The Florida Bar
Labor & Employment Law Section
E-UPDATES
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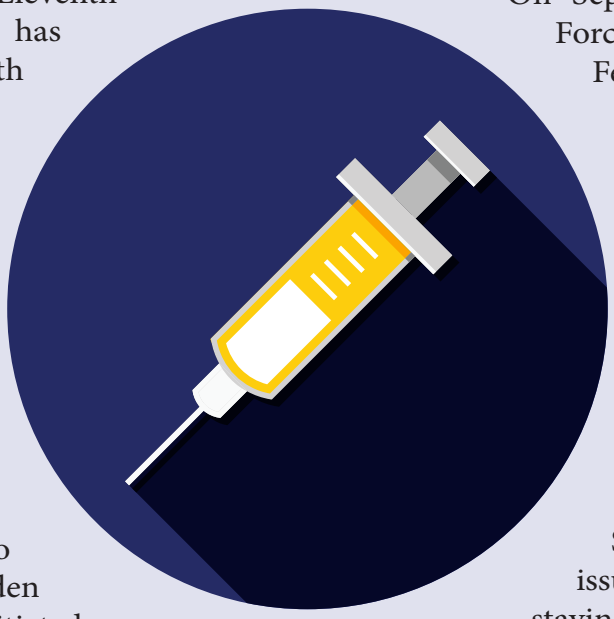
Viktoryia Johnson, Editor

Vaccine Mandates: What's a Florida Employer to Do?

By Aaron W. Tandy, Miami

The legal landscape surrounding vaccine mandates is a morass of confusion, pitfalls, and conflicting directives from federal and state sources. Moreover, the Eleventh Circuit Court of Appeals has taken different positions with respect to different vaccine mandate programs, further muddying the waters.[1] The United States Supreme Court has agreed to step in to create a clear path forward, but, for now, Florida employers must tread carefully to avoid litigation.



In addition to the mandate for federal employees to be vaccinated, the Biden Administration has initiated vaccine mandate programs for federal contractors, healthcare workers, and private employees at companies that employ 100 or more. Each of these three programs is the subject of intensive court activity, with the Administration attempting to sustain these programs in the face of state and private opposition.

Federal Contractor Vaccine Mandate

In September 2021, President Joe Biden issued an executive order requiring federal employees and employees of federal contractors to be vaccinated. Executive Order 14042 mandated that the Safer Federal Workforce Task Force, previously established in January 2021 by executive order, provide guidance to federal contractors and subcontractors on vaccine mandates.[2] On September 24, 2021, the Task Force issued its Guidance for Federal Contractors and Subcontractors, which required all covered contractors to be fully vaccinated by January 19, 2022, unless they are "legally entitled to an accommodation."[3] However, on December 7, 2021, Judge R. Stan Baker of the United States District Court for the Southern District of Georgia issued a nationwide injunction staying implementation of the vaccine mandate.[4] The Eleventh Circuit has left Judge Baker's order in place while it seeks expedited briefing from the parties. So, for now, federal contractors and subcontractors may only request that employees consider vaccination.[5]

Private Employer Vaccine Mandate

At the same time that he issued Executive Order 14042, President Biden directed the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare and Medicaid Services (CMS) to issue rules for mandatory vaccination programs for private employers of a certain size and for employees of facilities that provide health

care to Medicare and Medicaid beneficiaries. But courts have now enjoined those rules as well.

On November 5, 2021, OSHA issued an Emergency Temporary Standard (ETS)[6] requiring employees to be vaccinated or take weekly tests, allowing employers to choose the policy best suited to their businesses to comply with the ETS. A day after OSHA published its ETS—to implement vaccine mandates or provide for periodic testing of the unvaccinated—the Fifth Circuit Court of Appeals suspended the ETS.[7] Several challenges to the private vaccine mandate were consolidated for review by the Sixth Circuit Court of Appeals. On Friday December 17, 2021, the Sixth Circuit lifted the stay of the OSHA vaccine mandate.[8] Following the decision, the Department of Labor directed affected companies to establish policies compliant with the OSHA ETS by January 10, 2022. However, the parties involved at the Sixth Circuit sought review by the United States Supreme Court, which heard arguments on January 7, 2022.

Healthcare Worker Vaccine Mandate

On November 5, 2021, CMS issued an Interim Final Rule (IFR) requiring Medicare- and Medicaid-certified providers to arrange for their healthcare workers who treat patients directly to be fully vaccinated in a two-step process.[9] In support of the IFR, the CMS indicated that the mandate was necessary "to protect the health and safety of individuals providing and receiving care and services from Medicare- and Medicaid-certified providers and suppliers, and CMS's broad authority to establish health and safety regulations . . . ."[10]

On November 30, 2021, Judge Terry Doughty of the United States District Court for the Western District of Louisiana issued a nationwide injunction enjoining implementation of the healthcare worker vaccine mandate.[11] On December 15, 2021, the Fifth Circuit Court of Appeals upheld the injunction as to the fourteen plaintiff states but lifted the stay as it applied to other jurisdictions.[12] However, as noted above, the United States Supreme Court held oral arguments on January 7, 2022, regarding the stay of CMS and OSHA rules.

Conclusion

The rapid Supreme Court action on the emergency applications and the decision by the full Court to hear the emergency applications demonstrate the significance of the issue to employers and employees nationwide.

Aaron Tandy *heads Pathman Lewis, LLP's employment law practice, helping employers and employees navigate complex employment issues.*

Endnotes

1 *Compare Florida v. Dep't of Health and Human Servs.*, 2021 WL 5768796, at *1 (11th Cir. Dec. 6, 2021) (refusing to preliminarily enjoin enforcement of an interim rule by the Secretary of Health and Human Services requiring facilities that provide health care to Medicare and Medicaid beneficiaries to require their health staff to be fully vaccinated) *with State of Georgia v. President of the United States*, Case No. 21-14269 (11th Cir. Dec. 17, 2021) (refusing to stay preliminary injunction of vaccine mandate for federal contractors and subcontractors, but setting expedited briefing schedule).

2 Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 14, 2021).

3 Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, Safer Federal Workforce, https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (Sept. 24, 2021).

4 *See State of Georgia v. Biden*, __ F. Supp.2d __, Case No. 1:21-cv-00163-RSB-BKE (S.D. Ga. Dec. 7, 2021).

5 *See also State of Missouri v. Biden*, Case No. 4:21-cv-01300-DDN (E.D. Mo. Dec. 20, 2021) (enjoining the enforcement of the federal contractor mandate in certain states).

6 86 Fed. Reg. at 61402.

7 *BST Holdings, LLC v. Occupational Safety and Health Admin.*, 17 F.4th 604, 616–18 (5th Cir. 2021).

8 *See In re MCP NO. 165, Occupational Safety and Health Administration, Interim Final Rule: Covid-19 Vaccination and Testing, Emergency Temporary Standard*, 86 Fed. Reg. 61402 (6th Cir. Dec. 17, 2021) (dissolving temporary injunction).

9 86 Fed. Reg. at 61556.

10 86 Fed. Reg. at 61560.

11 *State of Louisiana v. Becerra*, Case No. 3:21-cv-03970 (W.D. La. Nov. 30, 2021).

12 *State of Louisiana v. Becerra*, Case No. 21-30734 (5th Cir. Dec. 15, 2021).

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THURSDAY, JANUARY 27, 2022

8:10 AM – 8:20 AM Opening Remarks
Angeli Murthy, Morgan & Morgan, P.A., Plantation; Suzanne Boy, Boy Agnew Potanovic Miller, PLLC, Fort Myers

8:20 AM – 8:50 AM OSHA
Phillip Russell, Ogletree, Deakins, Nash, Smoak & Stewart, Tampa; Dee Anna Hayes, Ogletree, Deakins, Nash, Smoak & Stewart, Tampa

8:50 AM – 9:35 AM WARN
Kevin D. Johnson, Johnson Jackson PLLC, Tampa

9:35 AM – 10:05 AM Unemployment Appeals
Cristina Velez, Reemployment Assistance Appeals Commission, Tallahassee

10:05 AM – 10:15 AM Break

10:15 AM – 11:00 AM Common Law Employment Claims
Katie Molloy, Greenberg Traurig LLP, Tampa

11:00 AM – 11:50 AM PERA/PERC
Deborah C. Brown, Brown Law & Consulting, PLLC, Tampa

11:50 AM – 12:50 PM Lunch Break

12:50 PM – 2:00 PM FLSA
Cathleen A. Scott, Scott Wagner & Associates, P.A., Jupiter

2:00 PM – 3:00 PM Business Interest
M. Sean Moyles, Langston, Hess & Moyles, P.A., Clearwater

3:00 PM – 3:10 PM Break

3:10 PM – 3:50 PM Constitutional Employment Claims
Thomas A. "Tad" Delegal III, Delegal and Poindexter, P.A., Jacksonville

3:50 PM – 4:20 PM ERISA
John V. Tucker, Tucker Law Group, P.A., St. Petersburg

4:20 PM – 5:00 PM Workplace Privacy
Robyn S. Hankins, Robyn S. Hankins, PL, Jupiter

5:00 PM – 6:00 PM Labor and Employment Law Section Executive Council Meeting (all invited)

The Florida Bar
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Course Number: 5598

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17 General CLE; 17 Labor and Employment Law Certification Credits

Labor and Employment Law Section Member: $590

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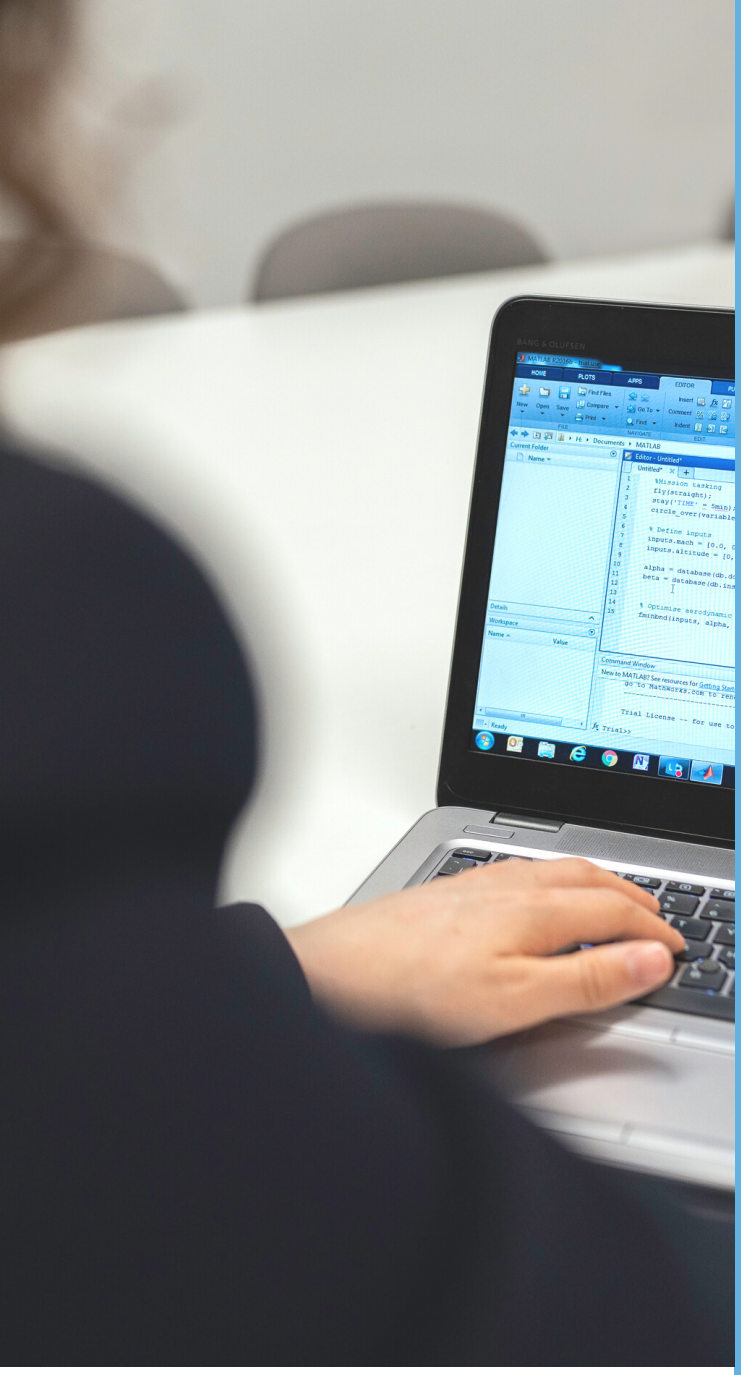

The Florida Bar
Labor and Employment Law Section

FRIDAY, JANUARY 28, 2022

8:00 AM – 8:05 AM Opening Remarks
Angeli Murthy, Morgan & Morgan, P.A., Plantation; Suzanne Boy, Boy Agnew Potanovic Miller, PLLC, Fort Myers

8:05 AM – 8:35 AM Drug Testing
Rudy Haidermota, Hillsborough County Attorney's Office, Tampa; Jay Lechner, Jay P. Lechner, P.A., Tampa

8:35 AM – 9:25 AM Whistleblower Statutes/Workers' Compensation Retaliation
Benjamin H. Yormak, Yormak Employment & Disability Law, Bonita Springs

9:25 AM – 10:15 AM EEO Procedural
Yvette Everhart, Sass Law Firm, Tampa

10:15 AM – 10:25 AM Break

10:25 AM – 11:55 P.M. EEO Substantive
Robert E. Weisberg, US Equal Employment Opportunity Commission, Miami

11:55 PM – 12:55 PM Lunch Break

12:55 PM – 1:35 PM USERRA
Kathryn S. Piscitelli, Orlando

1:35 PM – 2:35 PM NLRA
Tammie L. Rattray, Ford & Harrison LLP, Tampa

2:35 PM – 2:45 PM Break

2:45 PM – 3:45 PM FMLA
Eric J. Holshouser, Rogers Towers, P.A., Jacksonville

3:45 PM – 4:20 PM ACA
Kirsten L. Vignec, Hill Ward Henderson, Tampa