



The Current Landscape in Managing and Litigating Vaccination Requirements

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COVID-19 Pandemic: Over or “It Ain’t Over ‘Til It’s Over”?

By the Numbers:

Total U.S. COVID-19 infections: 95,552,308 people

Total U.S. COVID-19 deaths: 1,048,532 people

New 7-Day Avg. COVID-19 deaths: 355 people

Current U.S. hospitalizations: 23,639 people

<https://covid.cdc.gov/covid-data-tracker/#datatracker-home>

September 20, 2022



The Threat is Real: Causes of Death Among Police Officers

Deaths Due to COVID-19

- 2020: 276 officers
 - 2021: 458 officers
 - 2022: 62 officers
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- Source: Officer Down Memorial Page
(<https://www.odmp.org/search/year?year=2022>)

Deaths Due to Gunfire

- 2020: 46 officers
- 2021: 62 officers
- 2022: 49 officers



Vaccination Requirements Become Permanent

- State Vax Mandate, Proclamation 21-14, will end 10/31/22, but:
- Directive 22-13 and 22-13.1 impose:
 - Permanent COVID-19 vaccination condition of employment requirement for all executive and small cabinet agencies.
 - New employees of such agencies
 - Current exempt employees
 - State OFM and HR Division directed to take steps necessary to continue requirement for represented employees to remain fully vaccinated, and engage with labor organizations to do so.
- Boosters required in 22-13 then omitted in 22-13.1



Other Agencies' Response?

- King County Temporary COVID-19 Personnel Policy, August 18, 2022
- Snoqualmie City Council Resolution No. 1619 Amending Personnel Policies, June 14, 2022



Meanwhile. . .

Vaccine-related litigation continues to move at its customary pace. . .



Vaccine Litigation Issues

- Litigation = plethora of legal issues, including:
- Validity of vaccination requirement
- Validity of emergency declaration
- First Amendment Free Exercise
- Due Process
- Right to Contract
- Duty to Bargain
- Religious Exemption / Reasonable Accommodation Denial
- Unlawful Termination



Validity of Vaccination Requirements

- Challenges nearly uniformly unsuccessful
- Challenges summarily resolved based on *Jacobson v. Massachusetts*, 197 U.S. 1125 S.Ct. 35849 L.Ed. 643 (1905).
- Preliminary injunctions against vax requirement denied, even on appeal to U.S. Supreme Court, allowing vax requirements to take effect:
 - *Klaassen v. University of Indiana Trustees*, 7 F.4th 592 (7th Cir. 2021)
<https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/>
 - *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021); 142 S.Ct. 734 (Mem) (2021) (denying injunction pending appeal).
 - *Dr. A. v. Hochul*, 142 S.Ct. 2569 (Mem) (2022)(*certiorari denied*).
 - *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021); 142 S.Ct. 17 (2021) (denying emerg. inj. relief); 142 S.Ct. 1112 (2022)(*certiorari denied*).



Closer to Home:

- *Pilz v. Inslee*, Order Granting Motion for Judgment on the Pleadings, 2022 WL 1719172 (May 27, 2022)(on appeal)
- *Wise v. Inslee*, Order Denying Motion for Second Amended Complaint and Granting Motion for Judgment on the Pleadings, 2022 WL 1243662 (April 27, 2022) (on appeal).
- *Slidewaters LLC v. Washington State Dep't of L&I*, 4 F.4th 747 (9th Cir. 2021).
- *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173 (9th Cir. 2021), *reconsideration en banc denied*, 22 F.4th 1099 (9th Cir. 2022).
- *Donovan v. Biden*, 2022 WL 1531722 (E.D. WA 5/12/22) (on appeal).
- *Donovan v. Vance*, 576 F.Supp.3d 816 (E.D. WA 2021)



Duty to Bargain? Short answer: No.

- *AFSCME Local 3299 and Teamsters v. Regents of Univ. of Cal.*, 46 Pub. Employee Rep. for California ¶ 38, 2021 WL 3733093 (July, 2021) (vaccination requirement for students, faculty and staff was outside scope of state collective bargaining requirements, and not subject to mandatory bargaining; however, “effects” bargaining was required).
- *Teamsters Local 117 and Local 763 v. Port of Seattle*, Order Granting Defs. Cross-Motions for Summary Judgment, KCSC No. 21-2-14200-8 (September 9, 2022) (Port’s management interests in workplace and public health/safety outweighed employee interests in working conditions; vax requirement held not mandatory subject of bargaining).



Religious Exemption / Accommodation?

- Title VII of Civil Rights Act (42 U.S.C. § 2000e(a), 2000e(j)) prohibits discrimination against an employee “because of the employee’s religion, unless the employer demonstrates that it is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business.”
- Washington Law Against Discrimination (WLAD), Ch. 49.60 RCW, has been interpreted to implicitly provide similar right to religious accommodation. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481 (2014).



Challenges in Administering Exemptions/Accommodations in COVID-19 Context

- Exemptions available only for beliefs that are religious and “bona fide” or “sincerely held.”
- Not available for social, political, or economic philosophies, or mere personal preferences, even if strongly held.
- Exemption available only when actual conflict between an employee’s religious practice and the employer’s neutral policy; religious practice must be an inflexible one—that is, a practice that is required by his or her religious belief system.
- Most major religious denominations / leaders in U.S. publicly stated that COVID-19 vaccinations not prohibited by religion.
- Employees seeking exemptions from COVID-19 vaccines often indicate it is a personal decision and not commanded by their religious leader or institution.



Challenges in Administering Exemptions/Accommodations in COVID-19 Context

- Religious exemptions most commonly sought due to perceived connection between COVID-19 vaccines and abortion.
- No aborted stem cells in vaccines; but, like most medicines, COVID vaccines were tested during development using cells thousands of generations removed.
- Attenuated connection formed basis of Vatican guidance that vaccination is morally appropriate.
- Novavax vaccine approved by FDA in July, 2022: "No human fetal-derived cell lines or tissue, including HEK293 cells, are used in the development, manufacture or production of the Novavax COVID-19 vaccine candidate, NVX-CoV2373."

<https://www.cbsnews.com/news/novavax-fda-authorizes-mrna-alternative-covid-19-vaccines/?intcid=CNM-00-10abd1h>



Accommodations

- Undue hardship in context of Title VII and WLAD defined as “more than a de minimis cost.”
- Circumstances constituting “undue hardship” include additional operating costs such as overtime wages, decreased workplace efficiency from the accommodation, and the compromise to workplace safety caused by the accommodation.
- Recent split decision from Division III of Court of Appeals: *Suarez v. State of Washington*, Case No. 38381-4-III (September 20, 2022). Held: Grant of summary judgment in favor of Yakima Valley School District reversed due to questions of fact concerning whether District provided reasonable accommodation to resolve conflict with employee’s weekly Sabbath and whether District would suffer undue hardship.



Accommodations

- For public- or employee-facing positions, exemptions difficult or not impossible to accommodate.
- Delta and subsequent variants so transmissible that masking/testing not sufficient to prevent infection risk to public or others.
- Some work (e.g., police) may necessitate removal of masks in certain situations.
- Exemption/accommodation requests appear to come primarily from line-level, in-person employee work groups for whom accommodations are most problematic.



Exemption/accommodation litigation?

- Most court litigation has not involved employee-specific exemption/accommodation claims; many Title VII claims dismissed for failure to exhaust administrative remedies.
- Challenges to denial of exemption / accommodation generally being raised in grievance challenges to termination for failure to be vaccinated.
- Grievance arbitrations proceeding very slowly.
- Law enforcement terminations now required to be assigned in alphabetical rotation to law enforcement disciplinary arbitrators under PERC, and arbitration decisions must be published online. RCW 41.58.070(13) and (14).
- Stay tuned for further developments.



Questions?

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