that they would be terminated from their job. "If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. This is all part of the bargain."

Claims based on religious and disability discrimination

Even though employees will likely not be able to show that employer vaccine mandates violate federal law, particular employees may be able to show that they have a right to opt out of an employer vaccine mandate based on their religious beliefs or medical conditions. For example, in *Coronado v. Great Performances Artists As Waitress Inc.*, Antonio Coronado, a service worker, brought claims under the New York State and New York City Human Rights Laws in state court, claiming his employers' decision to place him on furlough until he got

vaccinated violated his “religious and ethical convictions” and discriminated against him “based upon his physical condition.” There are likely to be similar lawsuits brought by employees all over the country under federal, state, and local anti-discrimination laws. Although the court has not yet weighed in on Mr. Coronado’s complaint, the EEOC has provided guidance that will help show how such claims are likely to fair under the federal laws prohibiting employment discrimination on the basis of religion, Title VII of the Civil Rights Act of 1964, and disability, the Americans with Disabilities Act. Check out our blog post, [“COVID-19 Vaccinations: What Employees and Employers Need to Know”](#) to learn more.

Other vaccine mandate developments to come

Although most vaccine mandate litigation is focused on federal law concerning Emergency Use Authorization and anti-discrimination law, some opponents to vaccine mandates are taking other approaches. For instance, a case filed in the United States Court for the Northern District of Illinois argues that the employer’s imposition of a vaccine mandate – even one that allows accommodations for employees’ religious beliefs and disabilities – alters the terms and conditions of employment in violation of Collective Bargaining Agreements entered into by the plaintiff-union. See *International Brotherhood of Teamsters, Local 743 v. Central States, Southeast and Southwest Areas Health and Welfare Pension Fund*. This claim sidesteps any argument about the vaccine approval process as well as the employer’s legitimate interest in promoting workplace safety. Instead, the claim characterizes the employer’s vaccine mandate, which requires unvaccinated employees to use all of their paid time off and then face discipline (up to and including termination) unless and until they get vaccinated, as imposing a new restriction on the union members’ employment without going through the negotiation process required by the agreements and federal law protecting union rights. For instance, the National Labor Relations Act requires an employer to collectively bargain in good faith with the union over subjects that directly impact “rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. §§ 158(a)(5); 159(a). The Teamsters Union argued that the employer’s unilateral imposition of the vaccine mandate creates a new “condition of employment,” and requirements on how employees must use their paid time off unlawfully circumvented the mandatory bargaining process. It remains to be seen how the court will handle this claim, but other unions with members opposing vaccine mandates are likely to bring similar claims if the Teamsters Union has any success here.

Some state legislators opposed to vaccine mandates are circumventing courts altogether and are proposing state laws that outright prohibit COVID-19 vaccine mandates. While many such laws are still under consideration, two states have successfully enacted laws curtailing employers’ ability to require their employees to get vaccinated. On April 28, 2021, Arkansas enacted Act 977, which prohibits any state or local agency or entity from requiring a COVID-19 vaccine as a condition of employment, education, entry to facilities, receipt of services, or issuance of a license, certificate, or permit. Ark. Code § 20-7-142. Montana went even further. As of May 7, 2021, it is unlawful in Montana for any private or government employer to discriminate against any employee based on the employee’s vaccination status or possession of an “immunity passport,” although health care facilities are allowed to inquire about employees’ vaccination status and implement reasonable accommodations to protect employees and patients from any dangers posed by non-vaccinated employees. See Mont.

Code Title 49, Chapter 2, Part 3. It remains to be seen if employers or employees seeking a safe workplace will challenge these state laws in court, and how courts will weigh an employer's interest in workplace safety against the state's interest in regulating commercial activity and protecting individuals against employer restrictions.

As more employers demand their employees get vaccinated and courts weigh in on existing lawsuits, the tactics of legal resistance to vaccine mandates are sure to adapt and change.