

Mandatory Vaccination Policy Lawsuit Update: Nurses Take a Shot Against Hospital, But Judge Jabs Back

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Many workplace leaders have been wondering, “Can we require employees to get the COVID-19 vaccine as a condition of employment?” According to a recent Ogletree Deakins [benchmarking survey](#), most employers are not ready to implement mandatory vaccination policies, and 87.9 percent of employers reported that they currently do not plan to require workers to get the vaccine. On the other end of the spectrum, 7.6 percent of respondents have implemented (or are planning to implement) a vaccination mandate. The rest have been undecided, but a recent court opinion on the legality of such mandatory policies may shift some employers’ feelings about which direction they should go and when.

[Hospitals may have stronger justifications](#) than other types of workplaces with regard to masking and mandatory vaccination requirements. Retail, hospitality, and transportation operations also have more reasons to mandate vaccinations, but even employers in other industries that opt for voluntary vaccination policies may still have to determine the vaccination statuses of their employees for purposes of enforcing different masking, social distancing, and quarantining requirements based on the [new guidance for “fully vaccinated” individuals issued by the U.S. Centers for Disease Control and Prevention \(CDC\)](#). As employers have implemented and enforced several different types of policies during the last several months, legal challenges will be increasingly filed in courts across the country. One such case, *Bridges v. Houston Methodist Hospital*, No. 4:21-cv-01774 (U.S. District Court for the Southern District of Texas), was recently decided.

Background

In April 2021, a Texas hospital system announced to its 26,000 employees that they all needed to receive a COVID-19 vaccine as a condition of staying employed. The hospital gave employees only a couple of narrow exemptions—based on a medical condition or a sincerely held religious belief, which the hospital granted when appropriate. More than 100 nurses and other healthcare employees filed suit against their employer, Houston Methodist Hospital and Houston Methodist The Woodlands Hospital, under Texas common law, claiming that it is unlawful for Houston Methodist to require the vaccine.

The employees filed in the 457th Judicial District Court of Montgomery County, Texas, but the hospital removed the case to the U.S. District Court for the Southern District of Texas, because the primary focus of the case was that the U.S. Food and Drug Administration (FDA) has (at this moment, at least) only allowed the administration of COVID-19 vaccines under an “emergency use authorization” classification as prescribed by federal statute. The plaintiffs also asked the court for a temporary restraining order prohibiting enforcement of the hospital's policy and preventing termination of employment of those employees who refused to receive the vaccination by the policy's deadline.

Court's Analysis

On June 12, 2021, after denying the employees' request for a temporary restraining order—and a mere four days after Houston Methodist moved to dismiss the claims—U.S. District Judge Lynn N. Hughes inoculated employers from such challenges (at least in Texas) by kicking the lawsuit out of court because “Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker ... [and r]eceiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties.” And, while Judge Hughes found that “Texas does not recognize [a public policy] exception to at-will employment,” he further determined that—even “if it did, [Houston Methodist's] injection requirement is consistent with public policy.” Judge Hughes also found comfort in the [U.S. Equal Employment Opportunity Commission's \(EEOC\) May 28, 2021, guidance](#) permitting employers to mandate vaccinations in the workplace, subject to valid medical or religious objections.

Judge Hughes went on to explain:

[Plaintiffs have] misconstrued this provision. It confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency. It neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers like the hospital in this case. It does not confer a private opportunity to sue the government, employer, or worker. [Plaintiffs'] claim that the injection requirement violates 21 U.S.C. § 360bbb-3 fails.

This statute governing the FDA (and the drugs and vaccines approved by it) states that those receiving an emergency vaccine must be informed “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.” Since the COVID-19 vaccines were [authorized by the FDA for emergency use](#) at the end of 2020, employers have been waiting for further guidance on the meaning of this somewhat cryptic statutory language and its application to the employment context.

Judge Hughes further clarifies that 21 U.S.C. § 360bbb-3 simply has no relevance to private employers and their employees, and employers are not “coercing” employees to get vaccinated when implementing policies requiring vaccination. He explained:

This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. [Plaintiffs] can freely choose to accept or refuse a COVID-19 vaccine; however, if [they] refuse, [they] will simply need to work somewhere else.

The judge continued by emphasizing the nature of an at-will employment relationship, noting that “[i]f a worker refuses an assignment, changed office, earlier start time, or other directive, he may be

properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain."

Future of Claims Involving Vaccination Policies

Of course, workplace vaccination requirements are nothing new, particularly [in healthcare settings](#). For years, hospitals and other healthcare providers have required employees, subject to certain exceptions, [to receive vaccines against ailments like influenza](#) and Hepatitis B. Some of these employers have faced lawsuits before, and usually they prevail and can continue to enforce their mandatory vaccination policies. However, most of the earlier vaccine-related lawsuits have not involved large classes of employees. Typically, a single employee discharged for refusing the vaccine has subsequently sued over the decision. Employers may want to be mindful of the risk that requiring a vaccine could lead to a lawsuit by a group of employees challenging the requirement, perhaps before it even takes effect. As seen in the few cases involving vaccination policies prior to the COVID-19 pandemic, the employer's process of communicating with the employee about his or her individualized situation will be important. In a similar vein, the employer's proactive efforts to suggest alternative accommodations may assist in reducing the risk of a disability or religious discrimination claim.

The outcomes of claims like these will likely differ in the various states around the country. For example, [Montana recently](#) became the first jurisdiction to recognize an individual's vaccination status as a protected category. The Montana law also prohibits employers from requiring employees to disclose their immunization status and bars employers from requiring employees to receive vaccines still in the FDA's preliminary emergency use authorization status. Legislators in many states have also introduced and proposed bills that would make it illegal for employers to implement and enforce mandatory vaccination policies with regard to employees. It remains unclear how many states will follow Montana's action and pass such laws. Additionally, employers may want to review international regulations and laws on mandatory vaccinations, such as those pertaining to [employers in the United Kingdom](#).

The legal claim brought by the nurses in Texas required them to demonstrate that receiving a COVID-19 vaccination *was a crime*. Other states have much broader protections against wrongful discharge in violation of public policy that might provide a better basis under which to bring a wrongful discharge claim. While Judge Hughes held that requiring vaccination would not be against any federal or state public policy in Texas, judges in other states could potentially find otherwise.

Employers are required—like Houston Methodist did here—to include exceptions to a mandatory vaccination policy for employees with valid medical conditions or sincerely held religious beliefs that prevent them from receiving the vaccine. The Americans with Disabilities Act, Title VII of the Civil Rights Act, and similar state laws prohibit workplace discrimination based on disability and religion and require employers to make reasonable accommodations so that all employees have an equal opportunity to perform the essential functions of their jobs. In the context of vaccine requirements, lawsuits generally allege that excusing the employee from an employer-mandated vaccine would have been a reasonable accommodation for the employee's disability or religious beliefs, but the employer refused to grant the reasonable accommodation. Importantly, *none* of the plaintiffs in this lawsuit against Houston Methodist claimed a valid medical or religious belief for declining to get vaccinated, so those types of challenges are not infringed at all by this court decision.

There may not yet be any law that directly or explicitly makes it illegal for employers to require the vaccine (and now, with this court decision, there is authority expressly greenlighting such policies),

but that may not stop employees from bringing lawsuits around the country to apply existing legal theories in new ways. No crystal ball can predict exactly how many battles will ensue following this court.

It remains to be seen what will happen if the plaintiffs appeal their loss against Houston Methodist or if other cases will be injected into the courts across the country. But this case and the several prior workplace vaccination lawsuits shed light on the type of legal claims employers might anticipate and allow them to fortify their defenses if they choose to implement mandatory COVID-19 vaccination policies.

Key Takeaways

In the wake of this decision, employers should keep the following in mind:

- The types of claims brought against employers by employees who decline the vaccine may vary based on the circumstances, the relevant jurisdiction, and whether the employer is a public or private institution.
- Before implementing and enforcing a mandatory vaccination policy, an employer may want to make a pre-determination that vaccination is essential for the health and safety of employees and third parties, such as patients, customers, guests, etc.
- Having a clear and compliant disability and religious belief reasonable accommodation request process may be helpful in successfully defending a legal attack on a vaccination policy. Employers may want to consider options such as continued masking, social distancing, working remotely, etc., for those employees with valid medical or religious reasons for declining a vaccination.
- The communications and documentation between an employer and employee revolving around the implementation of the policy—as well as the reasonable accommodation request and approval process—may be scrutinized by the courts and, therefore, could serve as critical evidence in defending a mandatory vaccination policy.

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