

What Employers Need to Know About the COVID-19 Vaccine/Testing Rules in Light of Recent Court Rulings

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There are few topics as in flux and confusing for employers as the COVID-19 vaccine mandates. This article will summarize^[1] the current rights or obligations of private sector employers to require their employees to be fully vaccinated for COVID-19.

Are private sector employers currently *required* to implement a vaccine mandate?

As of this writing, no, there is no broad requirement for private sector employers to mandate vaccinations. Although the White House COVID-19 Action Plan, which was announced on September 9, 2021, included requirements for large groups of employers (e.g., private sector employers with 100 or more employees, most health care settings that participate in the Medicare and Medicaid programs, and certain federal contractors and subcontractors), those mandates have been stayed, in whole or in part, as follows:

- On November 6, 2021, a federal appeals court issued a nationwide stay of the Occupational Safety and Health Administration's Emergency Temporary Standard that pertained to private sector employers with 100 or more employees;
- On November 30, 2021, a federal judge in Louisiana issued a nationwide preliminary injunction that prohibited the Centers for Medicare & Medicaid Services ("CMS") from enforcing its healthcare worker vaccine mandate while lawsuits challenging the CMS rule are being decided; and
- On November 30, 2021, a federal judge in Kentucky issued a preliminary injunction that enjoined the federal government from enforcing the Executive Order that included a vaccine mandate for federal contractors and subcontractors in three states: Kentucky, Ohio, and Tennessee.

Ok, but can private sector employers *choose* to mandate employees to receive the vaccine?

Generally, yes, but there are some key exceptions and issues to consider.

- First, some states (such as Florida, Montana, Tennessee and Texas) have banned or are in the process of seeking to ban private employer vaccine mandates and/or prohibiting employers from inquiring about employees' vaccination status. So, employers should determine whether such bans exist (or are likely to exist) in any of the jurisdictions in which they employ people.
- Second, employers who have unionized employees may be required by federal and state labor laws to bargain in good faith with unions over any planned vaccine mandate that includes those employees. This duty prohibits unilateral action relating to terms and conditions of work until and unless the parties bargain to an impasse.
- Third, any vaccine mandate must recognize that some employees may be legally entitled to a reasonable accommodation under federal or state civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with a vaccination requirement. Employers who mandate the vaccine must establish a process that interacts with employees who notify them of a potential need for such an accommodation and then evaluates each request in accordance with applicable laws.

- Finally, as with all employment policies, employers need to make sure that their vaccine/testing policy does not discriminate against any employees based on their membership in a legally-protected class. The Equal Employment Opportunity Commission has issued guidance to employers on this issue here: <https://eeoc.gov/coronavirus>.

Ok, so what should private sector employers do while the dust settles?

- If the employer is covered by the OSHA ETS or the CMS rule, it should keep a close eye on court rulings relating to the ETS/CMS rule. Things can change quickly and, if the stays are lifted such employers will need to be ready.
- If the employer is a federal contractor or sub-contractor in Kentucky, Ohio and Tennessee, it should keep a close eye on court rulings relating to the Executive Order. Things can change quickly and, if the stay is lifted such employers will need to be ready.
- If the employer is a federal contractor or sub-contractor outside of Kentucky, Ohio and Tennessee, carefully review and seek guidance regarding information and documents it has or will soon receive from the applicable federal government agency.
- Decide whether to implement a vaccine/testing mandate prior to any government requirement to do so, taking into account the exceptions and issues outlined above. Those that do should draft policies that clearly communicate – with adequate notice – the employer’s view on key aspects of the mandate, such as:
 - a. the policy’s effective date;
 - b. to whom the policy applies;
 - c. deadlines (e.g., for submitting vaccination information, for getting vaccinated/tested);
 - d. procedures for compliance and enforcement of the specific requirements and deadlines for COVID-19 vaccination;
 - e. applicable exclusions from the requirements (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
 - f. information on determining an employee’s vaccination status and how this information will be collected and maintained;
 - g. notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace; and
 - h. disciplinary action for employees who do not abide by the policy.

5. Continue to strictly follow all COVID-19 related regulations/guidance from the Center of Disease Control and Prevention, OSHA, and other federal, state and local public health or occupational health and safety agencies.

Does that mean employers can pause efforts to implement a government-ordered vaccine mandate if the one that applied to them has been stayed by a court?

Yes, although an employer that does so must continually monitor the status of the pending lawsuits and, if the stay is lifted, be prepared to swiftly recommence the steps needed to comply with the mandate.

If you have any questions, please feel free to reach out to me, the other attorneys listed below, or your contact at Tucker Arensberg, P.C.

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[1] IMPORTANT DISCLAIMERS: First, this article is meant to serve as a current summary of vaccine-related laws/regulation for general informational purposes and, therefore, it neither addresses all aspects of these laws nor constitutes legal advice. Second, this article is focused on federal laws that broadly affect most private sector employers and, as such, it does not address relevant state or local laws that may apply in certain jurisdictions. Lastly, there will almost certainly be significant changes to the state of the law on this topic, so employers will need to closely monitor

developments. Readers should direct specific questions to their legal counsel.