



Boulder Area Human Resource Association

BAHRA Legal Minute August 2021

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Mandatory vaccination has arrived!

- » **This is an area of law and human resources management about which people have extremely divided opinions**
- » There is a significant amount of distrust and misinformation informing people's opinions; plus, some can't get vaccinated
- » Vaccine mandates have raised constitutional objections, but vaccine mandates are *usually upheld* as proper use of states' general police power to promote public health and safety, *Jacobsen v. Massachusetts* (U.S. 1905)(mandatory smallpox vaccine); *Zucht v. King* (U.S. 1922)(unvaccinated child could be excluded from public school).

EEOC updated vaccine guidance May 2021

- » EEO laws do not prevent employers from requiring employees who are “physically present in the workplace” to be vaccinated, subject to duty to reasonably accommodate employees not vaccinated due to a disability or a sincerely held religious belief, practice, or observance; pregnant persons; and vaccinated persons who are still immunocompromised
- » Can require, but must maintain confidentiality of, vaccine proof
- » Incentives for vaccines "administered by the employer or its agent" must not be "so substantial as to be coercive"; can offer incentives to show proof; does not address incentives to employees who can't vaccinate for medical or religious-based reasons.
- » US DOJ opined “long COVID” may be a disability under the ADA

Cases favor employers . . . so far

- » *Bridges v. Houston Methodist Hospital* (S.D. Tx., June 12, 2021) dismissing lawsuit by 117 healthcare workers who objected to hospital's mandatory vaccine policy REFUTING employees' claims (1) vaccine is dangerous, (2) it is wrongful termination to fire an employee in TX who refuses to vaccinate, and (3) vaccine requirements violate public policy as COVID vaccine is "emergency use authorization" only. Public policy favors getting the vaccine to protect others; vaccine mandate not "forced medical experimentation."
- » *Klassen v. Trustees of University of Indiana* (7th Cir., August 2, 2021) ruled that public university's vaccine mandate for students does not violate the Due Process Clause of the 14th Amendment. (Exempt students must wear masks and be tested 2x per week which are not "constitutionally objectionable" and students are not required to remain at university)

Mandatory vaccine considerations

- » Many employers, institutions, governments now mandating vaccine OR following CDC guidelines including masking and testing. Expect more employers to follow upon FDA approval!
 - » Must consider exemptions/accommodations for disability, religion, pregnancy. **Have a policy! Inconsistency may lead to claims.**
 - » How will you track vax status? Still take employees at their word?
 - » Must consider any union obligations to bargain over mandate
 - » Should consider paid leave for vax or paying for testing of unvaxxed
 - » Workers' comp for adverse vaccine side effects, if vax required?
 - » Are you prepared to lose employees who refuse vax or alternatives?
 - » FYI CDC now recommends *fully vaccinated* wear mask in public indoor settings in areas of substantial or high transmission

Thanks!

Questions?

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