

Employers in Limbo – OSHA Suspends Vaccination Rule After Fifth Circuit Ruling as Florida Limits Mandates

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On November 12, 2021, the Fifth Circuit Court of Appeals issued its second stay against OSHA's emergency temporary standard (ETS) requiring large private employers to "vaccinate or test" their employees (a summary of ETS). The Fifth Circuit further ordered OSHA to "take no steps to implement or enforce the Mandate until further court order." Although the many challenges to the ETS have been consolidated before the Sixth Circuit Court of Appeals as of November 16, 2021, the stay of the ETS has yet to be lifted or addressed by the Sixth Circuit.

On November 18, 2021, Florida Governor Ron DeSantis signed a number of bills passed by the Florida House of Representatives and Senate into law. The main bill affecting employers is House Bill 1B, which is now Florida Statute §381.00317. The statute targeted employer COVID-19 vaccine mandates and went into effect immediately upon being signed by Governor DeSantis yesterday afternoon. The statute, which remains in effect through June 1, 2023, is summarized below.

Immediate Temporary Invalidation of All Mandatory COVID-19 Vaccine Policies

Of immediate importance for private employers is that the statute immediately invalidates all vaccine mandates of employers operating in Florida and requires the Florida Department of Health (DOH) to issue emergency rules implementing the Statute by December 3, 2021.

Given the federal court's stay of OSHA's "vaccinate or test" ETS and OSHA's corresponding suspension of all activities related to the implementation and enforcement of the ETS pending future developments in the federal litigation, there is no federal preemption of Florida's statute at present. Accordingly, and while this may change, Florida's statute is controlling law for employers operating in Florida at this time.

No Mandatory Vaccination Policy Absent Acceptance of One of Five Possible Exemptions

The statute broadly prohibits private employer COVID-19 vaccination mandates for employees unless the employer offers employees five exemptions to the mandate, any one of which suffices to exempt an employee from COVID-19 vaccination. Those five exemptions are based on:

1. Medical reasons (including, pregnancy or anticipated pregnancy);
2. Religious reasons;

3. COVID-19 immunity;
4. Periodic testing at the employer's expense; or
5. Employee use of employer-provided personal protective equipment (PPE).

Unlike the ETS, which requires employers to implement a mandatory COVID-19 vaccination policy or require that unvaccinated employees undergo weekly testing and masking, ordinarily at the employees' expense, the statute exempts employees from an employer's vaccination mandate if the employee seeks any one of the five exemptions. Further, an employer must accept any of the exemptions to its mandatory COVID-19 vaccination policy, if the employer decides to implement a vaccine mandate in the first instance.

Employers and employees must use exemption forms provided by the DOH or create their own forms that are substantially similar. The requirements of each exemption are set forth in more detail below.

The Statute's Five Exemptions

1. To obtain a "medical reasons" exemption, an employee must present his or her employer with an exemption statement, dated and signed by a physician, physician assistant, or an APRN, who has examined the employee. The statement must provide that in the medical practitioner's professional opinion, COVID-19 vaccination is "not in the best medical interest of the employee." (DOH Medical Exemption from COVID-19 Vaccination Form)
2. To obtain a "religious reasons" exemption, an employee must present his or her employer with an exemption statement indicating "the employee declines COVID-19 vaccination because of a sincerely held religious belief." According to the plain language of the statute, no more needs to be stated by the employee, and, it is unclear presently if the statute allows an employer to further inquire as to what that sincerely held religious belief is or why it prevents the employee from receiving a COVID-19 vaccination. It is also not clear whether an employer remains in compliance with the statute if the employer challenges or ultimately rejects the employee's claim of a sincerely held religious belief. On the other hand, the DOH's exemption form does explicitly provide that, "An employer shall not inquire into the veracity of the employee's religious beliefs." (DOH Religious Exemption from COVID-19 Vaccination Form)
3. To obtain an exemption based on "COVID-19 immunity," an employee must present his or her employer with an exemption statement along with "competent medical evidence" the employee has immunity to COVID-19 documented by results of a "valid laboratory test" performed on employee. The statute requires the DOH to adopt a standard that will be accepted as medical proof of immunity. The DOH exemption form appears to accept an antigen test, PCR test, or antibody test as sufficient to establish immunity to COVID-19. It remains to be seen if the DOH's emergency rules will further specify what tests are acceptable and for how long a natural immunity exemption is valid. At this point, there is no expiration date for an exemption based on natural immunity. (DOH Exemption

from COVID-19 Vaccination Based on COVID-19 Immunity Form)

4. To obtain an exemption based on "periodic testing," an employee must present his or her employer with an exemption statement indicating the employee agrees to comply with regular COVID-19 testing occurring no more than weekly and at the employer's cost. The form appears to also allow an employer to require an employee who displays COVID-19 symptoms to be tested, apparently even if that would exceed the once per week limit of the testing exemption. The DOH may clarify this in the emergency rules it issues. Stay tuned. (DOH Exemption from COVID-19 Vaccination Based on Periodic Testing Form)
5. To obtain an exemption based on "wearing PPE," an employee must present his or her employer with an exemption statement agreeing to comply with the employer's "reasonable written requirement" to use employer-provided PPE when in the presence of other employees or other persons. This raises the question of what "in the presence" of others means; does it mean in the same room? Less than six feet apart? Also, if an employee opts for PPE, does the employee also have to undergo periodic testing if the employer requires the same? The employer may still require the testing, but, at whose cost? Hopefully, the DOH's emergency rules, when issued, will clarify these issues. (DOH Exemption from COVID-19 Vaccination Based on Employer-Provided Personal Protective Equipment Form)

Once an employer receives any proper exemption form from an employee, the employer must allow the employee to opt-out of the employer's COVID-19 vaccination mandate, if the employer has one in the first place.

Further, the statute makes clear it is a violation of the statute to terminate an employee because the employee has not complied with an employer's COVID-19 vaccination mandate. The statute clarifies that the "functional equivalent of termination" will be treated as termination. The statute tasks the Florida Department of Legal Affairs (DLA) with specifying what constitutes the functional equivalent of termination by adopting emergency rules to that effect. At this time, it is easy to envision that placing an employee who refuses to comply with a mandate on unpaid leave could qualify as a functional equivalent of termination.

This statute, like many others, does lack some clarity. For example, among the issues to be resolved is whether employees who seek medical, religious, or natural immunity exemptions must agree to wear PPE or be tested if an employer so requires. The statute is silent on this issue. However, the statute does require regulations to be issued within 15 days of its effective date-no later than December 3. Hopefully, these and other questions will be answered by the regulations.

Unemployment Assistance for Terminated Employees

An employee dismissed for refusing to comply with his or her employer's mandatory COVID-19 vaccination policy, whose employer offered no exemptions to the vaccination policy or whose employer improperly applied any of the statute's

exemptions, may be eligible for reemployment assistance. Such a termination is also not be classified as misconduct for purposes of reemployment assistance.

Filing Complaints Against Employers

The statute also establishes a new complaint and investigation process overseen by the DLA. Employees who allege their employer failed to offer an exemption to the employer's mandatory COVID-19 vaccination policy, improperly applied an exemption, or denied an exemption may file complaints with the DLA. Once a complaint is filed, the DLA must conduct an investigation and, at minimum, decide:

- i. whether the employer imposed a COVID-19 vaccine mandate;
- ii. whether the employee submitted a proper exemption statement and complied with any specified condition of the exemption; and
- iii. whether the employee was terminated because of the employer's vaccine mandate.

If a DLA investigation finds an exemption was not offered, was improperly applied, or was denied, the DLA must give the employer notice of the employer's noncompliance as well as an opportunity to become compliant.

Administrative Fines upon Finding of Improper Termination

If the DLA finds an employee was improperly terminated under the Statute, the DLA must impose an administrative fine against the noncompliant employer.

For employers with less than 100 employees, the maximum fine is \$10,000.00 per violation.

For employers with 100 or more employees, the maximum fine is \$50,000.00 per violation.

But, no fine may be imposed if, prior to issuance of a final order by the Attorney General, the employer reinstates terminated employee and gives the employee back pay going back to the date the employee's complaint was received by the DLA.

The DLA will consider the following factors in determining the amount of the fine:

1. Did the employer knowingly and willfully violate the statute?
2. Did employer show good faith in attempting to comply with the statute?
3. Did the employer take action to correct the violation?
4. Has the employer been fined in the past for violating the statute? and
5. Are there any other mitigating or aggravating factor that fairness or due process requires the DLA to consider in determining the fine amount?

Emergency Rules Forthcoming

Employers can expect the DOH to adopt emergency rules on or before December 3 that:

- Specify the requirements for the frequency and methods of COVID-19 testing which may be used by employers for the testing exemption;
- Specify what constitutes competent medical evidence that an employee has immunity to COVID-19 for the immunity exemption; and
- Specify what circumstances qualify as an "anticipated pregnancy" for purposes of the medical exemption.

The statute provides that any emergency rules adopted by any Florida agency as required by the statute will remain in effect until replaced by rules adopted under regular rulemaking.

No Policies Prohibiting COVID-19 Vaccination

The statute also forbids employers from implementing any policy prohibiting employees from receiving a COVID-19 vaccination.

No Educational Institution or Government Entity Mandates

The statute also forbids all educational institutions or government entities from imposing COVID-19 mandates for any employee on penalty of a maximum fine of \$5,000 per violation.

Conclusion

While the OSHA ETS is stayed, and OSHA itself has announced it is not taking any steps to implement or enforce the ETS, Florida's new statute is now in effect and precludes employers, both large and small, from implementing COVID-19 mandates without offering one of five statutorily required exemptions to employees upon penalty of administrative fines. If the stay of OSHA's ETS is lifted, or if OSHA announces it is taking steps to implement and enforce the ETS, employers will then be faced with a new legal question - does the ETS, as a federal regulation, preempt Florida's statute? Similarly, if the ETS is upheld as statutorily and constitutionally valid (likely a question the U.S. Supreme Court will ultimately have to decide), Florida employers will face a catch-22 of attempting to comply with OSHA or the Florida statute.

Lowndes will continue to keep you updated regarding these issues and legal developments and remains available to assist employers comply with these newly enacted requirements.