

LABOR AND EMPLOYMENT LAW INFORMATION MEMO

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Department of Justice Issues Opinion on the Legality of COVID-19 Vaccination Mandates

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Since the first COVID-19 vaccines were granted emergency use authorization by the Food and Drug Administration in December, many businesses have wrestled with whether to impose vaccine mandates for their employees. This is a difficult question, with many considerations, including whether such a requirement is necessary or practical. Perhaps the most significant consideration, with which businesses and lawyers have struggled, is whether such a requirement is “legal.”

On Monday, the U.S. Department of Justice issued an [opinion letter](#) that appears to remove one of the most significant legal roadblocks to employer vaccine mandates.

There are several legal issues associated with employer vaccine mandates. For example, employers were initially concerned that local, state and federal equal employment opportunity laws might potentially restrict their ability to mandate vaccination for employees. These laws prohibit discrimination in the workplace on the basis of various protected characteristics, including disability (Americans with Disabilities Act) and religion (Title VII of the Civil Rights Act of 1964).

Fortunately, the Equal Employment Opportunity Commission, which is the federal agency tasked with enforcing federal equal employment opportunity laws, has issued guidance for employers that answers whether vaccine mandates violate federal equal employment opportunity laws such as Title VII or the ADA. The EEOC’s guidance clearly states that employer vaccine mandates are permissible under those laws, so long as reasonable accommodations are provided to employees with disabilities or sincerely held religious beliefs, unless such accommodations would pose an undue hardship on the operation of the employer’s business.

Unfortunately, the EEOC guidance does not end the inquiry into whether vaccine mandates are permissible under other legal theories. As most people are aware, the three COVID-19 vaccines currently in circulation in this country do not have full FDA approval. Rather, these vaccines have been permitted by the FDA under an emergency use authorization. The EUA procedure is statutory, and allows medical products, including vaccines, to be utilized without full FDA approval in emergency circumstances. The statute that authorizes the EUA process states that individuals receiving a vaccine through an EUA must be informed of certain information, including the “option to accept or refuse administration of the product.”

This has caused employers to ask whether they can mandate the COVID-19 vaccine if all individuals being offered the vaccine must have the option to accept or refuse it. Lawyers for individuals challenging employer vaccine mandates have raised this issue in legal proceedings across the country. For example, health care workers at the Houston Methodist Hospital recently challenged an employer vaccine mandate, arguing, among other things, that the hospital could not mandate a vaccine that was being

utilized under an EUA. This argument was soundly rejected by a Texas federal district court judge in a widely publicized opinion. In [this decision](#), the Texas judge reasoned that employees could “freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.” In other words, the decision to get vaccinated is voluntary, but may have consequences.

In the memorandum opinion released Monday, lawyers for the Justice Department wrote that employers *are not* prohibited from requiring the use of a vaccine subject to an EUA. The opinion analyzes the history of the EUA process, including the fact that in the years since the EUA procedure was first authorized, the FDA has issued hundreds of EUAs in response to various public-health emergencies, including more than 600 EUAs for products to combat COVID-19. The EUAs related to the COVID-19 pandemic have authorized the use of various products including drugs, tests, personal protective equipment and ventilators. The DOJ lawyers concluded that the statute authorizing the EUA procedure requires “only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs.”

Although not entirely dispositive, the DOJ opinion certainly suggested that one of the largest hurdles for employers who are considering a vaccine mandate for their employees—the EUA—can be cleared. There remain several other challenges to vaccine mandates currently pending in federal and state courts across the country, and those authorities are not bound by this opinion or the other court decisions to date. But for now, the federal government has weighed in with its opinion, adding more authority in support of vaccine mandates.

If you have any questions about the information presented in this memo, please contact [Adam Mastroleo](#), any [attorney](#) in Bond’s [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

