



Vaccine-Exemption Requests Putting Legal Departments in Tricky Spot

McDermott Will & Emery

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In-house legal departments are facing a big challenge: finessing company vaccine-exemption policies to strike the right balance between keeping workforces safe and minimizing exposure to litigation.

The issue is coming to the fore as more employers mandate vaccines for their workers. A Gartner Inc. study last month (<https://www.law.com/corpocounsel/2021/09/24/vaccine-mandate-hesitancyfades-amid-delta-outbreak-new-federal-guidance/>) found that 46% of legal, compliance and HR execs expect their companies to enact vaccination mandates, up from 8% at the beginning of the year.

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“Legal departments are facing a huge challenge ... because of the politicization of a health issue—and that just increases the difficulty and the challenges that they’re facing,” said Dan M. Forman, Los Angeles office managing partner at CDF Labor Law.

Forman’s clients include legal departments in a range of industries, including health care, manufacturing, transportation and financial services.

“I would expect in a typical workforce, maybe 1% of employees are seeking an accommodation,” Forman said. “But in places where I would say it’s much more politically sensitive, we’ve seen instances of 10% or 15%,” fueling suspicions that some requests are in bad faith.

A string of recent government actions have emboldened companies to move forward with vaccine mandates. In August, the Justice Department opined such mandates are not illegal (<https://www.law.com/newyorklawjournal/2021/08/05/the-justice-department-solc-thinks-your-company-can-mandate-the-covid-19-vaccine-even-if-not-fully-approved/>). The same month, the U.S. Food and Drug Administration fully approved the Pfizer vaccine, and in September OSHA gave private sector employers permission to shift the responsibility for vaccine mandates to the government (<https://www.law.com/corpcounsel/2021/09/24/vaccine-mandate-hesitancy-fades-amid-delta-outbreak-new-federal-guidance/>).

The number of employer mandates will climb further once the federal workplace safety agency releases its COVID-19 emergency temporary standard, according to employment attorneys who have been consulting corporate legal departments on vaccine issues. While the release date and details of the standard aren't yet public, President Joe Biden announced Sept. 9 (<https://www.law.com/newyorklawjournal/2021/09/24/new-federal-mandates-for-covid-19-vaccination-what-do-employers-need-to-know-now/>) that it will require employers with 100 or more employees to ensure their workforces are either fully vaccinated or tested weekly for the virus.

Employers already should have the infrastructure to handle medical- and religious- accommodation requests in compliance with the Americans with Disabilities Act and Title VII, attorneys say, but the politicization of the pandemic — and vaccines in particular — has upped the ante.

In addition to fielding more requests overall, some employers are seeing more requests based on religious reasons — which can be new territory.

“Employers are very used to dealing with medically related accommodation requests, but religious accommodation requests are not as common ... a lot of employers have just not handled them as often in the past,” said Carole A. Spink, a Chicago-based partner at McDermott Will & Emery who advises corporate legal departments in a variety of industries, including health care.

Alana F. Genderson, an associate at the Washington, D.C., office of Morgan, Lewis & Bockius who also works with corporate legal departments, said her clients have seen more vaccine-exemption requests based on religious reasons than medical ones.

This is because the Centers for Disease Control and Prevention “has been so specific about the limited number of medical conditions that would prohibit vaccinations,” Genderson said. “With medical

conditions, there's a more objective basis to analyze whether a medical condition is qualifying.”

It is less clear what criteria employers should use to assess the legitimacy of a religious exemption, she said. This lack of clarity means employees are more likely to believe they'll qualify for an exemption based on a religious reason, Genderson said, though they still might be rejected.

Under both Title VII and the ADA, employers do not have to make special accommodations for employees with religious beliefs and medical conditions if doing so would be an “undue hardship” on their business.

Because the Title VII standard for an “undue hardship” is easier for employers to meet than the ADA standard, employers can deny religious accommodation requests more easily than they can deny medical accommodation requests, Genderson said.

Donald L. Samuels, a principal at Polsinelli who works across the firm's Denver, Los Angeles and San Francisco offices, agreed that employers have more leverage on religious-accommodation requests.

He said it is especially critical for employers to precisely understand their obligations under the law given the political climate, which has left employers both “cautious and a little skeptical about purported exemptions to the vaccination mandate.”

“If you look at the internet, there are both religious individuals and some medical professionals who are willing to write notes in exchange for a fee indicating that the individual has a disability or a sincerely held religious belief,” Samuels said.

He added that some clients he's worked with have had to deal with a “whack-amole syndrome,” with employees failing to secure an exemption on religious grounds then trying again on medical grounds (and vice versa).

Still, legal departments should work closely with human resource departments— which are typically on the front lines of handling exemption requests—to make sure they fulfill their obligations to engage in good-faith discussions with employees about accommodations, Forman said.

Communicating clearly with employees is critical to safeguard against discrimination or retaliation claims, he said.

“They feel left out, they feel like nobody's considering their thoughts,” Forman said of employees. “I think lots of employees want their thoughts respected, even if at the end of the day their thoughts aren't always agreed with.”

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