SEPTEMBER 23, 2021 | LABOR & EMPLOYMENT INTERSECTIONS

Pfizer Vaccine's Full FDA Approval – What Does This Mean for Employers?

By Conn Maciel Carey's COVID-19 Task Force

Earlier this week, on August 23, 2021, the U.S. Food and Drug Administration fully approved the Pfizer-BioNTech COVID-19 vaccine. Earlier this year, many employers were hesitant to issue vaccine mandates and expressed concerns about potential legal risks associated with such a mandate since the COVID-19 vaccines were only approved for emergency use. While the full approval designation may not change the legal landscape as it relates to vaccine mandates, many employers may feel more comfortable imposing such mandates.



As explained in our prior blog, employers can mandate employee vaccinations under federal law. The U.S. Equal Employment Opportunity Commission (EEOC) issued guidance several months ago stating that employers generally can mandate COVID-19 vaccinations for employees who physically enter the workplace without running afoul of the federal anti-discrimination laws it enforces. The U.S. Department of Justice (DOJ) also issued a slip opinion on July 6, 2021, regarding vaccination mandates and the emergency use authorization status of the vaccines:

We conclude that section 564(e)(1)(A)(ii)(III) concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs.

As more employers have implemented vaccine mandates, we have begun to see legal challenges to those mandates, but, so far, the courts have been hesitant to place any limitations on vaccine mandates. For example, in the first case, *Bridges v. Houston Methodist Hosp*., 2021 U.S. Dist. LEXIS 110382 (S.D. Tex., June 12, 2021), one hundred seventeen employees from Houston Methodist filed a lawsuit over the employer's COVID-19 vaccine mandate alleging wrongful termination. The plaintiffs argued that it was illegal because it forced people to get an "experimental" vaccine in order to keep their jobs. The District Court Judge rejected the claim that the vaccine is experimental and dangerous, explaining that Texas state law only protects employees from being fired for refusing to commit a crime, and "receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties." The Judge also relied on the nature of an at-will employment relationship, stating that "[i]f 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. That is all part of the bargain."

Furthermore, at least one U.S. Court of Appeals has addressed a vaccine mandate – albeit not in the employment setting. Specifically, on August 2, 2021, the U.S. Court of Appeals for the Seventh Circuit denied a motion for a temporary injunction that would have kept Indiana University from enforcing its vaccine mandate, noting that the school requires students who are exempt for religious or medical reasons to wear masks and be tested twice a week. Specifically, the Court concluded:

Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenzas, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them.

The Court relied on a Supreme Court case decided more than 100 years ago in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), where the Supreme Court held that a state may require all members of the public to be vaccinated against smallpox. This case developed the legal framework to support vaccine requirements imposed by state governments. While there were factual differences between the two cases, the Court explained "there can't be a constitutional problem with vaccination against SARS-CoV-2."

From an employment law perspective, a COVID-19 vaccine mandate does not violate any federal workplace anti-discrimination laws such as Title VII of the Civil Rights Act or the Americans with Disabilities Act. This is because a person's vaccination status is not a protected class.

Nevertheless, with several state legislatures looking to pass laws to make it unlawful to discriminate against an employee based on vaccination status, employers need to confirm that there isn't an applicable state prohibition on a vaccine mandate. Montana, for example, passed a law in May 2021 making one's vaccination status a protected class. The law goes even one step further by prohibiting employers from requiring an employee to disclose their vaccination status or receiving a vaccine that is subject to the FDA's preliminary emergency use authorization status.

While courts and state legislatures continue to delineate the scope and legality of COVID-19 vaccine mandates, employers that are considering imposing such a mandate should take steps to protect themselves from a potential lawsuit. Specifically, employers should carefully evaluate why they require that their employees be

vaccinated and gather information that will help make an informed decision, such as the number of employees already vaccinated and whether such a mandate would receive significant pushback from employees.

Finally, it will be imperative for employers that do impose a vaccine mandate to determine whether there are any employees who cannot be vaccinated due to religious or disability-related concerns and outline a clear process for employees to request an accommodation. Employers should carefully document and maintain any communications and records related to the interactive process and the employee's accommodation request.

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