

# [Podcast]: A COVID-19 Employment Law Update

**Law and the Workplace Blog** on **November 11, 2021**

In this episode of The Proskauer Brief, partners [Evandro Gigante](#) and [Steve Hurd](#) discuss key developments regarding the COVID-19 pandemic, including employer vaccination policies, the forthcoming OSHA emergency temporary standard and the New York State HERO Act. So be sure to tune in as we explore the latest trends we are seeing in terms of employer-imposed vaccine mandates.

**Evandro Gigante:** Welcome to The Proskauer Brief: Hot Topics in Labor and Employment Law. I'm Evandro Gigante and on today's episode, I'm joined by partner Steve Hurd. Today we're going to discuss some key developments regarding the COVID-19 pandemic, including employer vaccination policies, the forthcoming OSHA emergency temporary standard and the New York State HERO Act. So we'll start with a question that lots of employers have been asking. And I'll start by asking, Steve, what trends are we seeing in terms of employer-imposed vaccine mandates?

**Steve Hurd:** Thanks, Evandro. You know, at the beginning of the vaccine rollout, there were many questions regarding the extent to which employers could mandate vaccines, including whether vaccines could be mandated while only authorized for emergency use by the FDA. But that issue has largely been resolved by a couple of court cases and legal opinions, making clear that employers could legally mandate vaccines authorized only for emergency use, and the fact that the Pfizer vaccine has now received full FDA approval. The EEOC has also issued guidance making clear that employers can mandate vaccinations subject to certain limitations and exceptions. In light of this many employers are moving forward with mandatory vaccination policies.

**Evandro Gigante:** Well, as you mentioned, Steve, the rule will require that all employers with at least 100 employees ensure that their workforce is either fully vaccinated or require unvaccinated workers to provide proof of a negative test on a weekly basis. Those are the general outlines of what we know now the details, of course are yet to be determined. The rule is not yet in effect. And in fact, it hasn't even been released yet. With so many details needing to be fleshed out in those regulations. We hope that some of the key questions that will be addressed in those regulations include things like which employees are going to be included in the 100 employee's threshold. What types of COVID-19 tests are going to be acceptable? And of course, the big question of how and who is going to pay for that? And also what type of proof of vaccination and negative tests employers will need to collect from employees in order to demonstrate that the requirements are being met. What we heard last week on Tuesday, OSHA sent a draft of the rule to the White House, which is an indicator we hope that the rule will be issued in the coming days or weeks. Steve, for employees who opt to be tested rather than vaccinated, who will bear the cost of those tests, at least based on what we known now?

**Steve Hurd:** So that's another example of an issue that we expect to be addressed by the regulations. A similar emergency temporary standard that was implemented for the healthcare industry this year generally requires that employers bear the cost of testing, but it remains to be seen whether OSHA will take the same approach with this rule. In addition to what is ultimately included in the rule, Employers will also need to consider federal and state wage and hour laws, which may require that they cover at least in part, the cost of testing. Reimbursement may be required under federal wage and hour law if the cost of the testing would cut into the minimum wage or overtime due to an employee and reimbursement may also be required under state Wage and Hour laws such as California. Evandro, for those employers who are going forward with vaccination policies, what types of reasonable accommodations must employers consider?

**Evandro Gigante:** Thanks, Steve. This is probably the biggest area for us in terms of activity at least over the last several weeks and months. So as I'm sure you know, under the Americans with Disabilities Act and title seven of the Civil Rights Act as well as applicable state and local law, employers with mandatory vaccination policies must consider exemptions from those policies for individuals who qualify with disability related or religious accommodation requests. On the disability side according to the patient fact sheets that accompany the COVID-19 vaccines it bears noting that the CDC and the FDA have said that individuals who have severe allergic reactions after a previous dose of the vaccine or individuals who have a severe allergic reaction to any ingredient of the vaccine should not receive it. So at the outset, many disability related inquiries or accommodation requests that we've seen involve some type of allergy to the vaccine or to an ingredient in it.

More generally, we've also seen a fair number of employees requesting medical accommodations on the grounds that they have some underlying medical condition for which a medical professional has advised the patient or and/or the employee not to get vaccinated. On the religious side, employers must also consider accommodation requests from employees who have sincerely held religious beliefs that prevent them from being vaccinated. Title seven defines religion broadly to include all aspects of religious observance and practice as well as belief and not just practices that are mandated or prohibited by specific tenets of the individual's faith. Therefore, EEOC guidance explains that employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief practice or observance. But that said, employers are often entitled to request additional information from employees if there's a question as to whether that individual actually does have a sincerely held religious belief practice or observance.

Some key questions that have come up here that we've certainly been helping our client's employers through are one, what type of documentation can employer's requests to actually substantiate an employee's religious belief and the need for an accommodation? And under what circumstances can and should that documentation be requested? What options do employers have when an employee says that they cannot be vaccinated because of a religious belief, but the religious leader has in that instance come out in favor of vaccination, but also to what extent are employees entitled to an accommodation if they object to a vaccine because they are vegan, for example, or because they have a belief that the vaccine might do more harm than good to them, or when they object to the vaccine to the extent that it was either developed or researched using fetal cell lines? Those are some of the questions that we're seeing and certainly questions that we're helping our clients navigate. That employee presents with a disability or sincerely held religious belief that conflicts with getting vaccinated.

An employer is not required to provide an accommodation if the accommodation would impose an undue hardship on the employer or in the context of a disability related accommodation where it would result in a direct threat to the health and safety of those in the workplace. We expect that these exemptions are going to be litigated in the coming months and we're certainly starting to see some of that litigation be filed. When an accommodation is warranted, the most common accommodation request that we've been seeing has been working remotely or continuing to work remotely.

Whether this accommodation is appropriate, of course, would depend on whether the essential job functions allow an employee to work remotely or not. And certainly for employees whose essential job functions cannot be performed remotely, the most common accommodation request we have seen is a request to work on site unvaccinated albeit with some combination of mask wearing social distancing and or periodic testing. Steve, are there any jurisdictions in which employers cannot mandate that employees be vaccinated against COVID-19?

**Steve Hurd:** Well, there are currently two but it'll be interesting to see if others follow. Montana law prohibits an employer to refuse employment to a person bar a person from employment or to discriminate against a person in compensation or in a term condition or privilege of employment based on the person's vaccination status, or whether the person has an immunity passport. And in Texas on October 12, the governor signed an executive order stating that no entity in Texas can compel receipt of a COVID-19 vaccine by any individual including an employee or a consumer who objects to such vaccination for any reason of personal conscience based on a religious belief or for medical reasons, including prior recovery from COVID-19. Two obvious questions under the Texas order are whether the basis for objection of quote, any reason of personal conscience, close quote, is a free standing basis to object to a vaccination policy, or whether the reason of personal conscience must be based on a religious belief. And how the Texas law and also the Montana law will interact with the forthcoming OSHA standard that we discussed. Upon returning to the HERO Act in New York State on Labor Day of this year, Governor Hochul announced that the Commissioner of Health has designated COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health under the New York State HERO Act. What does that mean for New York employers?

**Evandro Gigante:** The HERO Act has certainly been another topic of significant interest among our employees our clients and of course, particularly in those locations or offices in New York as a general matter, the HERO Act requires all employers in New York to implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace. Now that COVID-19 has received such a designation, employers in the state must promptly take certain steps to activate their plans and ensure compliance. That essentially means the following: immediately review the worksite exposure prevention plan and update the plan if necessary. Finalize and promptly activate the plan. Provide a verbal review of the plan and provide each employee with a copy of the plan. Post a copy of the plan in a visible and prominent location at each worksite and ensure that a copy is accessible to employees during all shifts. For employers that maintain an employee handbook you should make sure that the plan is incorporated into the handbook. Now this designation will remain in effect at least until the end of this month. That is until the end of October, at which point the state will reassess whether to continue the designation. Steve, I just mentioned that a verbal review must be provided to employees. What does that entail?

**Steve Hurd:** So this is another of the aspects of the HERO act that we've received a lot of questions about. As you stated, the HERO Act requires that once a designation of highly communicable disease is made that a verbal review be provided of infectious disease standards, employer policies and employee rights under the law. There are some limited exceptions to that including individuals working for staffing agencies, contractors or subcontractors and for those making deliveries, but the verbal review is required for most employers in New York. According to the standard, the verbal reviews shall be provided in a manner most suitable for the prevention of an airborne infectious disease, whether in person in a well ventilated environment with appropriate face masks or personal protective equipment or via audio or video conference technology. Nothing in the act standard or model plan states that the verbal review must be conducted live or be made interactive. Because the designation was made in early September, we recommend that all employers in New York conduct the verbal review as soon as possible. Now I also understand Evandro that the HERO Act requires employers to implement a workplace safety committee, what do employers need to know about that?

**Evandro Gigante:** So Steve, section two of the HERO Act, which unlike section one does not go into effect until November 1 requires employers to allow employees to quote establish and administer a joint labor management Workplace Safety Committee, close quote. So basically, there's no affirmative requirement for employers to create a workplace safety committee, they simply must allow employees to form one and operate in accordance with the terms of the HERO act. Now there are some specifics that are embedded within the statute so far, but we are awaiting more guidance. For now we know that each committee is to be comprised of employees and employer designees, provided that at least two thirds of the committee or non-supervisory employee. In addition, we know that committees would be authorized to, among other things, raise health and safety concerns in the workplace, review any policy put in place in the workplace required by this law and provide feedback or participate in any site visit by any governmental entity responsible for enforcing safety and health standards in a manner consistent with law. And finally, schedule a meeting during work hours at least once a quarter. Those are the things that the committees are authorized to do.

As of now, as I mentioned, there are many unanswered questions regarding the workplace safety committee provisions. The New York State Department of Labor has said that it will provide guidance on this section two have the HERO Act sometime prior to its effective date on November 1, 2021. So these are all really interesting and timely topics and something that we're obviously going to keep our eye on as we continue to see significant developments over the coming weeks and months. Thank you very much, Steve, for your insights here and thank you for joining us on The Proskauer Brief today. Stay tuned for more insights on the latest hot topics in labor and employment law. And please be sure to follow us on Apple Podcasts, Spotify and Google Podcasts.

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- **Evandro C. Gigante**  
Partner
- **Steven D. Hurd**  
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