



COVID-19

Employer Vaccine Mandates

Legal Issues for Associations

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Road Map

- Overview of Employment Issues
 - General legal authority
 - ADA
 - Title VII
 - OSHA
 - Federal Employees/Contractors
 - State Laws
 - Worker's Comp
 - Other Liability Issues

- The Anatomy of an EEOC Charge and Investigation

Employment Issues

- General Legal Authority for Employer Mandates
 - Long history of courts upholding government and private employer vaccine mandates
 - Mandates are permissible under EEOC guidelines if ADA and Title VII rules are followed
 - EUA status does/should not matter
 - Collective bargaining agreements should be followed

Employment Issues

- ADA
 - Mandates are permissible under EEOC guidelines if ADA disability analysis and rules are followed, including making reasonable accommodations for individuals with qualified disabilities that prevent them from being safely vaccinated.
 - EUA status does/should not matter
 - Employee vaccine status and other vaccine screening information should be kept confidential

Employment Issues

- Title VII
 - Under EEOC Guidance, employers must also make reasonable accommodations for employees who raise sincerely-held religious belief
 - Accommodation standard more favorable to employers than for ADA analysis.

Employment Issues

- OSHA
 - Biden has ordered OSHA to issue employer mandate/weekly testing rule
 - OSHA sent proposed Emergency Temporary Standard sent to White House earlier this week
 - Only applies to employers with 100 or more employees
 - Questions about OSHA's jurisdiction and preemption of contrary state laws
 - Penalties--\$14,000 per violation
 - OSHA has also issued guidance on preventing and mitigating the spread of COVID-19 that encourages mandates or testing

Employment Issues

- Federal Employees and Contractors
 - Biden issued Executive Order 14042, which requires federal employees and contractors to be vaccinated against the coronavirus.
 - Employees need to be vaccinated by Nov. 22 and contractors by Dec. 8

Employment Issues

- State Laws

- Most states have not addressed mandates

<https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>

- TX, FL, MT have banned employer mandates or precludes employers from requiring proof of vaccination

- See also 50 state summary of state laws re vaccine mandates
<https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations#top>

Employment Issues

- State Laws
 - Possibility of private lawsuits based on violation of state privacy laws or adverse effects from vaccine
 - May be blocked by worker's comp laws

EEOC Charge/Investigation

CHARGE OF DISCRIMINATION
 This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) () FEPA (X) EEOC

Name (Indicate Mr., Ms., Mrs.) _____ State or local Agency, if any _____
 Street Address _____ City, State and ZIP Code _____ Home Phone No. (incl. Area Code) _____

Named Is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency The Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name _____ No. Employees, Members _____ Phone No. _____
 Street Address _____ City, State and ZIP Code _____
 Name _____ No. Employees, Members _____ Phone No. _____
 Street Address _____ City, State and ZIP Code _____

DISCRIMINATION BASED ON (Check appropriate box(es).)

<input type="checkbox"/> RACE	<input type="checkbox"/> COLOR	<input checked="" type="checkbox"/> SEX	<input type="checkbox"/> RELIGION	<input type="checkbox"/> NATIONAL ORIGIN
<input type="checkbox"/> RETALIATION	<input checked="" type="checkbox"/> AGE	<input checked="" type="checkbox"/> DISABILITY	<input type="checkbox"/> OTHER (Specify below)	

DATE(S) DISCRIMINATION TOOK PLACE _____
 CONTINUING ACT

I was hired by Respondent on January 23, 2001. Respondent was aware of my disability, severe allergies.

On October 1, 2021 Respondent issued a new policy requiring that all employees receive COVID 19 vaccination as a condition of continued employment. I told Respondent that I was unable to get vaccinated because of my disability and Respondent terminated my employment.

I believe I was discriminated against because I my disability in violation of the Americans with Disabilities Act of 1990, as amended.

I am also aware that Respondent has made reasonable accommodations for younger, female employees.

I believe I have been discriminated against because of my age (59) in violation of the Age Discrimination in Employment Act of 1967, as amended, and my gender (male) in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will NOTARY - When necessary for State and Local Agency. Request advise the agency of my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

I swear or affirm that I have read the above charge and the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT _____
 SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE _____

Policy Considerations

- For policy-based complaints like this one, EEOC investigators always start by analyzing the policy
- The EEOC loves to find policy violations that affect multiple staff because the agency loves class actions
- For a mandatory vaccination policy, the investigator might consider whether the policy:
 - is narrowly tailored and addresses a legitimate business need (eg: workplace safety)
 - advises employees that accommodations may be available and how to request an accommodation

Response to Charge

- Technical defenses:
 - Employer too small or claims too old
 - Assert these before responding substantively?
- Substantive Defenses:
 - Employee isn't disabled
 - Physical or mental impairment that substantially affects a major life activity (severe allergies?)
 - Right to request reasonable documentation substantiating disability and accommodation
 - No reasonable accommodation available or the accommodation would cause undue hardship

What is Reasonable?

- EEOC always wants employer to engage in interactive process (eg: wooden leave policies)
- Possible accommodations:
 - Remote work
 - Negative COVID test
 - Masks
 - Social distancing
- Investigator will look at what have you done for other employees (are there other remote workers?)
- Cost vs resources, burden on organization, etc.
- Employee not entitled to preferred accommodation

Religious Accommodation

- Analysis similar to ADA (except hardship threshold lower)
- Sincerely held religious belief
- EEOC presumes stated belief is sincere
- Tough to challenge, but Employer may make inquiry if there is an objective basis to question the stated belief
- Factors relevant to determination of sincerity:
 - Behavior inconsistent with stated belief
 - Accommodation sought is particularly desirable (eg: delivery driver wanted Sundays off)
 - Suspicious timing of request
 - Other objective facts

Discrimination Claims

- Apply policies consistently to avoid discrimination claims (eg: age and gender discrimination claims in this charge)
 - Who approves accommodation requests?
 - Supervisor
 - HR
 - Is the decision based on objective criteria?
 - Does it apply to all positions, all departments, all locations?
- Have other employees been granted accommodations?
- Have other employees been denied accommodations?

Right to Sue vs EEOC Litigation

- At the conclusion of the investigation:
 - EEOC litigates (rare)
 - Issues notice of right to sue