COVID Vaccine Updates, Changes in Labor and Employment Laws, and Anticipated Litigation Trends in 2022

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Agenda

- OSHA's New Head
- Status on vaccine mandate rules
- Implementation Recommendations
- Legal changes coming for 2022
- Status of "at-will" employment and "right-to-work" bills
- Litigation Trends

OSHA's New Head

- Douglas L. Parker sworn in on November 3, 2022
- Former chief of California's Division of Occupational Safety & Health (Cal/OSHA)
- First safety professional to head OSHA since John Henshaw
- Oversaw Cal/OSHA enforcement of COVID-19 requirements
- Expect a return to OSHA's prior enforcement strategies:
  - Press release shaming
  - Increased enforcement, increased penalties, less negotiating flexibility
  - Congress is also currently considering increased penalties of $70,000 for serious and $700,000 for "willful," "repeated," or "failure to abate" violations

OSHA 100+ Employee Vaccine Mandate:

- Applies to employers with 100+ employees company-wide.
- Does not apply to federal contractors or healthcare settings covered by CMS requirements.
- Does not apply to workers who work solo, in home offices, or exclusively outdoors.
- Vaccination deadline is January 4, 2022.
- Allows for weekly testing and masking. Employers are not required to pay for testing.
- Nearly two dozen Attorneys General have issued letter opposing the proposed rule, signaling legal challenges.

OSHA 100+ Employee Vaccine Mandate Specifics:

- Covered employers must have a written policy by December 5, 2021.
- Must confirm employee vaccination status.
- Must provide up to four hours of paid leave to get vaccinated and provide paid leave to recover from side effects.
- Vaccination deadline is January 4, 2022.
- Mandatory notice and removal requirements for positive cases.
- Face coverings required for unvaccinated workers.
- Must maintain records of vaccinations and test results and provide to employee or authorized representative.
- Unions may request details about the number of vaccinated workers and the size of the workforce.
- Intended as a proposed Final Rule.
- Preempts state and local laws that interfere with these requirements.

Deadlines for Public Employers and State Plan States

- OSHA's vaccine mandate rule will take immediate effect in the 29 states where federal OSHA has jurisdiction once it is published in the Federal Register.
- Public employers in Illinois and employers with state plans will have a delayed deadline, as OSHA will allow up to 30 days for the states that manage their own programs to either adopt the OSHA rule or create their own standard.
- State plans can be *stricter* than the OSHA requirement. Some states may cover smaller employers.
- States may try to block the rule in Court.

Federal Contractor Vaccine Mandate:

- Now: January 4 deadline for vaccinations. Not a hard deadline.
- Federal contractor rule should take precedence over OSHA requirement. Watch for details.
- Generally applies to new agreements and modifications to current agreements.
- Although no “mask” exception, religious and medical exemptions are required.
- A dozen states have filed suit to challenge the rule.

CMS Vaccine Mandate:

- Full details should be available today.
- Must have a policy by December 5, 2021. January 4, 2022 is the deadline for vaccinations.
- Should take precedence over OSHA requirements. Watch for details.
- Would apply to providers paid through Medicare and Medicaid or that receive funding. Also covers service providers and contractors to covered facilities.
- CMS will enforce through survey and enforcement processes. A provider or supplier will be cited by a surveyor as being non-compliant and have an opportunity to return to compliance before additional actions occur.
- Religious and medical exemptions are required.

Illinois Vaccine Mandates:

School personnel, health care workers, higher ed personnel, State employees at congregate facilities all subject to Executive Orders.

Illinois expressly included weekly testing as an alternative to vaccines.

All State employees, contractors and vendors at State congregate facilities must have the first dose of a two-dose COVID-19 vaccine series or one dose of a single-dose COVID-19 vaccine by October 26, 2021, and the second dose of a two-dose COVID-19 vaccine series by November 30, 2021, subject to bargaining.

Face coverings may be removed temporarily while actively eating or drinking and may be removed by employees at workplaces when they can consistently maintain six feet of distance (such as when employees are in their office or cubicle space).

Covered employers can permit employees to be on premises while they are awaiting the results of a weekly COVID-19 test as long as they do not have any symptoms of COVID-19 that warrant exclusion.

Looming Questions over Vaccine Mandates

- Is there a “testing exception” to getting vaccinated?
- Is the employee on the clock when getting COVID tested?
- Who should do the testing?
- Who pays for weekly COVID testing?
- Is the employee on the clock when getting vaccinated?
- Will there be a sick leave requirement?
- Does the 100-employee mean overall employees, or employees per facility?
- How will the vaccine requirement be enforced?

Wait—your vaccination card says your name is "McLovin" and you're from Hawaii?

- Employers should be prepared for fake vaccination cards
- Consider risks of accepting scanned copies of vaccination records or substitutes for an actual card
- Illinois residents can verify vaccination status through I-CARE
- Look for misspellings, inconsistent dates, illegible portions, missing information, documents not on card stock, identical handwriting for both vaccines, etc.
- Follow up consistently and document why you are asking for more information from employees
- Be respectful of employees at all times and provide a reasonable opportunity for employees to provide correct information
- Clearly identify documentation requirements

If you are not required to mandate vaccines, should you do it anyways?

- One reason many oppose a mandate is that it will likely drive more people out of the labor pool, creating an even larger shortage—an issue that has impacted many employers from the beginning of the pandemic.
- Employees who have worked remotely for months or who have worn masks may believe that the risk of remaining unvaccinated are overblown.
- State of Illinois permits weekly testing in lieu of vaccine.
- Messaging should fit the culture of the business and your actual business needs.

PCR or Antigen Testing?

	MOLECULAR TEST	ANTIGEN TEST
Is another test needed...	Not usually. This type of test is typically highly accurate andmusually does not need to be repeated. Some may indicate the need to re-test in certain circumstances.	Maybe. Positive results are usually highly accurate, but false positives can happen, especially in areas where very few people have the virus. Negative results may need to be confirmed with a molecular test.
What it shows...	Diagnoses active COVID-19 infection. (Some tests may also diagnose influenza or other respiratory viruses)	Diagnoses active COVID-19 infection. (Some tests may also diagnose influenza or other respiratory viruses)
What it can't do...	It cannot show if you ever had COVID-19 or were infected with the virus that causes COVID-19 in the past	It may not detect an early COVID-19 infection. Your health care provider may order a molecular test if your antigen test shows a negative result, but you have symptoms of COVID-19. It also cannot show if you ever had COVID-19 or were

Source: https://www.fda.gov/media/140161/download

EEOC Guidance on the COVID Vaccine Mandate

- The EEOC has consistently held that employers can mandate that employees be vaccinated and ask for proof of vaccination.
  - Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodations of the ADA and Title VII and other EEO considerations.

Applicable Accommodations: Disability

- When an employee requests a disability-related accommodation to be exempt from a vaccine mandate, e.g., there is a medical reason they cannot get the vaccine, employers can ask certain questions, but with limitations:
  - The ADA places restrictions on when and how much medical information an employer can obtain from an employee or applicant.
  - Disability-related inquiries or medical exams must be job-related and consistent with business necessity.
  - Medical information must be kept separately from personnel information with limited access to those in management who need to know the information.

Applicable Accommodations: Religion

- Accommodations are available for those with sincerely held religious beliefs, practices, or observances.
  - This is broadly defined. Employers can only ask information about this when there is an objective basis for questioning the sincerity of it.
  - This must be accommodated unless it would pose undue hardship to the employer (meaning, it's more than a de minimus cost or inconvenience).
- "Undue hardship" is a lower threshold for employees to meet in the religious accommodation context than in the ADA accommodation context. Considerations include the proportion of employees in the workplace who are already vaccinated and the extent that employees come in contact with non-employees with unknown vaccination status.

EEOC October 25 Updated Guidance on Religious Exceptions:

- Title VII does not require you to exempt employees from vaccine requirements for their political, social, or economic reasons, which are not "religious beliefs."
- No "magic words" are required to ask for an accommodation.
- You should assume that a religious belief is sincerely held, unless you have an "objective basis" for questioning. You may also ask how your company's vaccine requirement conflicts with the individual's religious beliefs or practices and employees requesting accommodation must respond.
- Religious beliefs may change over time. Thus, a request may be "sincere" even if an individually acted inconsistently with a certain belief in the past.
- Most assessments of religious accommodation requests will likely hinge on whether or not they would cause your business an "undue hardship." Employers may consider not only costs, but also "the risk of the spread of COVID-19 to other employees or to the public."
- You should consider each request on the basis of "its specific factual context." Thus, granting (or denying) one request does not necessarily mean that another request would result in the same result.
- Employers may "take into account the cumulative cost or burden of granting accommodations" to many other employees.

Sincerely Held Religious Belief?

The following is a list of common medicines that have used fetal cells in their testing, research, and/or development. This is a commonly used and available, but not all-inclusive list of every day medicines that fall into the same category as the COVID-19 vaccine in their use of fetal cell lines:

Tylenol	Ibuprofen	Benadryl	Claritin
Pepto Bismol	Maalox	Sudafed	Zoloft
Aspirin	Simvastatin	Albuterol	Suphedrine
Tums	Ex-Lax	Preparation H	Prilosec OTC
Lipitor	Zocor	Enbrel	Azithromycin
Senokot	Zostavax	MMR Vaccine	Varilrix
Motrin	Tylenol Cold & Flu	Acetaminophen	Havrix

I truthfully acknowledge and affirm that my sincerely held religious belief is consistent and true and I do not use or will not use any of the medications listed as examples or any other medication (prescription, vaccine, or over the counter medication) that has used fetal cell lines in their development and/or testing.

Conscientious Objections in Illinois?

- Illinois law protects employees from discrimination based on their refusal to accept health care based on their conscience.
- At least one Illinois appellate court found that exceptions and standards used under Title VII religious discrimination claims do not apply under State law.
- Arguably, Illinois law could be a problem if an employer grants medical accommodations but denies religious accommodations.
- On October 28, 2021, an amendment, which will become effective on June 1, 2022, creates a COVID-19 carve-out, making clear that employers can impose COVID-19 vaccination requirements and COVID-19 treatment as a condition of employment and terminate those who refuse to comply, regardless of "conscience" objections.

What to do?

- Confirm whether a mandate applies to your workplace or if your employees need to be vaccinated to enter another's workplace.
- Obtain current information about vaccination status within the workforce.
- Regardless of whether you mandate vaccines, have a COVID-19 preparedness plan in place.
- Make sure that all employees understand your COVID-19 safety precautions.
- Disciplinary policies should include COVID-19 issues.
- Train management and supervisors for the possibility of an OSHA inspection and for questions about masking rules and COVID-19 precautions.
  - OSHA is not at your worksite to take questions or provide guidance. Address OSHA's questions with specifics and confidence. Make sure that you are putting your best foot forward with OSHA from minute one.

What is the Illinois Wage Payment and Collection Act and why should I care about this recently Amended Law?

- Federal and Illinois law govern minimum wage rates, overtime wage calculations, status as an exempt employee, and status as a non-exempt employee.
- The Illinois Wage Payment and Collection Act governs an employer's obligation to pay the wages that have been agreed upon by the employer and employee. The Act has a 10-year lookback and was amended in July 2021.
- You should care about this law because it allows employees to assert civil claims against the employer *and* those personally responsible for causing the unpaid wages in order to recover unpaid wages, 5% interest (up from 2%) on the unpaid wages for each month the wages remain unpaid, and attorneys' fees.

What the 150% Increase in Interest Rates Mean to You and Your Company

Consider this scenario:

A 15-year employee has accrued 20 weeks of vacation valued at $800 per week at the time of separation, *i.e.*, $16,000.

The employee is discharged for cause and company policy states that employees who are discharged for cause will not be paid accrued, unused vacation at separation, which is prohibited by the Illinois Wage Payment and Collection Act.

Five years after being discharged, the employee files a lawsuit against the company, the company's human resources manager who administers and makes decisions about payroll and the company's CFO who also makes payroll decisions.

Under the new damage rate of 5% interest per month, in addition to attorneys' fees and costs, the employee will likely recover $16,000 *plus* 5% of $16,000 ($800) per month, which equals $48,000 in interest alone and total wage damages of $64,000 *before* attorneys' fees and costs are considered.

Minimum Wage and FLSA Exemption Trends

- At the federal level, the current minimum wage rate has remained at $7.25 over the last dozen years. With the recent change in administration and shift in the Senate, we can expect that lawmakers will consider raising the minimum wage rate. In doing so, some lawmakers will likely push for a $15.00 per hour minimum wage rate.
- In early 2021, the Senate Parliamentarian ruled that a plan to gradually increase minimum wage levels to $15 per hour could not be voted upon based on the rules governing Senate bills, which include reconciliation bills. As recently as last month, the current Administration voiced support for such wage increases, but there has no been no recent movement towards independent legislation.
- However, on the state level, at least 18 states enacted higher wage rates in 2021. Illinois, for example, has multiple new wage rates. The State's hourly minimum wage rate increased to $11.00 in July 2021 and will increase by $1.00 per year until reaching $15.00 per hour in 2025. Chicago's minimum wage rate also increased in July 2021 and stands at $15.00 per hour ($14.00 per hour for small employers).

Minimum Wage and FLSA Exemption Trends

In 2020, the FLSA salary thresholds for exempt employees were raised to $684 per week, which is annualized at a salary rate of $35,568. This represented an increase of about $12,000 annually to the prior exemption levels.

The current Administration has not signaled an intention to re-introduce the failed 2016 FLSA salary thresholds. The 2016 FLSA salary thresholds would have set the bar at $913 per week, which would have been annualized at a salary rate of $47,476.

We are mindful that the current Administration's position could change once the COVID 19 pandemic subsides.

Illinois applies the salary thresholds that are applicable to the FLSA exemption.

Minimum Wage and FLSA Exemption Trends

During the 2016-2020 Administration, we saw the return of the U.S. DOL published Opinion Letters.

The Administration that came before the 2016-2020 Administration did not issue DOL Opinion Letters.

In February 2021, the current Administration withdrew a number of DOL Opinion Letters that had been issued by the prior Administration.

Since taking office, the current Administration has not issued any DOL Opinion Letters, and we expect that trend to continue.

Minimum Wage and FLSA Exemption Trends

Although not an exemption trend, we are also monitoring the DOL's recent clarifications on pay status when a tipped employee is employed in dual jobs under the FLSA.

In its clarification issued in October 2021, the DOL explained that employers will be able to claim a tip credit only during the timeframe during which the employee spends time performing tip producing work or spends time directly supporting tip producing work, but the employee must be paid the full minimum wage rate **whenever** performing work that is not a tipped occupation.

This means that there is no grace period or *de minimis* exception. Further, unless the employee is paid the full minimum wage rate during the work period, when performing work that supports tipping, the employee may not work in this capacity for more than 30 consecutive minutes or for more than 20% of the workweek during which the tip credit is applied.

Status of “Right to Work” and “At Will Employment” in Illinois

- Illinois is not among the 28 or so states that have enacted right to work laws to prevent workers from being compelled to join unions/pay certain union dues as a mandatory term for securing/continuing employment in a union setting.
- In May 2021, the Illinois General Assembly passed a joint resolution to place this issue on the 2022 ballot.
- In November 2022, Illinois voters will consider a constitutional amendment which, in part, would ban any law or local ordinance that “interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and workplace safety. . .” [including] “any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.” If passed, Illinois could not become a right to work state in the future.

Status of "Right to Work" and "At Will Employment" in Illinois

- As we all know, Illinois is currently an "at-will employment" state. However, on February 19th and 26th of this year, twin bills were introduced and, if passed, they would eliminate at-will employment and require Illinois employers to: (i) only utilize just-cause terminations; and (ii) issue severance pay to terminated employees.
- The just-cause standards applied for terminations result from: (i) a policy violation or unsatisfactory work performance, whereby the employer utilized progressive discipline (which contain a minimum 15-day period from the first warning and non-reliance on year old conduct); (ii) the employee's conduct being egregious; or (iii) a bona fide economic basis.
- As drafted, the bills provide that the employee would be entitled to 1 hour of severance for every 12.5 hours worked in the first year of employment, and 1 hour of severance for every 50 hours worked thereafter.
- The "Employee Security Act" is currently in both chambers, and we shall follow its progression.

New Non-Compete Rules in Illinois

The Illinois Freedom To Work Act, which becomes effective January 1, 2022, changes the landscape of non-compete law in Illinois in at least seven meaningful ways.

- First, this law prohibits new covenants not to compete being applied to a former employee who had actual or expected annual earnings of less than $75,000. This threshold amount increases by $5,000 every five years until 2037.
- Second, this law prohibits a new non-solicitation covenant being applied to a former employee who had actual or expected annual earnings of less than $45,000. This threshold amount increases by $2,500 every five years until 2037.
- Third, this law prohibits the enforcement of new non-compete and non-solicitation agreements where the employer discharges, lays-off, or furloughs an employee for reasons associated with COVID 19, unless payment (base salary minus the employee's new wages) is provided.

New Non-Compete Rules in Illinois

- Fourth, this law prohibits non-compete agreements where the employee was covered by a collective bargaining agreement subject to the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act.
- Fifth, this law contains procedural requirements for entering into new agreements: (i) the employee is to be advised in writing to consult with an attorney; and (ii) the employee is to be provided at least two calendar weeks in which to consider the covenant(s).
- Sixth, this law provides that a worker who successfully prevails in a court or arbitration forum whereby an employer sought to enforce a restrictive covenant shall be entitled to recover her/his reasonable attorneys' fees. The Attorney General is also authorized to bring suit or join suit if the AG determines that the employer is engaged in a pattern or practice of unlawful behavior in the context of restrictive covenants.
- Finally, this law codifies prior common law non-compete standards and makes them applicable to both non-compete and non-solicit agreements, *i.e.*, employment must be at least 2 years long to constitute adequate consideration standing alone or employment plus other consideration (usually financial in nature) will suffice, the agreement is ancillary to a valid employment relationship, the covenant is no greater than what's necessary for the protection of a legitimate business interest, the covenant does not impose an undue hardship on the employee and is not injurious to the public, and courts may blue pencil terms.

The Employee Background Fairness Act

- This new law places restrictions on Illinois employers' reliance upon criminal conviction records.
- Under the new law, it is a civil rights violation for any Illinois private sector employer to consider an applicant or current employee's criminal conviction in making adverse employment decisions unless another law governs the issue or the employer has utilized the required 5-step process on a case-by-case basis.
- As to Step 1, there must be a consideration as to whether: (i) there is a substantial relationship between the job at issue and the prior criminal convictions; and (ii) hiring the applicant or continuing to the employ the person would involve an unreasonable risk to property or personal safety.
- A substantial relationship exists if the job presents the opportunity for the individual to commit the same or similar offense. This requires an assessment of: (i) the time that has passed since the conviction; (ii) the total number of convictions; (iii) the nature and severity of the crimes and their relationship to the risks to property and persons; and (iv) mitigating factors.

The Employee Background Fairness Act

- If an employer determines that the applicant/employee's criminal convictions disqualify him/her from employment, the employer must proceed to Step 2.
- Step 2 requires the employer to provide written notice of the preliminary decision to find the individual as being disqualified for the job. This written notice must: (i) identify the disqualifying conviction(s) and the employer's reasoning for determining the disqualification; (ii) enclose a copy of the conviction report that was examined by the employer; and (iii) inform the applicant/employee of the right to respond to the employer's preliminary decision before that decision is finalized – the employee must be informed of the right to challenge the accuracy of the conviction record and the right to produce mitigating evidence.
- Step 3 requires the employer to provide the applicant/employee with an opportunity to actually respond, *i.e.*, the applicant/employee must be given at least 5 business days to respond before a final decision is made.
- Step 4 involves the employer's decision to deem the applicant/employee qualified or disqualified for the job after considering the applicant/employee's response.
- Step 5 requires the employer to advise in writing rejected applicants/employees of: (i) the specific disqualifying conviction(s); (ii) any internal process for challenging the decision; and (iii) their right to file a charge with the IDHR.

Expected Changes in Labor Law and Employment Laws

- There has been a proposed change in law that would expand the definition of race (in employment and schools) in the IHRA. The Protective Hairstyle/Crown Act would prohibit race discrimination by expanding race to include traits associated with race, including hair texture and hair styles. Several states already have these measures in place. The bill is presently pending in the Senate.
- We also expect to see changes in Illinois law concerning pregnancy and disability rights. In early 2021, a bill seeking to amend the Illinois Human Rights Act was introduced, and it seeks to provide for expanded protections for employees who are disabled by reason of pregnancy, childbirth or related medical reasons. If passed, the IHRA would require up to four months of leave for covered employees, who would be entitled to continued medical coverage at the employer's expense during the leave period. It would also establish *quasi* FMLA based protections for eligible employees (1 year of employment and at least 1,250 prior work hours) who need time off for family care and medical leave. The bill is presently pending in the House.

Expected Changes in Labor Law and Employment Laws

We expect the current Administration to push for the passage of the Protecting the Right to Organize Act, which is a comprehensive piece of legislation seeking, among other things, to:

- Legalize secondary boycotts.
- Ban the use of replacement workers to permanently displace strikers.
- Quickly impose first CBAs where no such contract has been agreed to.
- Create private rights of action (and individual employer liability) for labor law violations.
- Create an employee friendly definitions of joint employers and supervisors.
- Prohibit right to work laws.

However, given the current filibuster rules, this may face significant challenges.

Anticipated Litigation Trends

- We anticipate that there will be significant litigation in the area of employer mandates on vaccination.
- In the labor context, for example, on November 1, 2021, a Cook County Judge temporarily enjoined the City of Chicago's vaccine mandate directed at the City's police officers. However, this same Judge declined to enjoin the City's vaccination status mandate.
- In addition to issues concerning defined labor terms that have been collectively bargained for, we have seen, and expect to continue to see, increases in EEO charge filings asserting failure to accommodate claims in connection with employer vaccination mandates. Specifically, we believe that determining what would constitute a *de minimis* burden on an employer under Title VII religious accommodation requests is likely to be a highly contested issue for the foreseeable future.
- Similarly, for employers who allowed remote working environments, we anticipate ADA and Title VII accommodation requests in response to vaccine mandates being litigated issues in the future.

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Thank You!
Any Questions?

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