



First Lawsuit Challenging Mandatory COVID-19 Vaccine May Shed Light On Employer Parameters

Insights

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Contending that he could not be forced to be a “human guinea pig,” a New Mexico detention center officer has filed a federal lawsuit challenging the right of his employer to require first responders to receive the COVID-19 vaccination. Isaac Legaretta’s complaint appears to be the first lawsuit in the country directly challenging an employer’s right to require the vaccine. The plaintiff is focusing his case on the fact that the Food and Drug Administration (FDA) approved the vaccine under an Emergency Use Authorization (EUA), rather than through its usual and more time-consuming approval process. While this claim is in its infancy, it could soon shed light on employers’ rights – or restrictions – in this fluid area of the law.

County Employer Requires Vaccine For Certain Employees

Legaretta works as a detention center officer for the Dona Ana Detention Center (DADC) in Las Cruces, New Mexico. According to his February 28 complaint, DADC is requiring him to be vaccinated in order to keep his job.

On January 29, the county issued a mandatory directive ordering all first responders to receive the COVID-19 vaccination as a condition of ongoing employment, unless they had a documented ADA or EEO exception granted by the county human resources. By mid-month, Lagaretta had not submitted proof of vaccination to his employer, nor a documented reason for an exception to be granted, and his employer issued him a Coaching/Counseling notice. The February 17 notice directed him get vaccinated within five business days and reminded him that he could request a reasonable accommodation if needed.

Legaretta believes he is in “imminent danger” of being terminated from his job for refusing to accept the vaccine, and claims he was “advised that he would be fired” if he continued to refuse. His lawsuit asks for a court order confirming that his employer cannot coerce him or other employees to get vaccinated, an injunction blocking DADC from firing him, and, if he already happens to be terminated from employment by the time the court issues its ruling, an order forcing the county to rehire him.

Employee Alleges He Has The Right To Refuse Vaccination

Legaretta's lawyers focus on certain language in the EUAs under which the vaccines were approved that cite requirements with which DADC purportedly failed to comply. Specifically, the applicable statute states that individuals to whom such vaccines are administered must be informed of the known and potential benefits and risks of its use "and ***of the option to accept or refuse administration of the [vaccine]..***"

Legaretta's complaint does not cite the remainder of that provision, which goes on to state that the vaccine recipient must also be advised of "the ***consequences, if any, of refusing administration of the [vaccine]***, and of the alternatives to the [vaccine] that are available and of their benefits and risks." Legaretta admits in the complaint that he was informed of the consequences of refusing the vaccine.

It is unclear to what extent he may or may not have been informed of the risks and benefits of the vaccine in this instance, especially since the defendants in the case have not yet even filed their initial response to his allegations, although providers who administer it normally provide such information. He contends that DADC did not inform him that he "had an option to refuse the vaccine" or inform him of the "known and potential benefits and risks of [being vaccinated] and...the extent to which to which such benefits are unknown."

What The Law Says

In guidance issued on December 16, 2020, approximately a week after the first vaccine distributions began in the United States, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding the vaccines and whether employers could require them.

While stopping short of explicitly stating whether vaccines could be mandated, the EEOC's guidance repeatedly referred to an employer's responsibilities if it requires employees to be vaccinated, describing accommodation requirements that would also be applicable if an employee is unable to be vaccinated because of certain medical reasons or because of a sincerely held religious belief or practice.

Consensus in the legal community has been that, at least in the private sector, employers may require at-will employees to be vaccinated, subject to accommodations that may be required for medical or religious reasons. DADC's position appears to be consistent with the EEOC's position, specifically that employers can indeed require a COVID-19 vaccine, even if issued under an EUA. From employers' perspective, the key question in this case appears to be whether the EEOC's guidance is as fully applicable to public employers, such as DADC, as it appears to be to private employers.

Still, in part due to this ambiguity and other reasons such as skepticism of the vaccine, Fisher Phillips' Flash Survey showed that only about 9% of employers are mandating or planning to mandate vaccines. Instead, approximately 20% of employers are considering various forms of incentives to encourage vaccinations. The Fisher Phillips Vaccine Resource Center contains

incentives to encourage vaccinations. The [Fisher Phillips Vaccine Resource Center](#) contains explanations, policy templates, charts and other information that can help employers navigate through these issues, based upon their unique circumstances.

What Should You Do?

In any event, as vaccine availability increases and these questions are resolved, it is becoming increasingly important for employers to develop their own action plan. We have developed a [10-step action plan for employers](#) to consider that provides practical guidance and suggestions for proceeding as we head towards the wider availability of the vaccine.

We will monitor the progress of this case, as it has the potential to either solidify or upend employers' collective understanding of this aspect of whether they can mandate that employees get the COVID-19 vaccine issued pursuant to an EUA. Make sure you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have questions about developing detailed vaccination plans or how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney or any attorney on our [FP Vaccine Subcommittee](#).

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular situation.

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