

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 21-16

COVID-19 Vaccination as Condition of Employment Imposed by Private Employers

Question

May a private employer require its employees to be vaccinated against COVID-19 as a condition of employment?

Opinion

Tennessee law does not prohibit private employers from requiring their employees to be vaccinated against COVID-19 as a condition of employment. But—depending on the particular facts and circumstances in any given private employment situation—federal law, as well as collective bargaining agreements and other employment contractual obligations, may preclude a private employer from requiring its employees to be vaccinated against COVID-19, subject to appropriate exceptions, such as exceptions for medical reasons.

ANALYSIS

1. State Law Does Not Preclude Private Employers from Requiring Employees to be Vaccinated Against Covid-19.

Earlier this year, the Tennessee General Assembly passed legislation that prohibits the State and its political subdivisions from requiring any person to be vaccinated or immunized against the SARS-CoV-2 virus or any variant of that virus (collectively “COVID-19”). 2021 Tenn. Pub. Acts, ch. 513, §§ 1, 7 (codified at Tenn. Code Ann. §§ 68-5-116, -117). By its express terms, Public Chapter 513 applies only to the government. Accordingly, this Tennessee law does not prevent *private* employers from requiring their employees to be vaccinated or immunized against COVID-19 as a condition of employment, subject to appropriate exceptions, such as exceptions for medical reasons.

State law governing employment relationships and practices in this State does expressly prohibit the termination or discharge of employees who engage in certain conduct,¹ but an employee’s refusal to be vaccinated is not recognized as protected conduct. When the General Assembly passed Public Chapter 513, it could have amended the law to prohibit private employers

¹ For example, Tenn. Code Ann. § 50-1-304 provides that no employee shall be discharged or terminated “solely for refusing to participate in, or for refusing to remain silent about, illegal activities,” and § 50-1-312 prohibits an employer from discharging or taking adverse action against its employees “solely for transporting or storing a firearm or firearm ammunition in an employer parking area in a manner consistent with § 39-17-1313(a).”

from taking adverse action against their employees for refusing to receive a COVID-19 vaccine as it has done with respect to other conduct, but it did not do so.²

2. Federal Law Could Preclude a Private Employer from Requiring its Employees to be Vaccinated.

Federal law, though, could preclude a private employer from requiring its employees to be vaccinated against COVID-19 as a condition of employment. Whether and to what extent any such federal law applies to any given private employer will depend on the particular facts and circumstances involved.

For example, in February 2020, the United States Department of Health and Human Services declared a public emergency and instructed the Food and Drug Administration (the “FDA”) to grant emergency use authorizations (“EUA”) for medical devices and interventions, including vaccines, to combat the COVID-19 pandemic. *See* 85 Fed. Reg. 7316-01, 7316-17 (2020); 85 Fed. Reg. 18250-01, 18250-51 (2020). The FDA then granted three vaccines EUA status for individuals sixteen and older: Pfizer-BioNTech and Moderna in December 2020 and Johnson & Johnson in February 2021.³

Faced with impending vaccine mandates following these grants of EUA status, employees sought to challenge employer vaccine requirements on the grounds that the Food, Drug and Cosmetics Act (the “FDCA”) allows individuals to refuse those vaccines that have not been fully approved by the FDA. They argued that the EUA status of the vaccines precluded enforcement of the vaccine mandates under the FDCA, which provides that individuals have “the option to accept or refuse” an EUA product. *See* 21 U.S.C. § 360bbb-3.

A number of courts in other jurisdictions have rejected such challenges to employer vaccine mandates. *See, e.g., Valdez v. Grisham*, No. 21-cv-783, 2021 WL 4145746, at *4 (D. New Mexico Sept. 13, 2021), appeal docketed, No. 21-2105 (10th Cir. Sept. 15, 2021) (finding that “the option to accept or refuse” an EUA product is an informed consent provision which “applies only to medical providers” who administer the vaccine) (quoting *Klaasen v. Trustees of Indiana Univ.*, No. 21-cv-238, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021), *aff’d*, 7 F.4th 592 (7th Cir. 2021). Under this view, private employers who require their employees to obtain a COVID-19 vaccination from a medical provider and attest that they have been vaccinated may not run afoul of the EUA provisions of the FDCA on the theory that the EUA provisions of the FDCA do not apply when employers are not “directly administering the vaccine.” *Id.* *See also Bridges v. Houston Methodist Hosp.*, No. H-21-1774, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021) (court rejected hospital employee’s claim that since “no one can be mandated to receive

² In fact, the legislative history for Public Chapter 513 is replete with statements that private businesses were not included in the proposed legislation and would remain unrestricted in their ability to require that their employees be vaccinated for COVID-19.

³ *See* Centers for Disease Control and Prevention, *COVID-19 Vaccination Recommendations*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html> (last visited October 1, 2021). The Pfizer-BioNTech COVID-19 vaccine was recently fully approved by the FDA on August 23, 2021. *Id.*

‘unapproved’ medicines in emergencies” COVID-19 vaccine mandate was not permissible under FDCA and determined that the FDCA “neither expands nor restricts the responsibilities of private employers”).

3. Other Federal Law, Collective Bargaining Agreements, and Other Employment Contractual Obligations May Prohibit Private Employer COVID-19 Mandates.

In addition, other federal law, collective bargaining agreements, and other contractual obligations assumed by a private employer may prohibit a given private employer from requiring its employees to be vaccinated. *See Vaccination in the Workplace*, Practical Law Practice Note w-028-8922, 2020 WL 7391418 (2021) (discussing federal laws and their potential impact regarding COVID-19 vaccination policies imposed by employers). The Occupation Safety and Health Act and the National Labor Relations Act could apply, for instance. *See id.*; Lee Modjeska and Abigail Cooley Modjeska, *Federal Labor Law: NLRB Practice* § 1:4 (Aug. 2021). If so, there may be applicable collective bargaining agreements executed pursuant to these laws that may preclude an employer from unilaterally implementing a COVID-19 vaccine mandate. *See id.*

Finally, employment contracts or other contractual obligations—other than those imposed by a collective bargaining agreement—might exist in a particular employment relationship that could prevent the employer from requiring its employees to be vaccinated for COVID-19.

In sum, Tennessee law does not prohibit private employers from requiring their employees to be vaccinated against COVID-19 as a condition of employment. But—depending on the particular facts and circumstances in any given private employment situation—federal law, as well as collective bargaining agreements and other employment contractual obligations, may preclude a private employer from requiring its employees to be vaccinated against COVID-19, subject to appropriate exceptions, such as exceptions for medical reasons.

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