

November 20, 2021

UPDATE:
NEW UTAH LAW REGARDING COVID-19 VACCINATIONS & TESTING

On November 16, 2021, Governor Cox signed into law [S.B. 2004](#), entitled “Workplace COVID-19 Amendments.” The law went into effect immediately upon signing and imposes a number of new state-specific restrictions on Utah employers, some of which conflict with the emergency temporary standard (“ETS”) enacted by the federal Occupational Safety and Health Administration (“OSHA”) earlier this month. Under the new law, Utah employers generally:

- May not require employees to be vaccinated for COVID-19.
- May not require employees to show proof of vaccination for COVID-19.
- May not maintain copies of records of proof of vaccination for COVID-19.
- Must pay for the cost of employee COVID-19 testing.

A more detailed discussion about the new Utah COVID-19 law and how it may apply to Utah employers is included below.

How does the new law affect employers with 15 or more employees?

Utah employers with 15 or more employees (excluding federal contractors and persons subject to Medicare or Medicaid regulations regarding COVID-19 vaccinations) may no longer require any employee or prospective employee to obtain a COVID-19 vaccination or show proof of vaccination status if the employee or prospective employee submits a statement to his or her employer that receiving a COVID-19 vaccine would:

1. be injurious to the health and well-being of the employee or prospective employee;
2. conflict with a sincerely held religious belief, practice, or observance of the employee or prospective employee; or
3. conflict with a *sincerely held personal belief* of the employee or prospective employee.

The first two categories are similar to rights that employees and prospective employees already have and may exercise under federal and state law, including the Americans with Disabilities Act, Title VII, and the Utah Antidiscrimination Act. The personal belief category, however, is entirely new and has no equivalent under existing federal or state law. Given that the term “personal belief” is undefined and seemingly unrestricted in scope, it now appears that any employee or prospective employee can refuse to obtain a COVID-19 vaccination or show proof vaccination status for virtually any reason.

What does this mean as a practical matter? The new law likely renders many mandatory COVID-19 vaccination policies ineffective under state law because an employee can circumvent any mandatory vaccination requirement simply by stating that he or she has a sincerely held personal belief against either receiving the vaccination or providing proof of vaccination status. Employers with existing mandatory COVID-19 vaccination policies who wish to continue encouraging vaccination through their policies should revise them to include the three exemptions under the new COVID-19 law.

If an employee or prospective employee refuses to obtain a COVID-19 vaccination or provide proof of vaccination status for any of the three reasons, the Utah COVID-19 law prohibits an employer from taking an “adverse action” against the employer or prospective employer, which the new law defines as “the refusal to hire a potential employee” or “the termination of employment, demotion, or reduction of wages of an employee.”

Does this mean mandatory COVID-19 vaccination policies are now useless?

Not necessarily. Although the Utah COVID-19 law prohibits an employer from terminating an employee or prospective employee who refuses to be vaccinated or show proof of vaccination status, the new law expressly states that an “adverse action” does not include an employer’s reassignment of an employee or even the termination of an employee, if reassignment of the employee is “not practical.”

Consequently, if an employee refuses to be vaccinated or show proof of vaccination for any of the three reasons described above, Utah’s COVID-19 law will allow a covered employer to reassign the employee, presumably so long as such reassignment does not constitute a demotion and does not involve a reduction of wages of the employee. (The new law does not address whether a reduction of benefits or other employment action, such as moving an employee to a different shift where he or she is less likely to interact with others, would constitute an adverse action.)

Additionally, while an employer may not terminate an employee out of hand because he or she refuses to obtain a COVID-19 vaccination or provide proof of vaccination status, if the employer considers reassigning the employee to a different position and the reassignment is not practical, the new law allows employers to terminate the employee. The new law does not provide any guidance as to when reassignment of an employee will be deemed “not practical,” nor does it identify who makes such assessment. Because the new law is silent on this issue, employers arguably retain the right and

authority to make such decisions for their individual businesses. How the law will be applied in practice, however, remains to be seen.

By way of one cautionary note, the discussion above should be limited to circumstances in which an employee refuses to be vaccinated or show proof of vaccination due to a sincerely held personal belief. If an employee refuses to be vaccinated due to health reasons or because of a sincerely held religious belief, employers should consider their additional obligations under the ADA and Title VII.

What about employers with fewer than 15 employees?

The three vaccination exemptions discussed above are not applicable to Utah employers who have fewer than 15 employees. Such employers may still require their employees to obtain a COVID-19 vaccine or show proof that employees received a COVID-19 vaccination, but only if the employer “establishes a nexus between the requirement and the employee’s assigned duties and responsibilities.”

The new COVID-19 law does not define what constitutes a nexus between the requirement and the employee’s assigned duties and responsibilities. Presumably a nexus would exist where an employee’s duties and responsibilities require him or her to physically interact with others, including members of the general public or co-workers. Borrowing from the OSHA ETS, however, it is unlikely that an employer would be able to establish a nexus if an employee does not report to a workplace where other individuals are present, if the employee works exclusively from home, or if the employee works exclusively outdoors.

Can employers still keep or maintain records of proof of vaccination?

The new law prohibits Utah employers of any size (again, excluding federal contractors and employers subject to Medicare or Medicaid regulations regarding COVID-19 vaccinations) from keeping or maintaining a record or copy of an employee’s proof of vaccination unless (1) maintaining such records is required by law, (2) an established business practice or industry standard requires otherwise, or (3) a contract for goods or services entered into before November 5, 2021 required the employer to keep or maintain proof of vaccination status (excluding contracts between the employer and its employees).

The new law does not prohibit an employer from asking its employees whether they are vaccinated for COVID-19 or from keeping records identifying which employees are vaccinated. Unless allowed under one of the three record exemptions identified above, however, employers will have to take employees at their word when they ask about vaccination status, as employers will no longer be able to verify the accuracy of an employee’s representation by asking for proof of vaccination status.

What if employers have already collected vaccination records?

The new law only prohibits employers from collecting proof of vaccination after November 16, 2021. Any vaccination records an employer obtained prior to that date would not be covered governed by the new law; however, employers may want to consider deleting or destroying such records if they are not needed, particularly employers with fewer than 100 employees.

If an employer has obtained proof of vaccination for COVID-19 since the new law went into effect on November 16, 2021, employers should immediately delete or destroy such records unless the employer is required to maintain them under one of the three records exceptions identified above.

Can employers require their employees to be tested for COVID-19?

Yes. Nothing in the new law prohibits Utah employers from requiring employees to be tested for COVID-19. However, the new law requires that employers pay for all COVID-19 testing an employee receives in relation to or as a condition of the employee's presence at the workplace.

Does Utah's COVID-19 law conflict with OSHA's COVID-19 ETS?

As a practical matter, not yet.

By way of brief background, on November 5, 2021, OSHA issued an ETS requiring employers with 100 or more employees to develop, implement, and enforce a COVID-19 policy and to take other safety-related steps to protect unvaccinated employees from the risk of contracting COVID-19 in the workplace. The ETS requires covered employers to, in relevant part:

- develop, implement, and enforce a COVID-19 policy, which either mandates vaccination or requires unvaccinated employees to wear a face covering in the workplace and elect weekly COVID-19 testing; and
- Determine the vaccination status of each employee, including obtaining proof of vaccination.

On November 12, 2021, the Fifth Circuit Court of Appeals granted a motion to stay OSHA's COVID-19 ETS. In response, OSHA formally suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation. (See OSHA's suspension statement [here](#).) All federal legal challenges against the OSHA COVID-19 ETS were subsequently consolidated with the Sixth Circuit Court of Appeals, which has not yet issued any decision. This means the OSHA ETS continues to remain in legal limbo.

Because the OSHA COVID-19 is currently stayed, the new Utah COVID-19 law is not currently in conflict with any active OSHA ETS (or with any state regulations promulgated by the Utah Occupational Safety and Health Division under OSHA and consistent with the COVID-19 ETS).

What if OSHA's COVID-19 ETS goes into effect?

The simple answer is that we do not yet know whether that will happen, or what effect it will have on Utah's COVID-19 law if it does. The ETS expressly provides that it will preempt and invalidate any state or local requirements that ban or limit an employer's authority to require a vaccination. So *if* the ETS (or any portion of it) is allowed to go into effect, any provisions of the new Utah law that conflict with the ETS could arguably be preempted and rendered invalid. But whether that will occur remains an open question.

Note that even if the ETS goes into effect as drafted, it is possible for Utah employers to comply with both the ETS and the new Utah COVID-19 law. Employers could do so by adopting a policy under the ETS that requires unvaccinated employees to wear a face covering in the workplace and submit to weekly COVID-19 testing. Utah law will simply force employers to pay for the cost of COVID-19 testing, which could be considerable depending on the number of unvaccinated employees who will be subject to weekly testing.

Does this mean that employers who would otherwise elect to adopt mandatory vaccination policies under the ETS should abandon their plans in favor of the mask and testing option? Not necessarily. Until we know more, it is probably premature for employers to make any definitive decisions on this issue. Employers should be prepared to be flexible and "roll with the punches." Ultimately, however, while these issues remain in flux, employers should consult with their legal counsel regarding which options are best for them.

What if an employer violates the new Utah law?

Unknown. The new Utah law does not include any statutory remedy or enforcement mechanism. Nor does it provide for a private right of action that would allow an employee to bring a claim against his or her employer for violation of the Utah law.

CONCLUSION

The legal landscape for employers during the COVID-19 era continues to change and evolve, and we do not yet have answers to many questions. For now, however, Utah employers would be advised to comply with the new Utah COVID-19 law until more guidance becomes available or until the Utah Legislature and/or courts provide employers with legal certainty regarding these and other open questions.

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