

PUBLICATION

Tennessee General Assembly Enacts COVID-19 Legislation that Impacts Tennessee Employers

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Over the weekend, the Tennessee General Assembly enacted legislation that significantly restricts private businesses and public schools from taking certain protective measures to prevent the spread of COVID-19. The law, which will be effective upon signature by Governor Bill Lee, provides new directives to businesses, employers, and schools regarding some of the following topics: COVID-19 vaccine mandates, whether an entity can compel proof of COVID-19 vaccination, face coverings, unemployment benefits, monoclonal antibodies, and liability for COVID-19 infections.

Private Businesses

The main directive of the new law prohibits private businesses from compelling or otherwise taking adverse action against a person to provide proof of vaccination if the person objects to receiving a COVID-19 vaccine for any reason. The definition of the term "person" in the statute is defined as "an individual." This sweeping definition is broad enough to include applicants, as well as employees. The law specifically states that it should be broadly constructed in a stated effort to "safeguard liberty." In effect, this new law prohibits most businesses in Tennessee from having a COVID-19 vaccine mandate.

This provision further prevents a business from requiring proof of vaccination from customers or others wishing to utilize the services of the business or enter the business premises. There is a limited exception for entertainment venues, which may allow a person to voluntarily provide proof of vaccination or proof of antibodies instead of a negative COVID-19 test result to gain admission to a "place of entertainment." This exception also mentions that a business may allow a patron to voluntarily provide a negative COVID-19 antibody test, although it is not clear whether a business that would accept proof of a vaccine in lieu of a test must accept proof of antibodies as well.

Another provision prohibits employers from taking "adverse action" against an employee to compel them to provide proof of vaccination. The statute defines term "adverse action" broadly, to mean:

Discriminate against a person by denying the person employment, privileges, credit, insurance, access, products, services, or other benefits; or

Discharge, threaten, or otherwise discriminate against an employee in any manner that affects the employee's employment, including compensation, terms, conditions, locations, rights, immunities, promotions, or privileges.

Based on this definition, it would appear that an employer may be prohibited from making unvaccinated individuals comply with any significant requirements that vaccinated individuals do not have to comply with (by virtue of their vaccination status). For example, a broad reading of the statute would indicate that an employer may be prohibited from requiring a vaccinated individual to provide proof of a negative COVID-19 test before entering the workplace. Another broad interpretation of this provision could conclude that an employer could not require unvaccinated individuals to wear masks at work. Because the statute does not expressly restrict

employer mask requirements and a mask requirement would not typically be seen as discriminatory in nature, we believe that employers may continue to enforce mask wearing by unvaccinated employees.

Face Coverings in Public Schools

Another sweeping section of the new law addresses the use and requirement of face coverings. The law requires schools to provide N-95 masks or similar masks to those in demand if face coverings are required. The law only allows for 14-day mask mandates for governments and public schools, subject for renewal, during severe conditions – at least 1,000 cases for every 100,000 residents in the past 14 days – which no county currently reaches. This does not apply to private schools. Different protocols are set forth for governmental entities. Private companies, including private schools, can require masks. The restrictions on face coverings also do not apply to in-home workers such as nannies and home health care providers, correctional facilities, or airport authorities. The new law also espouses the standard for the mature minor doctrine in the context of the COVID-19 vaccine, generally requiring the written consent of a minor's parent or guardian.

A person who is "injured" as a result of a violation of Chapter 2 or a violation of the mature minor provision is entitled to maintain a private right of action for injunctive relief and to recover compensatory damages and reasonable attorneys' fees against an alleged violator.

Unemployment Compensation Provisions

The statute also amends the unemployment compensation provisions of Tennessee law to state that a claimant cannot be disqualified from receiving unemployment benefits under Tenn. Code Ann. § 50-7-303(a)(1)(A) if the claimant left employment because the claimant's employer required employees to receive a COVID-19 vaccine and the claimant refused to do so. Significantly, TCA § 50-7-303(a)(1)(A) addresses employees who leave work voluntarily for failing or refusing to obtain a COVID-19 vaccine. This law does not address employees who are fired, which is covered in TCA § 50-7-303(a)(1)(B). Thus, if an employer fires an employee for refusing to take the COVID-19 vaccine in the face of an employer mandate, the employee can be (but is not necessarily) disqualified for benefits. This unemployment statute operates retroactively, so if a claimant was denied benefits on grounds that the claimant's separation from employment for failing or refusing to receive a COVID-19 vaccine was insufficient for benefits, that claimant may be entitled to go back and be awarded benefits.

Changes for Health Care, Funding, and Liability

Another section allows health care professionals to use independent judgment to prescribe monoclonal antibody treatments, allows the health commissioner exclusive power to design quarantine guidelines, bans the use of public funds for COVID-19 mandates, and requires that hospitals allow visitation by at least one family member of a COVID-19 patient as long as the family member tests negative for the disease and remains asymptomatic. Another chapter of the new law makes it more difficult to sue a person or business for loss, damage, injury, or death arising from COVID-19. Simply put, there is no claim against a person (defined to include an individual, health care provider, nonprofit, corporation, limited liability company, etc.) for loss, damage, injury or death arising from COVID-19 unless the claimant proves by clear and convincing evidence that the person proximately caused the loss, damage, injury, or death by an act or omission constituting gross negligence or willful misconduct. This does not amend the Tennessee workers' compensation law in any way.

Health Care and Long Term Care Employees

The law specifically addresses whether health care providers are included within the scope of the new provisions. The term "private business" does not include a Medicare or Medicaid certified provider, but only to the extent such provider is subject to a valid and enforceable Medicare or Medicaid condition of participation that imposes a requirement contrary to this law. Emergency medical services personnel are specifically mentioned in the law as individuals who may not be exempted out of the masking and vaccine mandates. There are also exceptions for assisted-care living facilities, homes for the aged, nursing homes, and residential

hospices. Those employers can require vaccination of employees but only if they are subject to a Medicare or Medicaid condition of participation that requires them to be vaccinated. The Center for Medicare & Medicaid Services (CMS) has not yet issued the previously-announced emergency regulations detailing the scope and requirements of the anticipated vaccine mandate, so this exception does not yet apply to Tennessee health care providers.

Federal Properties and Contractors

Another exception is carved out for any entity operating on property owned by the federal government, to the extent the entity is subject to a federal requirement contrary to this law. This could potentially include federal contractors that have space in a building owned by the federal government or a military installation or other federal property. Another exception excusing compliance with a provision of Chapter 2 of this law does not apply to a private business, governmental entity, school, or employer that submits notice in writing to the Comptroller of the Treasury that compliance with a provision of Chapter 2 of this title would result in a loss of federal funding, to the extent such an exemption is necessary to conform to federally awarded or amended contracts, subcontracts, or postsecondary grants as a condition to receipt of federal funds. The Comptroller of the Treasury is to create guidelines as to what information is required in the notice. These exemptions are not permanent and must be renewed if needed for more than one calendar year.

Takeaway

For Tennessee employers that have already enacted employee vaccine mandates, this new law is a game-changer. It will go into effect as soon as the Governor signs it, which may be mere days. Employers should have discussions about revisions to their employee vaccine mandate strategy now and should consider what other infectious disease transmission measures they may substitute for a vaccine mandate. This alert deals with the general application of requirements only and it is recommended that businesses and employers consult with a licensed Tennessee attorney to analyze any fact-specific situations that are unclear to their place of business or employment. If you have any questions about this law or need assistance with revisions to your vaccine mandate strategy, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#).