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MICHAEL J. SCHRIER
WASHINGTON:
202.378.2313
MICHAEL.SCHRIER@
HUSCHBLACKWELL.COM

JULIANNE P. STORY
KANSAS CITY:
816.983.8230
JULIANNE.STORY@
HUSCHBLACKWELL.COM

JENNA BROFSKY
KANSAS CITY:
816.983.8305
JENNA.BROFSKY@
HUSCHBLACKWELL.COM

New Kansas Law Affecting Employer COVID-19 Policies

On Monday, November 22, the Kansas legislature met for a special session in direct response to federal action mandating COVID-19 vaccination for certain employees. The Governor signed HB2001 on November 23.

Mandatory exemptions to Kansas employer vaccine policies

Notwithstanding any provision of law to the contrary, if a Kansas employer chooses to mandate COVID-19 vaccination, it must exempt any employee who submits a written waiver on one of the following bases:

Endangers the life or health of the employee

Endangers the life or health of an individual who resides with the employee

Violates sincerely held religious beliefs of the employee

An employee must provide a written statement in support of a request based on endangerment of life or health signed by a physician or another person who performs acts at the direction of a physician. If relying on religion, the employee must provide a written statement signed by the employee. Of note, an employer cannot inquire into the sincerity of a request for a religious exemption. This is distinct from federal and state antidiscrimination law that permits some inquiry, including where there is an objective basis for questioning the religious nature or sincerity.

The law also creates a new administrative complaint process for an employee whose request for exemption is denied. The employee can file a complaint with the secretary of labor, who will then conduct an investigation and issue a report with its findings. The penalty for a violation is up to \$10,000 for employers with fewer than 100 employees and up to \$50,000 for larger

employers. Employers can avoid the civil penalty by reinstating the employee with backpay.

Unemployment implications

Under the law, individuals who are discharged for misconduct as a result of refusing to comply with a COVID-19 vaccine requirement remain eligible for unemployment. Further, individuals who decline new employment after making a request for exemption and having such denied by a prospective employer also remain eligible for unemployment. This portion of the law is retroactive to September 9, 2021. Unemployment claims denied between September 9 and November 23 will be independently reviewed by the Secretary of Labor.

What this means for you

This law applies to all Kansas employers of all sizes and across all industries.

Kansas healthcare employers who are covered by the Centers for Medicare & Medicaid Services (CMS) Interim Final Rule and Kansas employers with more than 100 employees covered by the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard may be subject to conflicting federal and state laws regarding vaccine mandates. Both federal mandates provide standards for assessing requested exemptions that are different than under the new Kansas law. Both federal mandates are the subject of pending litigation.

Kansas employers who are federal contractors must comply with their contractual obligations to the extent FAR 52.223-99 or other similar contract clauses are actually inserted into their federal prime contracts or subcontracts. The Safer Federal Workforce Task Force's Guidance, which is incorporated by reference by FAR 52.223-99 and similar contract clauses, permits only narrow exemptions for medical disabilities and sincerely held religious beliefs based solely on applicable federal law. There are a number of well-established defenses federal contractors may be able to assert in a challenge to the new Kansas statute or in response to any Kansas enforcement actions, because the new law was apparently designed to deliberately thwart federal procurement policy and objectives. Federal contractors and subcontractors should continue to comply with both their federal contract requirements and the new Kansas statute to the extent possible. Where compliance with both is not possible, employers should seek legal counsel as to how to navigate their particular situation and preserve any potentially applicable defenses or legal challenges.

Lastly, in the first week since its passage, the Kansas Attorney General has taken an aggressive stance on enforcement, including sending letters to employers about potential violations of the new law.

Contact us

If you have questions about compliance with federal and state regulations, orders and laws regarding COVID-19 and your workplace, contact Jenna Brofsky, Julianne Story, Michael Schrier or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.