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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 16

Vaccine mandates and return-to-work scenarios seem to be the hot topics of the day, and with all hot topics, along comes litigation. Along with litigation, comes serious discussions by employers and organizations about how best to protect their workers and avoid a courtroom.

But, we cannot forget that COVID-19 is causing other litigation, such as refund lawsuits and demands of healthcare providers to provide certain treatments. And, the EEOC recently jumped into the fray over telework accommodations. We examine it all in this issue of *Unprecedented*.

Thank you for reading.

[James E. Simon](#), Co-Editor of *Unprecedented*

and

[Joseph A. \(Jay\) Ford](#), Co-Editor of *Unprecedented*

[COVID-19 Task Force](#)



[COVID-19 Vaccine Mandates: Unions Divided Over 'Complex Problem' for Organized Labor](#)

"The move comes amid a string of deals between major companies and unions over vaccine mandates that shows the labor movement is increasingly willing to support such precautions but also eager to shape their implementation."

Why this is important: President Biden frequently highlights his relationship with labor, so you might expect unions would be in favor of his recent actions to support vaccinations designed to protect employees and increase productivity after a year of layoffs, furloughs, and other negative economic consequences because of COVID-19. Instead, unions have taken different views on vaccine mandates.

Although the late AFL-CIO President Richard Trumka said he would support a vaccine mandate, other labor leaders have opposed mandates. For example, the International Association of Fire Fighters and American Federation of Teachers have at times opposed employer-mandated vaccination.

It appears most unions oppose employer-mandated vaccinations as interfering with a union's role to negotiate these rules. Employers with employees represented by a union may not unilaterally require employees to get vaccinated depending on the terms of the parties' collective bargaining agreement. Employers may need to bargain with the union regarding when, how, and which employees must be vaccinated, exceptions for vaccinations, and disciplinary action for employees who violate a vaccination mandate without an applicable excuse. For example, the Association of Flight Attendants negotiated an optional program providing extra vacation days for flight attendants who received the vaccine. Employers considering their options for requiring or incentivizing their unionized employees to get vaccinated should work with counsel to determine what decisions require bargaining with the union. --- [Mitchell J. Rhein](#)

NYC Lawyer Who Resisted Return-to-Office Advances Firing Lawsuit

"A New York City real estate management company must face discrimination claims by an in-house attorney who says he was fired for refusing to return to the office during the Covid-19 pandemic, according to a Manhattan federal judge's ruling."

Why this is important: When employers ask their workforce to return to the office after months working at home due to the pandemic, they may see an uptick in disability accommodation requests from employees who want to continue teleworking. As with any accommodation request, the employer is entitled to understand the disability-related limitation that forms the basis for the requested accommodation. If there is no disability-related need for telework, the employer does not have to permit the employee to work remotely as an accommodation. When there is a disability-related need for an accommodation, an employee's prior telework experience may be relevant to their request to continue working from home, such as the employee's ability to successfully perform the essential functions of the job while working remotely. Of course, if the employer can effectively address the employee's need with another type of reasonable accommodation at the workplace, the employer may choose that accommodation instead of telework. All accommodation requests should be followed by cooperative dialogue between the employer and employee as part of the interactive process. --- [Sarah E. Kowalkowski](#)

Federal Appeals Court Denies IU Request to Dismiss COVID-19 Vaccine Mandate Lawsuit

"IU argued that, since school has already begun and the students challenging its mandate had received exemptions or withdrawn from IU, they no longer had standing."

Why this is important: As the 2021 academic year kicked off, many universities and colleges instituted vaccine mandates requiring students to be vaccinated if they wished to attend classes. In response, many students have filed lawsuits over these mandates, including several students at Indiana University. Although Indiana University obtained early success in getting these claims dismissed in district court and in a federal court of appeals -- and the U.S. Supreme Court refused to intervene -- the Seventh Circuit Court of Appeals agreed to hear the students' challenge to the mandate, thus queuing up an early court battle as to whether universities can impose these types of mandates. --- [James E. Simon](#)

Arizona Becomes First State to Sue Biden Administration Over COVID-19 Vaccine Mandates

"But while many details about the rules remain unknown, Biden appears to be on firm legal ground to issue the directive in the name of protecting employee safety, according to several experts interviewed by The Associated Press."

Why this is important: Biden's recent announcement of a vaccine "mandate" is already facing legal challenges, even though the details of that rule have not been released. The rule would require private employers with 100 or more employees to mandate that their workers are either vaccinated or tested for COVID-19 once a week. It is predicated that the rule would affect two-thirds of the American workforce, or 100 million Americans total. Given the amount of litigation challenging lesser rules about mask wearing, social distancing, and stay-at-home orders, it was no surprise that legal opposition to Biden's rule was almost instantaneous. Arizona was the first state to file a lawsuit challenging the rule, arguing that it was unconstitutional because it allegedly favors undocumented immigrants (who the Arizona Attorney General believes would not be subject to the rule) over documented citizens (who he believes would). Other states were quick to join, including a group of two dozen Republican state Attorneys General who issued a public letter threatening the Biden administration with legal action if the rule was put in place. Litigation about Biden's proposed rule joins an already crowded field of lawsuits about vaccine mandates. For example, hundreds of universities require students to get the COVID-19 vaccine before arriving on campus, alongside the usual roster of vaccines (Measles, Mumps, Rubella, Meningococcal, Polio, Tetanus, Hepatitis B, etc.).

There has been significant litigation regarding university mandates, which recently resulted in the United States Supreme Court, led by Justice Amy Coney Barrett, denying emergency injunctive relief to a group of students at Indiana University, which has a vaccination requirement subject to religious, ethical, and medical exceptions. This denial, paired with aging -- but still effective -- Supreme Court precedence regarding small pox vaccines and health care requirements means that lawsuits like Arizona's are not clear cut. Add in the fact that some states have passed legislation to ban vaccine mandates, and there is a complex interplay of local, state, and federal law when it comes to vaccination requirements.

Biden's vaccination rule will add to this complex interplay and likely fast track a definitive decision from the court system. Spilman will continue to monitor the development of the Biden administration's rule and regulations, plus all the resulting litigation, and stands ready to assist in creating workplace vaccination policies that comply with the rules and regulations. --- [Chelsea E. Thompson](#)

StubHub Settles with US Attorneys General Over Its COVID Refunds Policy

"StubHub has formally agreed that it will pay out an estimated \$16 million in cash refunds to consumers in ten US states who were impacted by the ticket resale platform's decision to change its refunds policy as the COVID lockdown got underway last year."

Why this is important: If you purchased tickets from StubHub for an event that was cancelled because of the COVID-19 pandemic, you -- like many Americans -- may have been frustrated by the secondary ticketing company's decision to offer vouchers instead of cash refunds. In March 2020, StubHub implemented a policy providing that individuals who purchased tickets to a show that was later cancelled could be forced to accept a voucher value at 120 percent of the price of the cancelled ticket, rather than a cash refund. This decision drew criticism from consumer rights advocates and Attorneys General in many states, which led to class action lawsuits. StubHub claims that the policy change was necessitated by its cash flow problems during the pandemic. StubHub recently agreed to settle the lawsuits brought by several Attorneys General and pay an estimated \$16 million in cash refunds to consumers. This case presents yet another example of how companies are still waiting to see the full impact of decisions they were forced to make during the pandemic. --- [Joseph A. \(Jay\) Ford](#)

String of Suits Force Covid-19 Ivermectin Treatment in Hospitals

"The trend is unnerving health lawyers who worry court orders overriding medical guidance could lead to a slippery slope in health systems already strained by the pandemic."

Why this is important: A registered nurse in Louisville, Kentucky, filed a lawsuit against the hospital that is treating her husband for COVID-19, seeking to force her husband's doctors to treat him with ivermectin, an anti-parasitic drug that is not approved for treating COVID-19, but has nevertheless garnered a cult following across the Internet. Her case suffered an early setback, with the judge denying her request and succinctly noting that it appeared to stem from misinformation "if not out-right

falsehoods." Other plaintiffs have filed similar suits, with at least one in Cincinnati, Ohio initially obtaining a court order directing a hospital to administer ivermectin, only to have this order overruled by another judge. Many in the health care industry are troubled by these cases, and rightfully so. It would seem incredible for courts to permit lay persons to order medical professionals to administer treatment that they professionally disagree with, yet that is exactly what these cases are seeking to do. --- [James E. Simon](#)

EEOC Sues Georgia Facility Over Denying Employee's Request for Remote Work

"This case represents the first lawsuit the EEOC has filed about a request for an ADA accommodation related to COVID-19."

Why this is important: Documentation regarding requests to accommodate a disability is key because of the fact-based nature of accommodation decisions. And, more employees may be requesting the same accommodation now than ever before: telework. In this case filed by the EEOC, the employee alleges that she was denied a request to work remotely two days per week, but the company permitted other employees in her position to work from home. When employers grant or deny requests for telework (or offer alternative accommodations instead of telework), they should paper their files with the facts that form the basis for their decision. The reasons for any differences in how an employer responds to requests for telework should be clear from the documentation. The EEOC has provided updated guidance throughout the past 18 months regarding the effect of the pandemic on accommodation requests, including requests for telework, and will expect employers to follow all updated guidance. --- [Sarah E. Kowalkowski](#)



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Responsible Attorney: Eric W. Iskra, 800-967-8251