



KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

Broad New COVID-19 Federal Vaccine Mandates and Guidance on Religious Exemptions

Last week, the federal Occupational Safety and Health Administration (OSHA) issued an emergency regulation mandating all employers with 100 or more employees to require by **January 4, 2022** that its employees be fully vaccinated against COVID-19 or undergo weekly testing. Although the Fifth Circuit Court of Appeals has already paused the implementation of this new rule, it is not clear if the pause applies nationwide or only in the five states that were involved in challenging the rule in the Fifth Circuit (Texas, Louisiana, Mississippi, South Carolina, and Utah). Other states have filed similar challenges in other courts. In the meantime, employers would be wise to prepare for the implementation of the rule in the event the pause is lifted before January 4, 2022, it is determined that the pause does not apply nationwide, or the rule survives legal challenges.

Also, last week a similar mandate was imposed by the Centers for Medicare and Medicaid Services (CMS) on a broad range of healthcare providers. It requires vaccination and does not permit testing as an alternative mode of compliance. In particular, covered providers must ensure that all eligible staff have received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment or other services by **December 5, 2021**. Staff are required to have received a second dose of the Pfizer or Moderna vaccine by **January 4, 2022**.

These new mandates have brought attention to the issue of religious exemptions. The federal Equal Employment Opportunity Commission (EEOC) recently provided useful guidance for employers who have received an employee request for religious accommodation in response to a workplace vaccination mandate.

Consistent with federal law prohibiting employment discrimination based on religion, employees with sincerely held religious beliefs have the right to request from their employers a reasonable accommodation from a workplace requirement that conflicts with their beliefs. Employers must provide such accommodation unless they can

demonstrate that the accommodation would impose an undue hardship on its business operations. However, employers may choose which reasonable accommodation to provide (after considering the employee's preference) if more than one option exists.

Employers are permitted to perform a limited factual inquiry if there is an objective basis for questioning the employee's religious conflict or sincerity in requesting a religious accommodation. However, employers should be careful to avoid assumptions of insincerity where the employee's current practices deviate from their past practices or other commonly-followed tenets of the religion. The sincerity of an employee's religious beliefs is generally not up for dispute, but past conduct inconsistent with the religious belief, the employee's own statements, the timing of the request, and other factors may call into question the sincerity of the employee's asserted belief.

The EEOC further advises that social, economic, political, or personal preferences against vaccination are not protected religious beliefs under Title VII and thus do not qualify for religious accommodation. When granting an accommodation, an employer should consider telework and reassignment as possible solutions. However, the EEOC notes that employers are not required to grant the accommodation if doing so will impose more than a minimal monetary cost, impair the safety of other workers, or reduce efficiency of operations.

As they collect information about their employees' vaccination status, employers are **reminded by the Office of Civil Rights of the Department of Health and Human Services (OCR)** that HIPAA does not restrict an employer from requesting or requiring proof of employee vaccination, in part because HIPAA does not generally apply to employers. Rather, OCR reminds employers, HIPAA and its privacy restrictions apply only to covered entities (health plans, health care clearinghouses, and health care providers that conduct standard electronic transactions) and business associates that perform certain services for covered entities.

If you have any questions about the new vaccine mandates or religious exemptions, please contact a member of our employment or healthcare team: Paul Holtzman (pholtzman@kb-law.com); Jill Brenner Meixel (jmeixel@kb-law.com); Brian Richichi (brichichi@kb-law.com); Allison Lennon (alennon@kb-law.com); Jennifer Gallop (jgallop@kb-law.com); Anthony Cichello (acichello@kb-law.com); Emily Kretchmer (ekretchmer@kb-law.com); or Elisha Thapa (ethapa@kb-law.com).