

What About Vaccination Mandates for Independent Contractors?

Labor & Employment Workforce Watch

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The country is focused on vaccination mandates for employees and customers. What about independent contractors? Can companies require them to be vaccinated? The answer to that question may depend on whether the independent contractor has been properly classified. Before imposing a vaccination mandate on independent contractors, companies should enhance their compliance with applicable federal and state laws governing the classification of independent contractors.

President Biden issued his [COVID-19 Action Plan](#) last month. Under the Plan, the Occupational Safety and Health Administration (OSHA) will be developing a rule that will require all private “employers” with 100 or more “employees” to ensure their workforce is fully vaccinated or require at least weekly negative COVID-19 testing before coming to work. The Action Plan also requires vaccinations for employees of [government contractors](#); a negative test result will not suffice. *Notably, the Plan does not mention whether independent contractors will be covered by the vaccination mandates.*

Large Employers: Companies with over 100 Employees

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? The national discussion over the appropriate test for IC status is hotly debated. OSHA is unlikely to stride into that hotly contested area when issuing their rules under the Biden Administration’s COVID-19 Action Plan.

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? Generally speaking, independent contractors are, legally, nothing more than non-employee third parties. There can be dozens if not hundreds or thousands of non-employees who enter worksites on a weekly basis, such as a retail store. Some of those non-employees may be independent contractors who visit infrequently or regularly. If OSHA were to require independent contractors as well as employees to be vaccinated if they visited a company’s worksite, it would place an enormous burden on businesses to check every IC who visits a worksite. For that reason, it is more likely that OSHA will avoid including in its rule any vaccination mandate that would apply to independent contractors.

Government Contractors

Under the COVID-19 Action Plan, government contractors must ensure that employees are vaccinated by December 8, 2021, without any option for such workers to provide a weekly negative test result. Government

contractors are, however, required to consider medical and religious exemptions.

If OSHA chooses not to require large employers to ban unvaccinated independent contractors from their worksites, it is likely that government contractors will not be required to impose vaccination mandates on independent contractors. However, government contractors are free to require independent contractors to be vaccinated.

Independent Contractor Agreements and Vaccination Mandates

If the upcoming OSHA rule does not define employees to include independent contractors, can large employers with 100 or more employees still impose vaccination requirements on independent contractors they engage? Barring state or local law prohibitions, such as the recently issued [Executive Order](#) by Texas Governor Greg Abbott prohibiting private employers from requiring COVID-19 vaccines, the answer is probably yes.

Even where the underlying independent contractor agreement is silent on matters of health and safety or where there is no agreement in place, companies should be legally able to impose a vaccination mandate as a health and safety policy for its worksites.

IC Misclassification Claims

What if an independent contractor claims to have been misclassified? In that event, the issue is much more complicated where, for example, 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. Those laws, with very few exceptions in some states like New York, do not apply to *independent contractors*.

A company's refusal to accommodate an independent contractor's disability or religious beliefs related to vaccinations may prompt the independent contractor to file a complaint in court or with a regulatory agency alleging worker misclassification, claiming he or she is an employee entitled to the protections of employment laws.

To mitigate that type of risk, a company may wish to permit the independent contractor, as an alternative, to furnish a weekly negative COVID-19 test in lieu of vaccination. In the absence of offering independent contractors such an alternative, contractors may feel they have little choice but to claim misclassification and assert they have a sincerely-held religious belief or a disability-related reason for not becoming vaccinated. In that event, independent contractors may try to argue that such a mandate is evidence of direction and control and, as a result, undermines the independent contractor relationship.

While such an argument may have facial appeal, it is not a compelling legal argument. Court decisions have made clear that 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. Health and safety requirements, such as a vaccination mandate, do not relate to how independent contractors perform their services. A vaccination or negative COVID-19 test requirement is likely to be regarded by the courts, at most,

as a type of incidental control that is typically given inconsequential weight by the courts, at least in the absence of other factors demonstrating control over the how the work is to be performed.

Smaller Employers Not Covered by the President's Action Plan

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. Other than state and local law prohibitions on vaccination requirements, it is unlikely that independent contractors will have much if any legal basis to challenge such a 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.

What Can Companies Do To Best Protect Themselves If They Wish To Impose a Vaccination Mandate on Independent Contractors?

Businesses that choose to impose a vaccination mandate on independent contractors visiting their worksites, yet do not provide medical or religious accommodations to vaccine mandates, may find that they have 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.

Therefore, before imposing a vaccination requirement on independent contractors without accepting a weekly negative COVID-19 test as an alternative, companies should make sure they have taken steps to ensure they have 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 the 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.

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