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## **Lawsuit Filed Over Mandatory COVID-19 Vaccination**

As COVID-19 vaccinations become increasingly available, more and more employers are contemplating whether to adopt mandatory vaccinations policies for their employees. The federal EEOC has issued a statement that because this is a pandemic, the rules on requiring vaccinations *may* be different, but employers still have to take into consideration medical and/or religious objections on a case by case basis. The only court to issue a decision on this issue so far is the Fifth Circuit Court of Appeals where they upheld a termination when an employee refused to be vaccinated, but is it important to note that the Fifth Circuit is nothing like the Ninth Circuit which covers all of the Western states. There may not be a more employer friendly circuit in the country than the Fifth. We also have to take California's state courts into account, which are notoriously anti-employer.

In January 2020, just before the coronavirus pandemic picked up in the United States, the Fifth Circuit Court of Appeals decided a case that affirmed employers' legal authority to require vaccinations as a condition of employment. The case dealt with an employee who objected on religious grounds to his employer's requirement that all firefighters be vaccinated against tetanus, diphtheria, and whooping cough (TDAP). As a reasonable accommodation, and in response to the employee's objections, the employer offered the employee to transfer to a code enforcement position that did not require vaccination. The employee refused the accommodation, and the employer fired him. The employee sued and alleged religious discrimination. The court found that the employer acted lawfully because the accommodation was reasonable, and the law does not require employers to offer employee's their "preferred" accommodation but merely a "reasonable" one.

Many commentators touted this decision as confirmation that employers have firm legal ground to require employees to get the COVID-19 vaccination. In December 2020, the federal Equal Employment Opportunity Commission (EEOC) issued guidance that reaffirmed the conclusion that employers can mandate COVID-19 vaccinations (subject to some important limitations such as providing reasonable accommodations for employees with disabilities and religious beliefs). Many employers hoped, perhaps over-optimistically, that this would be sufficient to discourage plaintiff's attorneys from bringing claims against employers for requiring vaccination against COVID-19.

Unfortunately, an opportunistic plaintiff's attorney has proven us wrong and sued an employer over a mandatory COVID-19 vaccination policy in federal court in New Mexico. The employee alleges that requiring employees to get vaccinated against COVID-19 violates federal law because the vaccinations are in early, clinical stages and have only obtained emergency use authorizations. The employee argues that federal law prohibits employers from forcing an employee to be a "human guinea pig." This case was just filed, so there is no decision yet, and we presume that any trial court

decision will be appealed. New Mexico is not in the Ninth Circuit, but hopefully this case will provide some clarity, in the absence of other pronouncements from a California court or a state agency.

### **What This Means for Employers:**

Despite the legal precedent upholding mandatory vaccination policies other than COVID-19, employers should not assume that plaintiff's attorneys will shy away from challenging such policies. Accordingly, employers should work closely with the labor and employment law counsel to carefully consider whether and how to adopt mandatory vaccination policies that are fully compliant with federal and state law.

*The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.*