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COVID-19 Vaccination Mandates Are Expected to Surge: Here's What Oregon Employers Need to Know

By Stacie Damazo

Current Federal & Oregon COVID-19 Vaccination Mandates

Earlier this month, President Biden signed an executive order requiring all private sector employers with 100 or more employees to mandate either that their employees (1) be fully vaccinated against COVID-19, or (2) provide at least one negative COVID-19 test per week before reporting to work. According to Oregon Employment Department data and reporting by *The Oregonian*, this executive order is anticipated to impact 2,045 Oregon employers. President Biden has also signed similar orders that apply to federal employees, federal contractors, workers in healthcare facilities that receive Medicare and Medicaid reimbursements, and teachers and staff in Head Start and Early Head Start programs, as well as other federal education programs.¹ The Oregon Occupational Safety and Health Administration (Oregon OSHA) is expected to issue a rule relating to President Biden's executive order(s) once the federal Occupational Safety and Health Administration (OSHA) has promulgated its own rule. The timeline for the issuance of both the federal and state rules remains unknown.

Some states, including Oregon, have moved forward with their own COVID-19 vaccination requirements. For example, Governor Kate Brown has mandated that all Oregon healthcare workers and staff, public and private K-12 teachers, educators, support staff, and volunteers, and executive branch employees be fully vaccinated by October 18, 2021 (subject to certain disability or religious accommodations). The Oregon Health Authority has issued guidance relating to Governor Brown's mandates.

Pending Legal Challenges to Governor Brown's Vaccine Mandates

So far, two legal challenges have been asserted against Governor Brown's COVID-19 vaccine mandates. The outcomes of these challenges may influence an Oregon private employer's approach to implementing its own COVID-19 vaccination requirement. The first legal challenge, *Oregon Fraternal Order of Police et al v. Brown et al*, was initiated by first responders in Jefferson County Circuit Court, seeking relief against enforcement of Governor Brown's order, because it allegedly violates their rights and responsibilities to make medical decisions for themselves under applicable law. The second legal challenge, *Williams et al v. Brown et al*, was initiated by six Oregonians subject to the Governor's mandate, seeking relief because the mandate fails to account for individuals who have previously contracted, and therefore allegedly "acquired robust natural immunity" from, COVID-19. In addition, one of the six *Williams* plaintiffs asserts they requested an accommodation due to their "moral

¹ For more information on what to expect relating to President Biden's executive orders pertaining to COVID-19 vaccination mandates, see Amy L. Angel and Bruce T. Garrett's E-Alert, "Federal Executive Order Requires Private Businesses with 100 or More Employees to Mandate Vaccines or Weekly Testing Before Their Employees Can Report to Work" - Barran Liebman LLP.

objection” to the vaccine mandate and fears termination of employment as a result of making such request.

To Mandate, or Not to Mandate? United Airlines Sued Over COVID-19 Vaccination Policy

Following FDA approval of the Pfizer COVID-19 vaccine and these vaccine mandates, the number of employers within the private sector across the country that choose to mandate COVID-19 vaccinations is expected to surge. A recent survey of 961 U.S. employers, which employ a combined 9.7 million workers, found that 21% of those surveyed have already implemented a COVID-19 vaccination mandate, and another 29% of those surveyed plan to implement, or are considering implementing, a vaccination requirement. Further, 21% of employers surveyed are planning for or considering vaccination as a condition of employment.

Back in May, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance as to how a private employer may lawfully implement a COVID-19 vaccine mandate. In short, the EEOC advised that federal equal employment opportunity (EEO) laws do not prevent an employer from requiring employees physically entering the workplace to be vaccinated for COVID-19, provided the employer complies with the reasonable accommodation provisions of the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, and other EEO considerations. Meaning, employers requiring their employees be vaccinated for COVID-19 must provide reasonable accommodations for those employees whose disability or sincerely held religious belief precludes them from receiving the vaccine.

In light of this EEOC guidance, employers, including airlines, began implementing COVID-19 vaccination mandates. For example, in early August, United Airlines announced its COVID-19 vaccine mandate, requiring all employees to receive a vaccine within five weeks of the Food and Drug Administration granting full approval, or within five weeks after September 20, whichever occurred first. While United Airlines’ mandate does allow an employee to request a religious- or health-based accommodation, just last week, certain United employees filed a class action lawsuit, alleging the airline failed to provide reasonable accommodations in response to employees’ requests. Among other things, the complaint alleges that United Airlines’ employees seeking a medical- or health-based accommodation are ultimately placed on indefinite unpaid leave, effectively resulting in termination.

What Private Employers Can Do Now

So, what does all of this mean for a private employer?

Based on guidance issued to date, a private employer may mandate its employees be vaccinated for COVID-19, so long as:

- Those employees are physically entering the workplace;²
- The mandate incorporates a religious accommodation;
- The mandate incorporates a disability accommodation;
- The mandate does not create a disparate impact;

² Note, however, that federal employees, including certain federal contractor employees, will be required to be vaccinated even when not physically entering the workplace.

- Employee vaccination information is confidential; and
- Vaccination incentives offered to employees are not coercive.

What remains to be seen is whether an employer must also provide accommodations for employees asserting a moral objection to the vaccination mandate, or for employees who may have developed some form of natural immunity to COVID-19 as a result of a prior infection. Further, it is unclear where employers may draw the line, in terms of what actions constitute an accommodation that is harmonious with EEOC guidance and other applicable law. The outcomes of the legal challenges pending in Oregon, as well as other challenges to federal or state mandates across the country, will inform Oregon private employers' best practices for developing and implementing their own COVID-19 vaccination mandate.

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