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Management-side lawyers scrutinize vaccine mandate

By: Barry Bridges September 23, 2021

Though the issuance of a federal rule mandating that employers of 100 or more employees ensure that their workforce is vaccinated against COVID-19 or can present negative test results is still weeks away, management-side attorneys are already advising clients on what they should know about the anticipated emergency regulation.

President Biden announced the "100+" plan on Sept. 9 as part of a national strategy to fight the pandemic as cases have rebounded. The Department of Labor's Occupational Safety and Health Administration is expected to develop an "emergency temporary standard" to implement the objective, bypassing the notice and comment stages of its own rulemaking procedures.

The White House estimates the new rule requiring vaccinations or negative COVID tests will impact more than 80 million workers in the nation's private sector businesses.

A threshold question may be whether legal challenges being mounted across the country will gain traction.

"In a pandemic where such an order is being issued for the protection of public health, I find it hard to believe that a court would not uphold the government's mandate," says Providence attorney Robert P. Brooks, who chairs Adler, Pollock & Sheehan's labor and employment law group.

Erika L. Todd, an employment attorney at Sullivan & Worcester in Boston, sees the success of court challenges largely depending on how broad the mandate is, as OSHA is limited to issues of workplace safety concerns.

"It will depend on the process involved and the substance of the rule once it's issued," she says.

Some employers, particularly those involved in health care, decided to mandate vaccines even before Biden's order, notes Jonathan R. Sigel, who chairs Mirick O'Connell's labor, employment and employee benefits group in Westborough, Massachusetts.

"But companies may be glad they can 'piggyback' on Biden's mandate, as it takes away some of the controversy of a management decision," Sigel says. "It becomes a matter of the government doing it as opposed to the board of directors."

"I'd advise an employer of two things at this juncture," says Christopher Feudo, an employer-side attorney at Boston's Foley Hoag and chair of the firm's COVID-19 Task Force. "Think about where you want to be with

vaccinations. Even if there is some hesitancy to require them, there is no question that private employers can mandate vaccinations with exceptions for medical or religious accommodations. Since you may be required to do it at some point soon with short notice, it may be smart to get ahead of the curve and do it now."

Secondly, Feudo says, companies should make sure their mechanisms for requesting reasonable accommodations are in place.

'Benefit-of-the-doubt' factor

Attorneys say they are especially cognizant of one aspect of the 100+ mandate: Title VII's requirement that employers are required to accommodate an employee's "sincerely held" religious beliefs.

"The EEOC has counseled that there should not be excessive questioning from employers because religious beliefs can come in all shapes and sizes," Feudo says. "Unless an employer really has a strong basis for questioning, the company should assume the employee is entitled to an accommodation and should engage in an interactive process to determine what is reasonable."

Todd agrees, pointing out that employers should be thinking about the difference between medical and religious exemptions. With medical exemptions, she says, it is usually appropriate to ask questions of the employee or request documentation from health care providers.

"But with religious exemptions, there is a strong benefit-of-the-doubt factor and generally speaking employers need to take employees at their word," she says. "Only two things are required: that a belief be sincere and that it be related to religion."

That belief does not have to be consistent with a larger religious body, she says, and individuals can be idiosyncratic in their views.

"My advice for employers is to be very hesitant to start calling these things into question, because you want your employees to feel respected," Todd says.

That said, attorneys also agree that sometimes there may be reason to question an employee, such as when a requested religious accommodation is in reality based on political philosophies.

"The religious exemption is a different animal from the medical exemption and is completely ripe for fraud," Sigel says. "Some employers will not want to go down that rabbit hole and will instead look for ways to accommodate, but they could ask an employee to explain her religious belief and practice, or confirm in writing that it is in fact sincerely held. A company could also ask how the vaccine conflicts with those beliefs, whether the employee has received other vaccines, and why the COVID vaccine is different."

In that vein, Feudo says that while an employer is entitled to an explanation in some instances, a practice of "questioning too much" should be discouraged.

"The emphasis should really be on the accommodation, rather than sincerity," Feudo says. "But it's important for an employer to understand what the basis of the objection is. A political objection masquerading as a religious objection is not protected."

'Devil in the details'

An additional question, Brooks says, is how the 100-employee benchmark will be determined. For instance, prior to the rule's promulgation, it is not yet known if the measurement will be gauged by individual or aggregate locations, or whether only full-time employees will be counted.

"I imagine that an 'employee' will be broadly defined so that the government can capture as many employers as possible, consistent with its goal of getting people vaccinated," Brooks says. "From previous guidance, it's very clear that OSHA is encouraging employees to be vaccinated. They are not being neutral about it. In that sense, this mandate could be viewed as a continuation of work the government has already been doing."

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Todd also hopes that some of the ambiguous "gray areas" on this front will be resolved once the emergency rule is published.

"Separate legal entities are sometimes deemed joint employers — this can happen, for example, with certain franchising arrangements," Todd says. "That could push the headcount over the 100-employee threshold. When there is a larger corporate ecosystem, business leaders and their counsel will need to thoughtfully consider whether each component is sufficiently distinct that it remains under the threshold."

Elsewhere, Feudo explains that there is no foregone conclusion that a noncompliant employee would be fired. He says the outcome may depend on the underlying reason and even the type of industry involved.

"With medical or religious exemptions, for example, you can't terminate and you need to come up with some sort of reasonable accommodation. A work-from-home arrangement or a leave of absence may be appropriate," Feudo says.

And with some companies having difficulties finding talent to fill available jobs, they will likely not want to lose employees because of the rule. Moreover, he says, businesses are run by people with their own perspectives, with some more lenient than others.

Feudo is also hoping the rule will elaborate on who is responsible for the costs of the testing that will presumably be required of unvaccinated employees, noting that "there is a colorable basis to argue that if a private employer is mandating that employees be tested, that employer will cover the costs, particularly if it is running the testing program."

Brooks says it's currently unclear if a terminated employee would qualify for unemployment benefits, describing it as a "fine line to walk" when balancing public policy considerations of requiring vaccinations for the public's health while potentially adding to the unemployment roster.

"I think the main thing is that employers are hoping for clarity and clear guidelines," Todd says. "The good news is that this serves to level the playing field, because it can be an uncomfortable prospect for an employer to be the first to implement a mandate."

From a pragmatic standpoint, Sigel says that in the process of working with clients on the eventual rule's directives, lawyers should also strive to educate the workforce.

"Information from reputable sources, 'myth-busters' so to speak, could perhaps be enough to motivate some folks to change course in their vaccination decisions," he says. "If employers combine their mandate information with, say, a link to more information on the vaccine, that is probably not a bad idea."

Brooks confesses that he has been somewhat surprised with the recent announcements emanating from Washington.

"We've seen governors across the country coming out with mask requirements and encouraging employers to close and allow remote work, but having the federal government weigh in on mandates was unexpected, and I think many employment lawyers would agree with that," he says. "But now that they have, the devil is in the details."

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