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Locke Lord QuickStudy: Can a Company Require an ?Independent Contractor to Be Vaccinated??

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While much of the discussion about vaccination mandates involves employees, a more complicated question is whether such mandates can be imposed on independent contractors. This QuickStudy identifies a host of legal and practical issues and provides some guidance for companies.

I. Companies with over 100 Employees

Under President Biden's COVID-19 Action Plan announced last month, the Occupational Safety and Health Administration (OSHA) will be developing a rule that will require all "employers" with 100 or more "employees" to ensure their workforce is fully vaccinated or require at least weekly COVID testing before coming to work. OSHA generally protects employees only; independent contractors are not covered by the Occupational Safety and Health Act.

Will OSHA seek to expand the definition of employee to include independent contractors? Unlikely.

Will OSHA include in its rule a requirement that independent contractors who come onto an employer's premises be vaccinated or produce a negative test result from the past week? Also unlikely, as there can be dozens if not hundreds or thousands of non-employees who enter worksites on a weekly basis, such as a retail store. In this context, independent contractors are nothing more than non-employee third parties.

For purposes of determining whether a business has over 100 employees, will OSHA count as an "employee" independent contractors retained by an employer that regularly visit a worksite? This issue is unclear. However, simplicity should be a hallmark of an effective regulatory action, so it would be unwise for OSHA to complicate matters by counting any independent contractors or other third parties.

II. Government Contractors

The President's COVID-19 Action Plan also provides in an Executive Order that employees of government contractors – those who do business with the federal government – be vaccinated by December 8, 2021, without any option for such workers to provide a weekly negative test result. The guidance requires employers to consider medical and religious exemptions.

Although not expressly required by the Executive Order, government contractors are free to require independent contractors to be vaccinated if the independent workers wish to continue to provide services to them.

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III. Independent Contractor Agreements

If independent contractors are excluded as employees from the upcoming OSHA rule, can large employers with 100 or more employees impose vaccination requirements on independent contractors they engage? If an independent contractor agreement contains terms permitting the company to impose health and safety requirements, then there is likely to be a valid contractual basis to impose a vaccination mandate on an independent contractor.

If the contractor provides services to the company's customers, is there a provision in the independent contractor agreement that the contractor must comply with customer requirements or requests? If so, a customer may dictate that only vaccinated contractors may enter the customer's worksite. In that event, independent contractors should expect to lose out on work opportunities for such customers unless they provide proof of vaccination – and there is little if any legal recourse for independent contractors.

Can independent contractors be forced to provide proof of vaccination status if there isn't a contractual basis for doing so in the governing agreement? Companies should be able to impose a vaccination mandate even in the absence of a contractual basis in the independent contractor agreement. Likewise, where there is no agreement between the parties, a company should be legally free to impose this type of safety and health mandate on independent contractors.

What if an independent contractor has a medical condition that prevents him or her from being vaccinated or has a sincerely-held religious objection to vaccinations? Those exceptions may be available to *employees* under Title VII of the Civil Rights Act of 1964 and comparable state and local human rights and fair employment practice laws, or the Americans with Disabilities Act or state or local disability discrimination laws. However, those laws, with very few exceptions like New York, do not apply to *independent contractors*.

Refusing to accommodate an independent contractor's disability or religious beliefs related to vaccinations may, however, prompt the filing of a complaint in court or with a regulatory agency alleging worker misclassification, so that the contractor can seek to utilize the protections of employment laws.

The company may mitigate that type of risk, though, by accepting a weekly negative COVID test in lieu of vaccination, unless the independent contractor is required to perform services onsite for a customer that does not accept negative tests in lieu of a vaccination.

Bottom line: If an independent contractor resists a mandate to be vaccinated and does not have a basis for his or her refusal premised upon an applicable law, such as the New York law that extends to independent contractors the protections against discrimination including religion and disability, or if he or she is offered the alternative of presenting a weekly negative test result, the worker may end up losing a work opportunity and is unlikely to have a sound legal basis to object.

Independent contractors who are resistant to a vaccination mandate may argue that such a mandate is evidence of direction and control and, as a result, undermines the independent contractor relationship. That is not, however, a compelling legal argument. As the courts have made clear, the type of direction and control that undermines independent contractor status is control over the manner and means by which the services are to be performed;

i.e., how the services must be performed, not imposing health and safety measures. Requiring vaccination or a negative COVID test does not seem to implicate either the manner or the means by which the services are performed. Any such vaccination or negative test requirement is, at most, the type of incidental control that is typically given relatively inconsequential weight by the courts, in the absence of other factors demonstrating control over the how the work is to be performed.

IV. Smaller Employers Not Covered by the President's Action Plan

The federal vaccination requirement does not apply to companies with less than 100 employees or those who do not do business with the federal government. But it is anticipated that some smaller companies will impose a vaccination requirement on independent contractor service providers who regularly provide services at the company's worksite as well as the companies' employees.

There does not appear to be much if any legal recourse for independent contractors to challenge any such rule at a smaller employer, other than claiming that their refusal to be vaccinated is due to a sincerely-held religious belief or disability, and then bringing a lawsuit or administrative complaint that the company misclassified them as independent contractors instead of employees.

V. The Practical Effects of Imposing Vaccination Mandates on Independent Contractors

Practically speaking, what are the likely effects on companies that may decide to require freelancers to be vaccinated from COVID-19?

- Many independent contractors will comply, even if reluctantly. But those independent contractors who are steadfastly opposed to a vaccination mandate may well look for other opportunities where they don't have to be vaccinated or tested weekly.
- For companies who do not provide medical or religious accommodations to vaccine mandates, a business may find that it has provoked a freelancer to ?file an independent contractor misclassification lawsuit, where the contractor claims he or she is actually an employee and therefore entitled to legal protections that are otherwise available only to ?employees.
- Companies that impose vaccination mandates on both employees and independent contractors performing similar functions may find that they are creating a shortage of workers. For companies that impose vaccination mandates only on employees, those employees may seek to provide services on an independent contractor basis.

Key Takeaway

Before a company imposes a vaccination requirement, it would be wise to make sure it has thought through the issues above and taken steps to ensure it has an enhanced level of compliance with applicable independent contractor laws, given the foreseeability that one or more independent contractors may file misclassification suits including a class action. Many prudent businesses have resorted to a process such as IC Diagnostics (TM), where a company restructures, re-documents, and/or re-implements its independent contractor relationships to minimize misclassification liability in a customized and sustained manner consistent with the existing business model.

If time is of the essence before a vaccination mandate is imposed on independent contractors, a "quick and dirty" upgrade can oftentimes be accomplished fast enough to provide at least a greater level of protection from an

independent contractor misclassification lawsuit.

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