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Utah's New Law on Employer Vaccination Policies: What Employers Need to Know

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On November 16, 2021, Governor Spencer Cox signed into law SB2004 “Workplace COVID-19 Amendments,” a bill passed during a special session of the Utah Legislature. While the bill was introduced in response to vaccine mandates contained in the Executive Orders of President Biden and the special rule or ETS from the Occupational Health and Safety Administration (“OSHA”) (which has now been stayed by the federal courts), this new law nonetheless carries significant legal requirements for Utah employers. The bill became immediately effective yesterday upon the Governor's signature without giving employers any lead time to prepare or change policies/processes. This law does not apply to any “person” that is regulated by the Centers for Medicare or Medicaid Services related to COVID-19 (unless a state entity) or that is a federal contractor.

At a high level, the bill:

- (1) requires that any employer vaccination mandate include exemptions for a) health reasons; b) sincerely held religious beliefs; and c) “sincerely held personal beliefs”;
- (2) prohibits employers from taking any adverse action against an employee or potential employee who is not vaccinated or asks for an exemption;
- (3) requires employers to pay for any COVID testing requirements; and
- (4) prohibits employers from retaining a copy of any vaccination documents but allows employers to keep a record of whether an employee is vaccinated.

While employers are likely familiar with exemptions related to disabilities and sincerely held religious beliefs and have likely reviewed the requirements for these exemptions under the Americans with Disabilities Act and Title VII, Utah's newly crafted exemption related to an employee or prospective employee's “conflict with a sincerely held personal belief” is new territory. This is not a legal term of art or a concept contained in employment laws or guidance documents from any government agency. There appear to be no parameters, legal authority, or guidelines for employers to consult and follow or to help determine what a “sincerely held personal belief” is. The law implements a very broad exemption and likely undermines any employer vaccine mandate.

The new law defines adverse action as a refusal to hire or the termination,

demotion, or reduction of hours for an employee, meaning that Utah employers have limited ability to require that employees or prospective employees be vaccinated. Adverse action does not include, however, an employer's reassignment of an employee or the termination of an employee if reassignment is not practical. This exception appears to provide employers substantial leeway in making hiring decisions related to vaccination status in certain positions where it may be required, or the job duties would require a vaccination, and then reassignment is not practical.

Thankfully, the law does not affect an employer's ability to impose health and safety standards from federal guidance based on vaccination status. That is, the law does not prohibit employers from having different requirements in the workplace related to vaccinated and unvaccinated employees (such as social distancing, face masks, testing, reporting, etc.). Employers appear to be free to maintain different safety requirements in their workplaces based on vaccination status.

However, employers must now bear the cost of any testing requirements. Many employers have been reopening offices for the fully vaccinated and for the unvaccinated, requiring specific COVID testing and negative tests before unvaccinated employees can enter the workplace. This still appears to be appropriate under the law so long as the employer bears the financial burden of any testing requirement. With respect to test results, the law appears to be silent as to whether or not an employer may receive and retain such records, and therefore, it appears likely that employers can continue any such practice.

One of the most significant issues for Utah employers under this law relates to proof of vaccination. Under this new law, Utah employers are not allowed to maintain a record or copy of an employee's proof of vaccination. Many employers have implemented a process for employees to upload or provide a copy of their vaccination cards to enable the employee to return to work or not be subject to certain safety protocols. This type of approach now appears in potential conflict with the new law. There is an exception related to "an established business practice or [where an] industry standard requires otherwise." If an employer has established a business practice of maintaining a vaccination card before this law went into effect yesterday, then it could certainly argue its past practice does not violate this new law. In addition, if an employer used a third-party vendor (such as BambooHR, ADP, or the like) to retain a copy of vaccination cards, it could argue that the third-party vendor is not the employer and therefore not subject to this provision. The law does not prohibit an employer from recording whether an employee is vaccinated. So, an employer could implement a process by which proof of vaccination is shown, recorded by the employer, but no copy of the proof of vaccination is retained.

It is also notable that there are no penalty provisions listed in the statute. The statute is also silent as to whether there is a private cause of action for any violations of the law.

This new law certainly puts employers in the middle of a tug of war between mandates from both federal and state governments. Unfortunately, while the federal vaccine mandate issues are litigated,

uncertainty is likely to continue and will create ongoing compliance difficulties. Employers are advised to keep up to date as these issues continue to evolve.

Immediate steps for Utah employers:

- If you have a current vaccination mandate or policy in place, revise your policy for Utah-based employees to allow for potential exemptions for health reasons, sincerely held beliefs, or sincerely held personal beliefs;
- If you currently have retained copies of employee vaccination cards, immediately change your practice moving forward not to retain such cards, and instead simply keep a record of employee vaccination status;
- If you currently have retained copies of employee vaccination cards, consider whether you want to approach this conservatively by creating a list of employees who are vaccinated and then delete/destroy copies of vaccination cards on record and not maintain any vaccination cards (based on the ETS guidelines, even if the new rule goes into effect, there is a “grandfathering” clause that should be applicable making such list acceptable “proof of vaccination” under the ETS if made prior to the ETS effective date);
- Ensure that any COVID testing requirements are fully paid by the employer, not the employee; and
- Before taking any adverse action related to an employee or potential employee, their vaccination status, or their request for an exemption, carefully consider all alternatives, reassignments, and related issues.

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