

More Lawsuits Are Challenging Employer Mandatory Vaccination Policies, Relying More on Fear, Hyperbole, and Misdirection Than Law or Science

Insights

6.09.21

Invoking horrific images of Nazi war crimes and employees allegedly being used as “human guinea pigs,” a new round of lawsuits are challenging employers’ rights to enforce mandatory COVID-19 vaccination requirements in Texas, North Carolina, and New York. While their litigation has attracted considerable media attention and fuels strong emotions, these plaintiffs still appear to be falling well short of articulating viable legal claims. But the controversy and negative attention make it easy to understand why, despite overwhelming scientific evidence regarding the safety and effectiveness of vaccines, a vast majority of employers have chosen to encourage but not require their employees to be vaccinated. In a nutshell, what are these new lawsuits alleging and why are they simply more inflammatory than legally sound?

The Lawsuits

The new litigation is similar in many respects to the first two lawsuits challenging mandatory vaccine policies that we previously told you about filed in New Mexico and Los Angeles. The new Texas case filed against Houston Methodist in Texas garnered momentum after an initially anonymous nurse went to the media to express her opposition to the health system’s decision to require all of its employees to get vaccinated by early June. After more media coverage and an on-line crowdfunding effort, the nurse found an attorney and over 100 more employees to join her in a lawsuit against Methodist. The suit argues that Methodist is forcing “human experimentation,” references the post-World War II Nuremberg Trial that led to the creation of the Nuremberg Code which bans forced medical experimentation, and accuses the health system of placing profits ahead of people.

The plaintiffs’ actual legal claims are that they were or will be terminated for refusing to perform illegal acts – none of which are identified or occurred – and that requiring employees to be vaccinated violates public policy. Neither claim appears to have any validity, as explained below. Methodist has repeatedly explained that its vaccine requirement is based on what it views as a sacred duty to do whatever it can to protect its patients, who are among the most vulnerable people in the community – about 99% of its employees have either been vaccinated or received an exemption in accord with guidance issued by the Equal Employment Opportunity Commission (EEOC). Methodist has required its employees to receive annual flu shots since 2009.

The North Carolina lawsuit challenges the Durham County Sheriff's Department's decision to require vaccinations. Again referring to the COVID-19 vaccine as experimental, the plaintiff's argument is also grounded in public policy, relying on a portion of the federal statute stating that recipients of vaccines issued under the Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) must be informed of "the option to accept or refuse" its administration. Plaintiff does not, however, deal with the obvious implications of remainder of the applicable section, which goes on to state that recipients must also be informed of "**the consequences, if any, of refusing administration of the product.**"

The New York suit was filed by a hospitality employee alleging, among other things, that being forced to take the COVID-19 vaccine by his employer amounts to discrimination on the basis of religion. However, his lawsuit fails to explain how or why taking the vaccine would violate his religious beliefs. Like the other lawsuits mentioned above, his complaint also contains broad allegations based on the premise that the vaccine is experimental and cannot be required by employers.

What is the Applicable Law?

As mentioned above, the current vaccines have all been issued in the United States pursuant to the FDA's EUA process. The applicable statute indeed recognizes, as the name makes clear, that an EUA may be issued when the Health and Human Services Secretary determines that there is a public health emergency or the potential for such an emergency exists. This occurred in 2020, which permitted vaccines to later be distributed and used in the U.S.

Under EUA provisions, recipients of the product – in this case, the COVID-19 vaccines – must be informed of, among other things, the potential benefits and risks of its use and the extent to which such benefits are unknown. They must also be informed of their right to refuse administration – and, **critically**, of the **consequences** of refusing administration. This language seems to make it very clear that while no person can literally be forced to take the vaccine, there can indeed be consequences for refusing to take it. In the case of an at-will employee, consequences may include being barred from the workplace or having their employment terminated.

At-will employment means that either the employee or employer can end the employment relationship at any time for any reason not prohibited by law. Texas, North Carolina, and New York are among the vast majority of states where the employment relationship is presumed to be at-will. Thus, if an employee refuses to be vaccinated, the employer has the legal right to terminate the relationship. The great weight of legal authority indicates that the employers in these lawsuits are well within their rights to enforce a policy that requires COVID-19 vaccinations, just as they have long had the authority to require other vaccinations, including the flu shot.

Even in an at-will relationship, employees still have protections if they are unable to be vaccinated for certain medical or religious reasons. The employees, however, must confer interactively with their employer to determine whether their circumstances qualify for an exemption and whether a

their employer to determine whether their circumstances qualify for an exemption and whether a reasonable accommodation can be provided. In the above-referenced lawsuits, there is no evidence that the employers failed in fulfilling these obligations. In fact, Methodist's willingness to accommodate these situations has been well-publicized during the past several weeks. The EEOC has also clearly stated that employers may inquire into employee's vaccination status and seek proof for vaccination.

From a legal standpoint, the issues appear to be fairly straightforward. Employers may require vaccines if they decide that is the right decision for them, but they must provide for accommodation requests on the basis of certain medical or religious reasons. Employees have the right to refuse to be vaccinated, but if they do, at-will employers have the right to terminate their employment.

To determine whether a policy requiring vaccinations is right for your workplace, many considerations are important, including the emotions, potential distractions, politicization, and likely misunderstandings associated with the COVID-19 vaccines and their EUA status that will arise in the workplace.

Are the Vaccines Really “Experimental”?

Another important topic in terms of assessing legal risks and evaluating the impact of your policy decisions on your workforce is addressing the characterization of vaccines as “experimental.” As with all things COVID, the issues are evolving, complicated, and intense. But the findings of scientists and applicable agencies are helpful in clearing away considerable uncertainty.

A good starting point in addressing the question of whether the vaccines are experimental begins with examining their composition. Messenger RNA (mRNA) vaccines are among the first developed and approved for distribution in the U.S. But these types of vaccines were in development for decades prior to the COVID-19 pandemic. No scientific steps were skipped in their development – the vaccine has been through thorough standard safety testing, including Phases I - III of a clinical trial, which found them to be safe and effective.

Under emergency conditions, such as during this pandemic, the manufacturer can apply for Emergency Use Authorization (EUA) by the FDA, a regulatory pathway to allow for use of this vaccine during an emergency. This allows a company to produce and distribute the vaccine *while simultaneously applying for full FDA approval*, instead of waiting for full approval to begin manufacturing and distributing the vaccine. This helps to get the vaccine to the population faster to address the emergent need to stop the high rate of transmissions and infections of the virus.

According to UNC Health, a primary difference between full FDA *licensure*, compared with a vaccine issued pursuant to EUA, is that production of the vaccine can begin much sooner under the EUA process. The Centers for Disease Control and Prevention (CDC) says the vaccines are safe and effective, having been rigorously tested. The vaccine cannot give the recipient COVID-19 and it does not in any way alter a person's DNA.

In short, the vaccines are not “experimental” or the result of a short-circuited development and testing process. The underlying science and knowledge has been under development for many years and the data regarding their effectiveness and safety is consistently positive.

What Should Employers Do?

Last month, the CDC issued guidance that allows fully vaccinated people to dispense with masking and social distancing among other things. You should familiarize yourself with this guidance – and our seven-step blueprint to take your workplace mask-less – regardless of whether you mandate the vaccine among your workforce. The Occupational Safety and Health Administration (OSHA) appears to agree with that guidance as it pertains to the workplace, and its subsequent guidance provides employers with three clear options for proceeding.

Nevertheless, controversy, strong feelings, and media attention seem likely to ensue where companies decide to require vaccinations. Employers should keep these factors in mind and consult your Fisher Phillips attorney as you consider what options may be best for your workplace. If you decide to proceed with a mandatory vaccine policy, you should consult our list of top seven considerations to take into account before doing so, and coordinate with your Fisher Phillips attorney.

We will continue to monitor developments related to vaccines and related workplace questions that arise. Make sure you are subscribed to Fisher Phillips’ Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers.

Related People



A. Kevin Troutman
Senior Counsel
713.292.5602
Email

Service Focus

Litigation and Trials

Trending

COVID-19/Vaccine Resource Center