

## **Vaccine Mandate Leaves Many Employers with Whiplash, Frustration, and Increased Legal Risk**

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Navigating federal, state, and local attempts at vaccine mandates for employers has been like a ride on the bumper cars at an amusement park—just when you think you’re cruising, someone comes from the side and t-bones your car, sending you spinning in a completely different direction only to slam into a wall.

Not only have employers faced, in many cases, untenable compliance deadlines during one of their busiest seasons, but supplies for the testing required are low and, in many cases, unavailable, pushing employers to weigh the cost of procuring testing on a rushed and highly expensive basis (if this is even an option). All of this weighed against the risk that government agencies will actually be in a position to enforce these mandates and assess penalties for non-compliance within the first quarter of the year. Employers are pulling personnel away from their regular work in operational, compliance, and legal capacities, to strategize and implement rules such as OSHA’s ETS only to have enforcement stayed and, in the case of the federal mandate, pulled off the table entirely as of January 26, 2022. It’s safe to say everyone is ready to get off the ride at this point.

One thing continues to remain clear: COVID-19 is not fully going away any time soon. As states and cities fight to regain some sense of consistency and “normal,” we continue to anticipate that vaccine mandates will be part of the conversation and legislative agenda. The burning question for many employers is whether they continue down the path of collecting and

tracking vaccination status in preparation for vaccine mandates in their workplaces. In New York City, arguably the hardest hit area of the country, the local vaccine mandate remains in force and effect. We, along with many others, are watching closely to try to predict whether other cities and states will follow suit.

For many private employers, including restaurants and retailers with a high percentage of their workforce regularly engaging with the public, the answer was early, self-imposed vaccine mandates. In such instances, employees would only be exempted from vaccination with an approved religious or medical exemption request. Medical exemption requests are much easier to consider, as we have been evaluating medical accommodation requests for many years based on the requirements of the Americans with Disabilities Act (“ADA”) and similar state and local laws. The religious exemptions are new for many employers, particularly in the volumes that we have seen recently.

In the medical context, we typically have a licensed, healthcare provider certifying whether the employee’s need for exemption is valid, making the employer’s evaluation far more straightforward. When it comes to religion, however, where employers are being asked to evaluate not only the sincerity of their employee’s religious beliefs, but also whether those beliefs are being invoked or applied for religious purposes and not for personal or political reasons against the COVID-19 vaccine. Employers are essentially evaluating the credibility of their employees in many cases. Most employers don’t have well-developed or battle-tested processes in place for consideration of these types of issues. Moreover, we are seeing employers make opposite determinations on whether to grant religious exemptions on similar facts, leading to inconsistencies that, if put before a trier of fact in litigation, could lead to inconsistent and

confusing results. These factors, amplified by the lack of well-developed case law on religious accommodations, seem to point toward a tidal wave of litigation heading our way in the near term.

Based on our work creating these policies and processes for employers, and evaluating countless religious exemption requests across the country in the last several months, we have developed a toolkit of sorts with some immediate actions you can take to put your company in the best position to defend a claim of religious discrimination when the tide comes in on these claims.

- Be clear about the process for submitting an exemption request: the level of detail required, and the general timeline for receiving a response. If you have a process in place already for medical accommodation requests, consider making the religious accommodation/exemption process as close to this as possible so you are not re-inventing the wheel and being consistent with all employees across the board, regardless of the basis for the accommodation request.
- Develop a decision matrix to be applied consistently to each request based on your company's culture and risk tolerance. There will be facts and circumstances that do not fit squarely in the matrix, but when you do see similar bases for exemption requests coming through, it is critical to respond consistently across your workforce.
- In the same vein, develop responses to types of requests you see most frequently and use them consistently. If you request more information from one employee, do the same for another who asserts the same basis for his or her exemption request.
- While the interactive process is not required for religious accommodation requests in the same way it would be for medical accommodations, we still recommend engaging in the interactive process in a manner sufficient to ensure the employee has had ample opportunity to provide the support he or she may need for the basis for the request.

- Document each interaction and save this information confidentially and separate from any personnel file which may be accessed by the employee's supervisor or manager who makes employment decisions regarding the employee.
- Establish a set person or team of people to review all religious exemption requests. Supervisors and managers of the requesting employee should not be involved in the process.
- Consider whether you can make submissions "blind" prior to review. In other words, can you remove employee identifying information prior to sending the religious exemption request to the reviewing team? This further assures consistent consideration of the requests, without preconceived notions about the employee making the request.