

Courts Allow Employers to Enforce Vaccine Mandates

Amundsen Davis Covid-19 Alert

October 4, 2021

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As discussed in our September 9, 2021 alert, the Biden administration has directed OSHA to implement an Emergency Temporary Standard that will require employers with 100 or more employees to ensure their employees are either fully vaccinated or tested weekly for COVID-19. While employers anxiously await OSHA's Emergency Temporary Standard and guidance on who it applies to and what it entails, federal courts are upholding vaccine mandates that employers have chosen to voluntarily implement.

In August, New York City announced it was implementing a vaccine mandate requiring all public school teachers and employees to be vaccinated. New York City teachers filed a lawsuit seeking to stop enforcement of the vaccine mandate. A Judge from the United States 2nd Circuit Court of Appeals (New York, Connecticut and Vermont) initially granted the teachers an injunction stopping the vaccine mandate on a temporary basis, while it was being reviewed by a three judge panel. On Thursday, September 30, 2021, the three judge panel reversed the judge's ruling and removed the temporary injunction. The teachers' attempt to appeal the decision to the U.S. Supreme Court was swiftly denied leaving the vaccine mandate in place. As such, New York City made its vaccine mandate effective today by barring unvaccinated New York City public school teachers and other employees from entering schools and placing them on an unpaid leave.

Similarly, back on September 24, 2021, Federal District Court Judge David Bunning, a Republican appointee in the United States District Court for the Eastern District of Kentucky, refused to block a vaccine mandate issued by a health care provider, St. Elizabeth Medical Center. In doing so, the court concluded that the employees' constitutional arguments were not applicable to a private sector employer; the mandate allowed for both medical and religious exemptions and therefore did not violate the ADA or Title VII; and finally, no employee is "forced" to accept the vaccine. Rather, the court concluded, "these Plaintiffs are choosing whether to comply with a condition of employment, or to deal with the potential consequences of that choice." The court added, "[i]f an

employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment.” *Beckerich et al v. St. Elizabeth Medical Center, et al* 2:21-cv-00105-DLB-EBA, Doc. #34, 9/24/2021.

Both the New York City public schools mandate and the St. Elizabeth mandate are notable in that they are considered “hard mandates” in that neither allows periodic testing as an alternative to vaccination.

In a similar ruling issued in August, the United States 7th Circuit Court of Appeals (Illinois, Indiana, Wisconsin) unanimously upheld Indiana University’s mandate requiring all students to take the vaccine unless they were granted an exemption for medical or religious reasons. The court’s rationale mirrored that in the St. Elizabeth’s case. The court agreed that the plaintiffs “have a right to bodily integrity” but noted that vaccination was not a requirement of all members of the public, but rather “a condition of attending Indiana University” and therefore, the court concluded, “[p]eople who do not want to be vaccinated may go elsewhere.”

These rulings indicate that private employers and organizations are able to voluntarily implement mandatory vaccine policies. However, to limit the risk of legal challenges to a vaccine mandate and potential legal pitfalls when implementing a vaccine mandate (including potential wage and hour issues), employers should work with experienced labor counsel prior to implementing any policy requiring vaccinations.

We will continue to monitor and post on the many rapidly evolving matters regarding vaccine mandates.

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