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Briefly

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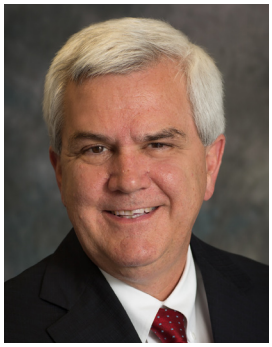

Howard B. Jackson

"[I]f the allegations are correct, United has done little to nothing to engage in the interactive process … requests are either administratively denied, or if granted employees are provided an unpaid leave of indefinite duration."

NOT SO UNITED – UNITED AIRLINES EMPLOYEES SUE OVER VACCINATION MANDATES

On September 21, 2021, a group of six employees filed a lawsuit against United Airlines ("United") in the federal court for the Northern District of Texas. The Plaintiffs are challenging United's vaccine mandate and have asked the Court to certify their case as a class action. The allegations in the case are for now just that, allegations. Examination of the claims provides some insight into issues employers and employees are grappling with when it comes to vaccination mandates.

The Complaint alleges that on August 6, 2021, United's Chief Executive Officer, Scott Kirby, announced that all employees must be vaccinated within five weeks of the FDA granting full approval of a vaccine, or five weeks after September 20, 2021, whichever came first. The FDA approved the Pfizer vaccine on August 23, 2021. Therefore, United employees had to receive at least the first dose of a vaccine by September 27, 2021.

As has been widely recognized, employers must consider exceptions for employees who register objections to being vaccinated on health or religious grounds. This is per requirements in the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The allegations in the case center largely around how United has handled, or in the Plaintiffs' view, failed to handle properly, those obligations.

Let's note here that the Plaintiffs have differing job titles and duties. Two of them are Captains. The others include a flight attendant, an Aircraft Technician, a Stations Operations Representative, and a Customer Service Representative. Obviously, these persons work in a variety of work environments that involve differing levels of exposure to other employees, vendors, or the public.

The Plaintiffs take issue with what they allege have been United's practices in connection with receiving, considering, and granting or denying accommodation requests. Let's take a quick look at each.

With respect to receiving requests, United has an online accommodation request system through its "Help Hub." That's great! Right? Well, except that, per the allegations, as of August 31, 2021, United stopped accepting requests for accommodation through this system. There is no other formal method for submitting such requests to United. It appears then that employees should go through their supervisor, which one Plaintiff alleged that he did.

Another issue with the online system was that it permitted only one reason for an accommodation request. More than one of the Plaintiffs allege that they have both health and religious based objections to receiving the vaccine. How were they to communicate this when the system provided by the employer would accept only one reason?

Plaintiffs also alleged issues relative to United's consideration of the requests. For example, they allege that United considered any requests for religious accommodation received after August 31, 2021, to be "untimely."

Further with respect to requests based on religion the Plaintiffs allege that United followed up the request with a series of questions. Plaintiffs alleged that the questions were probing and manipulative. Alleged questions included:

- "Are you aware if any vaccines or medications you have previously received were created, researched, tested or otherwise involved the use of stem calls" and, if so, "please explain why receiving such vaccines or medications were not a violation of your sincerely held religious belief;" and,
- "What about your religious belief prevents you from

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WHEN WORK HEATS UP, OSHA MAY PAY A VISIT

Mary C. Moffatt

"In the guidance, OSHA establishes an enforcement initiative aimed to preventing and protecting employees from serious heat-related illnesses and deaths while working in hazardous hot indoor or outdoor environments."

As many businesses anxiously await anticipated guidance from OSHA concerning mandatory COVID vaccinations, OSHA has not ignored other employee safety priorities.

On September 1, OSHA issued a memorandum establishing inspection guidance for heat-related hazards, which is part of the Biden administration's effort to "combat the hazards associated with extreme heat exposure," as reflected from the "Statement by President Biden on Mobilizing the Administration to Address Extreme Heat" which was issued on September 20, 2021. OSHA is also in the process of developing a National Emphasis Program on heat hazard cases and has formed the National Advisory Committee on Occupational Safety and Health Heat Injury and Illness Prevention Workgroup. These measures are all part of the agency's effort to protect workers from heat-related illnesses and injuries.

The inspection guidance is effective as of September 1, 2021 (the date of issuance) and emphasizes implementation of proactive interventions, such as providing employees with adequate water, rest, shade, and other measures to prevent heat-related issues. In the guidance, OSHA establishes an enforcement initiative aimed to preventing and protecting employees from serious heat-related illnesses and deaths while working in hazardous hot indoor or outdoor environments. It expands OSHA's heat-related illness prevention efforts by setting forth the process for inspections, enforcement (i.e., issuing citations) and outreach efforts. The initiative prioritizes heat-related interventions and inspections of work activities on days when the heat index exceeds 80°.

Heat-related illnesses generally occur when physical work is performed in conditions of high ambient heat, especially where conditions of heat and humidity contribute to the heat index and where there is inadequate cooling in the facility. The inspection guidance notes that "employers have a duty to prevent heat-related illnesses and deaths in both indoor and outdoor workplaces." The guidance further notes that typical worksites impacted by heat-related illnesses will include foundries, brick-firing and ceramic plants, glass production facilities, warehouses without adequate climate control, chemical plants, as well as outdoor work activities such as agricultural, landscaping, waste collection activities, package and mail delivery, and other activities requiring high physical exertions or heavy clothing.

The guidance further notes that on "heat priority days" (defined as those days with a heat index that exceeds 80°F), there is a need to increase OSHA enforcement efforts so as to identify potential heat-related hazards present in working conditions before the occurrence of an illness or death. During any heat-related inspections, OSH Compliance Officers (i.e., inspectors) are advised to focus on investigation measures to address these issues such as:

- Review of the OSHA 300 logs as well as records of employee emergency room visits indicating heat-related illnesses;
- Interview workers for any reports of headaches, dizziness, fainting, dehydration, or other symptoms that may indicate heat-related illnesses; and
- Review the employer's plan to address heat exposure as well as any training records reflecting a heat-illness prevention program.

The guidance also indicates the OSHA Inspector should note potential sources of heat-related illnesses such as working in direct sunlight, hot vehicles, or working in areas with hot air, near a gas engine, or the use of heavy or bulky clothing.

Finally, the guidance memorandum notes that any proposed citation for heat-related hazards where the employer's procedures have failed to protect workers adequately, can be issued under the General Duty Clause, Section 5(a) (1) of the OSH Act.

This guidance and the heat-related initiative applies "to indoor and outdoor worksites where potential heat-related hazards exist." The guidance further notes that "working conditions that have resulted in serious heat-related illnesses occur in all major industry sectors of employers, including general industry, construction, agriculture, and maritime."

According to OSHA's News Release, OSHA Area Directors across the nation will (1) prioritize inspections of heat-related complaints, referrals and employer-reported illnesses and initiate an onsite investigation where possible; (2) instruct compliance safety and health officers, during their travels to job sites, to conduct an intervention (providing the agency's heat poster/wallet card, discuss the importance of easy access to cool water, cooling areas and acclimatization) or opening an inspection when they observe employees performing strenuous work in hot conditions; and (3) expand the scope of other inspections to address heat-related hazards where worksite conditions or other evidence indicates these hazards may be present.

In the coming months, OSHA is also expected to issue

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an Advance Notice of Proposed Rulemaking on heat injury and illness prevention in outdoor and indoor work settings. The advance notice will initiate a comment period allowing OSHA to gather diverse perspectives and technical expertise on topics including heat stress thresholds, heat acclimatization planning, exposure monitoring, and strategies to protect workers.

Employers who have employees working in areas of high heat exposure (whether indoors or outdoors) should take steps promptly towards mitigating the presence and potential impact of any heat-related hazards, as well as adopting a written Heat Illness Prevention Plan and related employee training. The attorneys at Wimberly Lawson are available to assist employers with respect to these compliance issues.

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getting the COVID vaccines, but not taking other types of medicine?"

In addition, United asked persons requesting religious accommodation to submit a pastoral or third-party letter – within three days – attesting to the employee's religious beliefs. This request was later replaced by the requirement for a letter from a third party attesting to the employee's sincerely held religious beliefs.

With respect to granting or denying requests, as noted above some requests on religious grounds were denied as "untimely." In certain instances, Plaintiffs allege that United granted an accommodation of an unpaid leave of absence of indefinite duration. The Complaint alleges United has stated that such leaves could last up to seventy-two months. Per the allegations, such leaves are effectively a termination of employment.

What are some principles we may glean from our ADA experience as well as from analysis of the allegations in this case? Several are offered below.

The ADA is not well suited to rigid rules. In so many ways the ADA requires individualized analysis. One can understand why a large organization like United, or any organization for that matter, would like to be able to set out some easy to understand and apply rules and simply follow them. The ADA does not lend itself to such.

Assuming the allegations are correct, United has done little to nothing to engage in the interactive process with anyone. Requests are either administratively denied, or if granted employees are provided an unpaid leave of indefinite duration. Such a rigid process will not pass ADA muster.

Instead of setting out hard and fast rules, employers should provide information about who is designated to receive requests for accommodation and the appropriate bases for such requests. The persons who receive them should be trained in how to analyze job needs and work with line management to consider and implement accommodations. What works for one job may not work for another. But the employer and employee must work together and make the effort.

The same is true for requests based on religious reasons. Simply denying requests based on supposed timeliness is not sufficient. Title VII does not grant the employer the ability to draw a line in the sand and refuse to consider requests submitted after a certain date. An employee who waits to submit a request could perhaps be subject to some consequences such as working in an alternative assignment or being held out of work for a brief period of time while the employer works in a bona fide manner to find accommodation. But refusing to consider a request because of the date on which it is submitted is certainly not in compliance with the religious accommodation obligation in Title VII.

Encourage and engage in bona fide communication. By way of example, it is acceptable for an employer to request some amount of documentation to substantiate the need for accommodation. In the case of health-related reasons, an employer may wish to receive documentation from the employee's health care provider stating that the employee is advised not to receive the vaccine. CAUTION here. Employers do not want to receive documentation about underlying reasons except where such information is required for reasons of determining appropriate accommodation steps. Otherwise, the request could become an unlawful medical inquiry.

Similarly with respect to requests for religious accommodation, an employer may wish to request either from the employee or a third party some level of explanation for the religious grounds of objection. An appropriate explanation of the reasoning is sufficient, however. Going into detailed or even argumentative questioning can illustrate hostility to the request and lead to additional issues with employees.

Consider accommodations that can make it work. This is the proper attitude for an employer. Obviously, there are many different work environments that each have their own risks, considerations and opportunities for accommodation. That is often true even within the same organization. As noted above, a Captain is in a different environment than an Aircraft Technician, who is in a different environment than a Stations Operations Representative. Each situation should be considered separately. The employer should work with its management team, and the employee should participate in good faith, in an attempt to work out an accommodation that acceptably reduces risk and allows the employee to work.

One can imagine circumstances where the risk of allowing an unvaccinated person to work in certain positions it not acceptable. This could particularly occur in healthcare. It is not always possible to reach accommodation. But if everyone involved approaches the situation with a view toward finding a good resolution, that is what will happen the great majority of the time. And your organization, dear reader, will not be on the receiving end of a class action "failure to accommodate" lawsuit.

Court issues Temporary Restraining Order. On October 12, 2021 the Court entered a temporary restraining Order that prohibits United from placing employees granted a medical or religious exemption on unpaid leave, and that prohibits United from denying requests for exemption based on timeliness. While such an Order is temporary this move appears to signal the Court's view of United's policies on those points.