August 16, 2021

The Shifting Legal Landscape of Employer-Mandated Vaccination, from the Federal Perspective

Private employers across the country, including broadcasters large and small, are working to develop the best policies for their respective workplaces. For many employers, a critical question is whether and how to require that employees be vaccinated against COVID-19. This memo discusses three significant, recent developments from the federal perspective of which broadcasters ought to be aware as they think through this issue. Please note that the information contained herein does not discuss state and/or local laws regarding vaccine mandates.

Broadcasters should consult with their employment law counsel and research state and local laws that might affect the discussion below as they decide how—if at all—to move forward in this sensitive area.

*The EEOC Finds That Vaccine Mandates Are Not Discriminatory If Properly Implemented*.On May 28, 2021, the Equal Employment Opportunity Commission (“EEOC”) updated its guidance on mandating vaccines. The EEOC stated that federal EEO laws do not prevent employers from mandating that employees be vaccinated, so long as reasonable accommodations are provided to employees with disabilities, employees who are pregnant, and employees who have a sincerely held religious belief, practice, or observance. Reasonable accommodations may include, for example, requiring that the employee be tested for COVID-19 on a weekly basis, requiring the employee to wear a mask and distance from other employees, or—in some cases—even requiring the employee work remotely or on a modified work schedule. Note that, according to the EEOC, an employee’s vaccination status is confidential medical information under the Americans with Disabilities Act (“ADA”), and employers are prohibited from disclosing their employees’ vaccination status information.

*“Emergency Use Authorization” Status Does Not Render Vaccine Mandates Unlawful*. On July 6, 2021, the U.S. Department of Justice (“DOJ”) issued a memorandum interpreting the Food, Drug & Cosmetic Act (“FDCA”), the law which governs regulation of drugs—including the COVID-19 vaccines. Many had argued that because the COVID-19 vaccines have thus far received only “emergency use authorization” under the FDCA, private employers could not require employees to get the vaccine. The DOJ disagreed with that interpretation. To the contrary, the DOJ advised that the FDCA (specifically, Section 564 of the FDCA) permits employers to impose a COVID-19 vaccination mandate as a condition of employment even though the vaccine is subject to only emergency use authorization; the DOJ’s rationale, in part, is that the emergency use authorization provisions apply directly to the Food and Drug Administration (“FDA”) and not to private employers. The DOJ further stated that because employees could choose to work elsewhere, a vaccine mandate by a private employer does not run afoul of the FDCA’s requirement that people be given the option under the FDCA to refuse the vaccine.

Federal courts have concurred with the DOJ’s analysis. For example, the Fifth Circuit Court of Appeals upheld a hospital’s mandatory vaccine policy for employees, and the Seventh Circuit Court of Appeals upheld Indiana University’s vaccine mandate for students returning to campus.

*Vaccines Are Becoming Part Of Workplace Safety Plans*.On August 13, 2021, the Occupational Safety and Health Administration (“OSHA”), the federal agency responsible for developing and enforcing federal worker safety standards, officially directed employers to “consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing—in addition to mask wearing and physical distancing—if they remain unvaccinated.” While this guidance is by no means mandatory, it is the first time that a federal agency has actively encouraged private employers to adopt vaccination policies, linking the employer’s decision-making to the employer’s general duty to provide for a safe and healthful work environment. This guidance is very new and contains other recommendations related to incentivizing and supporting vaccination of employees.

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Of course, a multitude of practical issues must be considered when developing a vaccine policy that is particular to a workplace and the employees therein. These issues include, but are not limited to, whether to require weekly testing for unvaccinated people, how to track information, how to undertake an interactive process for employees seeking accommodations, and how to ensure confidentiality and non-discrimination. Again, we encourage broadcasters to consult with their employment counsel regarding these matters, including how state and local law may separately affect their decision-making.

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*Tim Nelson, Editor*

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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