



Burns White

ATTORNEYS AT LAW

COVID-19 Litigation: What Employers Can Expect

Jeff Adler, Esq.

Courtney Brennan, Esq.



Overview

- **Emerging trends in employment law and how the impacts of the pandemic have altered the legal landscape**
- **General considerations for employers to be aware of regarding COVID-19-related claims**
- **Practical considerations for COVID-19 vaccine policies**

COVID-19-Related Personnel Decisions

FFCRA-related claims

- Employees alleging termination after requesting leave under the FFCRA; or
- Alleging that employers are not properly informing employees of their rights under the FFCRA

Wrongful/Retaliatory Discharge Claims

- Employees alleging employer retaliated against them for taking leave or raising concerns of workplace safety violations
- Many COVID-19 related filings allege discrimination based on an employer's refusal to provide reasonable accommodations
- Employees alleging termination because of their heightened risk of COVID-19 due to preexisting conditions



Wage and Hour Claims

Case for Healthcare Employers to Monitor: *Harwell-Payne, Charletta v. Cudahy Place Senior Living, LLC et al*, (W.D. Wis. 2021).

- A healthcare worker in Wisconsin has filed a proposed collective and class action complaint against an assisted living facility alleging that the mandatory temperature checks and filling out a COVID-19 symptom checklist constituted unpaid overtime; and
- That her employer also improperly deducted daily 30-minute meal breaks from employees' work times when they were not actually relieved from their job duties during that time.

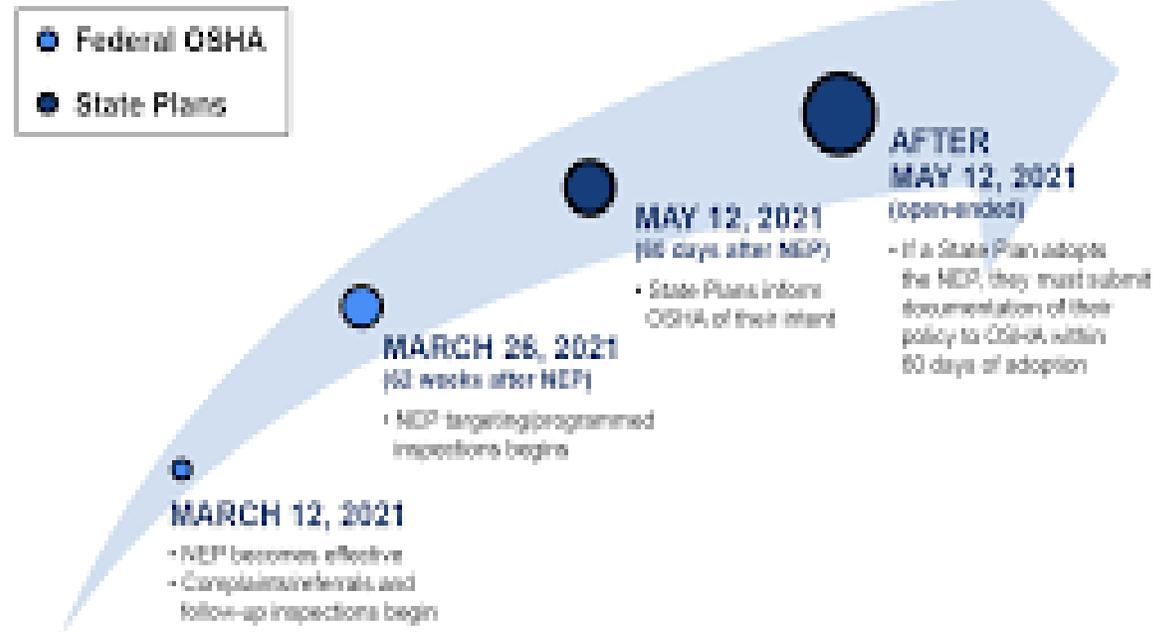


Workplace Safety/OSHA litigation

OSHA's General Duty Clause

- Employer has a duty to maintain a workplace free of recognized hazards
- COVID-19 vaccine will not replace the employer's general and pre-pandemic obligation to provide a safe working environment for employees
- OSHA's announcement for increasing in-person inspections of workplaces in NEP program

Important Dates for the COVID-19 National Emphasis Program



Can employers require employees to get a vaccine?

The short answer is a qualified yes, but the right to require the COVID-19 vaccine is not absolute

- Federal equal employment opportunity (EEO) laws categorically bar employers from applying a blanket rule requiring all employees to be vaccinated regardless of disability status or religious belief
- While an employer may require employees to get a COVID-19 vaccine, employers may have to adjust the policy or excuse its application to certain individuals

Can employers require employees to get a vaccine?

Available Exemptions

When putting a vaccination policy into practice, employers should be mindful to avoid violating federal and state discrimination laws – in particular:

- The Americans with Disabilities Act (ADA)
- Title VII of the Civil Rights Act of 1964

In 2009, during the H1N1 pandemic, the EEOC issued enforcement guidance specifying employers may not categorically require all employees to get flu shots. Instead, employers may be required to excuse the requirement for certain employees as a disability accommodation under the ADA or a religious accommodation under Title VII

Can employers require employees to get a vaccine?

The Religious Exemption

The right to refuse a workplace COVID-19 vaccination based on religious grounds comes primarily from Title VII of the Civil Rights Act of 1964 (Title VII)

- This law applies to local, state and federal governments, as well as private employers with 15 or more employees
- Title VII protects employees from discrimination on a variety of characteristics, including religion

Can employers require employees to get a vaccine?

The Religious Exemption

To determine if a religious exemption under Title VII allows an employee to avoid getting a COVID-19 vaccine, the employee must prove two things:

- They have a sincerely held religious belief; and
- Not getting vaccinated does not impose an undue hardship on the employer

What is a sincerely held religious belief?

- A religious belief is sincerely held if the employee honestly holds that belief
 - In most cases, this element is assumed
 - However, there may sometimes be evidence that indicates the religious belief an employee relies on to request an accommodation is not sincerely held

Can employers require employees to get a vaccine?

Undue Hardship Under Title VII

Even if an employee has a sincerely held religious belief, the employer does not have to allow for the vaccine exemption if providing this accommodation would constitute an undue hardship on the employer

What is an undue hardship?

- An undue hardship is something that imposes more than a minimal burden on the employer
- If a requested accommodation would result in staffing shortages, cost more than a minimal amount of money, or jeopardize the health or safety of others, it will likely constitute an undue burden

Engage in the interactive process

Can employers require employees to get a vaccine?

Undue Hardship Under Title VII

Practical Reality

Assuming an employer has a legitimate concern for the health and safety of its workers, customers and anyone else in its workplace, it's easy to imagine how a COVID-19 vaccine refusal would result in an undue burden on the employer in most situations

However, it's also possible there is an accommodation that imposes only a minimal burden on employer and provides an equivalent level of protection from COVID-19 infection or spread

- Depending on the nature of the job, this might allow the employee seeking the vaccine exemption the ability to work socially-distanced with appropriate PPE (mask)

Can employers require employees to get a vaccine?

The Medical Exemption

The American with Disabilities Act of 1990 (ADA) may allow an employee with a certain medical issue to be exempt from an employer's COVID-19 vaccine mandate

To qualify for an ADA exemption, an employee needs to show two things:

- They have an ADA-recognized disability that prevents them from taking the COVID-19 vaccine; and
- This vaccination exemption does not impose an undue hardship on the employer

Can employers require employees to get a vaccine?

The Medical Exemption

What disabilities are covered by the ADA?

The ADA recognizes disabilities that impose a physical or mental impairment that *substantially limits* a major life activity

The American with Disabilities Act Amendment Act of 2008 (ADAAA) requires employers to interpret the term “substantially limits” broadly so that employees may receive the greatest level of protection under the ADA

- Compromised immune system
- Allergy to an ingredient in the vaccine
- Vaccination considerations for people who are pregnant

Can employers require employees to get a vaccine?

Undue Hardships Under the ADA

Assuming the employee seeking the COVID-19 vaccine exemption has a disability that's covered by the ADA, they can only refuse the vaccine if the refusal does not impose an undue hardship on the employer

What is an undue hardship?

- An accommodation poses undue hardship if the employer has to incur substantial expense or difficulty to provide the accommodation
 - This is a very fact-specific analysis and depends on the characteristics of the job, the employer's business and the employer's resources

Can employers require employees to get a vaccine?

Undue Hardships Under the ADA

The EEOC has declared the coronavirus a “direct threat”

- A direct threat is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”
- This designation gives employers more leeway in what they can require of their employees

Engage in the interactive process

Workers' Compensation Liability

This is a developing area of law, that is very fact specific.

Certain states' workers' compensation statutes expressly state that injuries arising from vaccines administered as part of a government-sanctioned vaccination program are covered by workers' compensation.

Coverage considerations include whether:

- The vaccine is mandatory, voluntary, or potentially even strongly encouraged;
- It is administered during personal or company time
- It is administered offsite or on company property
- An employer pays or provides for the vaccine

Political and Social Objections

Employers may also be faced with political and social objections to a mandatory vaccine program

- Employees may raise concerns that vaccination poses moral, ethical, and public health issues

In the past, federal courts have held that employers raising secular objections to mandatory vaccination, as opposed to objections based on “sincerely held religious beliefs” aren’t protected under federal law

But...

- State law may protect employees’ rights to engage in certain political activity
- Section 7 of the National Labor Relations Act (NLRA) protects employees’ rights to band together regarding terms and conditions of employment (applies to all workplaces, not just unionized ones)

Other Considerations

Unionized workforce?

If so, employers need to assess whether and to what degree they need to bargain on this subject given the terms of the collective bargaining agreement

Even if the CBA permits employers to decide when and how to modify all of the employment terms, employers would still be required to provide notice and a meaningful opportunity to bargain about the effects of many of those prospective types of changes before implementation absent an emergency



Key Takeaways

- There has been a significant increase in the number of lawsuits filed against employers, including retaliation, discrimination and FMLA claims.
- Employers must remain vigilant in their safety and precautionary measures.
- Employers should continue to train and remind managers and supervisors about the importance of documenting employee requests.
- Continue to stay engaged with employees through clear and frequent communications.





Burns White

ATTORNEYS AT LAW

Questions?



Contact Information



Jeffrey S. Adler, Esq.

Chief Operating Officer, Eastern Region | Member

jsadler@burnswhite.com | 484.567.5656



Courtney Brennan, Esq.

Associate

ccbrennan@burnswhite.com | 412.995.3151

Disclaimer

The slides in this presentation are an outline intended to be supplemented by an attorney. The slides are not legal advice and should not be considered as such.





Burns White

ATTORNEYS AT LAW

Thank you!

