

Employer obligations in administering COVID-19 vaccine mandates when facing religious exemption requests

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As American workplaces continue to re-open, employers are precariously balancing optimally operating their businesses with keeping their employees, clients and customers safe. To accomplish this, both private and public employers have begun requiring their employees to become vaccinated against COVID-19 in an effort to stop the spread of the pandemic and prevent further business interruption.

This article explores employer and employee obligations for those businesses that have implemented vaccine mandates and resulting litigation, particularly in the public sector.

Private employers' 'at-will' employment relationships

The United States is unique from other developed countries in that employment in most states is presumed to be "at-will" absent any written agreement to the contrary. This means that employment relationships may be terminated by the employer with no notice and for any legal reason.

At-will employment also allows the employer to unilaterally modify the terms and conditions of an employee's employment with no notice and for any legal reason. Thus, employers have broad discretion in an at-will environment to establish and enforce vaccine mandates, i.e., make an employee's employment contingent upon becoming fully vaccinated against COVID-19.

Those who are anti-vaccine have pushed back against at-will employers to unilaterally require vaccination of its employees. Specifically, the use of religious exemptions and religious accommodations have been invoked to sidestep vaccine mandates in the workplace.

Traditionally, religious exemptions extend to a person whose sincerely held religious belief may conflict with an employer's otherwise-neutral policy. For example, a Muslim individual who seeks to wear a hijab or a Hindu employee who seeks to wear a bindi may be exempted from an employer's dress code policy. The key element with these exceptions is that the religious belief is "sincerely held."

Religious exemptions specifically related to COVID-19 vaccine mandates, however, have been emerging since employers have begun implementing these mandates. Such claimed exemptions have become so prolific that the Equal Employment Opportunity

Commission ("EEOC") has commented and provided guidelines to private employers that are faced with a claimed religious exemption.

Broadly speaking, the EEOC has advised that there is no law that prevents an employer from requiring that all employees physically entering the premises be vaccinated against COVID-19. However, employers must provide a reasonable accommodation to the employee once advised that a policy is in conflict with religious beliefs unless such an accommodation would constitute an undue hardship on the employer. The accommodation to the employee does not have to be ideal or optimal for the employee, only "reasonable." On balance, an "undue hardship" on the employer has to be more than difficult or inconvenient.

Given the social and political climate surrounding the COVID-19 vaccine, employers may question the validity of the "religious belief" as "sincerely held." The EEOC generally advises that Title VII protects beliefs, practices, and observances with which the employer may be unfamiliar and that employers should presume that a request for religious accommodation is based on a sincerely held religious belief.

If the employer has an objective basis for questioning the sincerity of the employee's beliefs, the employer may be justified in inquiring further. If the employee does not cooperate with an employer's inquiries, that may be a basis to deny the exemption.

Codification of vaccine mandates and resulting litigation

On Sept. 9, 2021, President Joe Biden issued Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. Executive Order 14043 found that it was "essential that Federal employees take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public." The [Centers for Disease Control] has found that the best way to do so is to be vaccinated." See Exec. Order 14043, 86 Fed. Reg. 50,989 (Sept. 9, 2021).

While such a mandate by the federal government may operate similarly to one in the private sector, the fact that there is state action triggers protections under the U.S. Constitution. In fact, Executive Order 14043 has already generated at least one legal challenge that implicated the religious exemption on constitutional grounds.

In *Church v. Biden*, Civil Action No. 21-2815 (CKK), 2021 WL 5179215 (D.D.C. Nov. 8, 2021), 18 civilian (and two military) employees claimed religious exemptions to Executive Order 14043. The civilian employees specifically alleged that each plaintiff is a “devout Christian who cannot in morality receive the vaccine without compromising [his or her] closely held religious beliefs.” *Id.* at *14.

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Specifically, the civilian employees alleged that the vaccine mandate violated their First Amendment Free Exercise rights and violated their Fifth Amendment Equal Protection rights. The civilian employees sought a temporary restraining order seeking enjoinder from enforcement of the vaccine mandate while the court considered the constitutional questions. However, the religious exemption of one of the 18 employees was granted; those of the other 17 remained pending.

The U.S. District Court for the District of Columbia denied injunctive relief to the civilian employees. In denying the plaintiffs’ relief, the court addressed the ripeness of such allegations. The fact that the first plaintiff’s exemption was granted meant that he failed to demonstrate an actual harm, let alone the “irreparable harm” required as an essential element of a temporary restraining order. Any allegations that the first plaintiff made of future adverse action against him was purely speculative. Similarly, the constitutional harm alleged by the 17 plaintiffs whose requests remained pending could not be proven while their exemption request remained pending.

Similar mandates on the state level also faced legal challenges. In response to rapidly increasing COVID-19 infection rates, the State of New York implemented an emergency rule that mandated that certain public health care employees be vaccinated against the COVID-19 virus. The emergency rule provided for medical exemptions but did not provide for religious exemptions.

About the authors



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Various individual health care workers filed separate suits in both the Northern and Eastern Districts of New York, alleging that enforcement of the vaccine mandate violated their First Amendment Free Exercise rights as well as their fundamental rights to privacy, medical freedom, and bodily autonomy under the 14th Amendment. The Northern District plaintiffs successfully obtained a preliminary injunction, but the Eastern District plaintiffs were denied relief.

The 2nd U.S Circuit Court of Appeals considered the two separate cases together, where it vacated the Northern District’s injunction and affirmed the Eastern District’s denial of the injunction. *We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, (2d Cir. Nov. 4, 2021). As to all plaintiffs’ Free Exercise claims, the Second Circuit held that the plaintiffs had not met their burden to establish likelihood of success on the merits because the court held it unlikely that plaintiffs would demonstrate that the Emergency Rule was not a neutral law of general applicability.

The various 14th Amendment claims also failed because the Second Circuit and the Supreme Court “have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional.” *Id.* at *52.

Employer takeaways

For private employers of “at-will” employees, vaccine mandates will very likely be within the scope of the employer’s discretion. While an employee may request a religious exemption, the accommodation that an employer must provide need only be “reasonable.” In the context of COVID-19, the EEOC recommends re-assignment or telework if available. Smaller employers that may not have the infrastructure or additional job sites for re-assignment or telework may have to consider other options, such as ongoing masking requirements and social distancing of unvaccinated employees.

However, when state actors as employers or as legislators start codifying vaccine mandates, constitutional protections are triggered. This can open the door for additional avenues for litigation, though detractors have yet to prevail on the merits of their claims.

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