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Florida Issues Emergency Rule and Additional Guidance Regarding Vaccine Mandate Exemption Law

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The Florida Department of Legal Affairs has issued an emergency rule and other additional guidance regarding the recently enacted House Bill HB-1B, which, among other things, requires private employers who mandate COVID-19 vaccination in the workplace to recognize additional exemptions from such vaccine requirements beyond what is required under federal law. The law, which applies to employers of all sizes, took effect immediately upon signing by Governor Ron DeSantis on November 19, 2021, and the private employer provisions will remain in effect until June 1, 2023 unless otherwise extended.

The Law

Specifically, HB-1B provides that "[a] private employer may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; religious reasons; COVID-19 immunity; periodic testing; and the use of employer-provided personal protective equipment."

Exemption Statements

The statute states that employers should use forms adopted by the Florida Department of Health, or substantially similar forms, for employees to submit exemption statements in accordance with the law. The statute further specifies the information an exemption statement must include under each of the delineated categories, as follows:

- To claim an exemption based on medical reasons, including, but not limited to, pregnancy or anticipated pregnancy, the employee must present an exemption statement, dated and signed by a physician, physician assistant, or advanced practice registered nurse who has examined the employee, stating that, in the professional opinion of the healthcare provider, COVID-19 vaccination is not in the

best medical interest of the employee;

- To claim an exemption based on religious reasons, the employee must present an exemption statement indicating that the employee declines COVID-19 vaccination because of a sincerely held religious belief;
- To claim an exemption based on COVID-19 immunity, the employee must present an exemption statement demonstrating competent medical evidence that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee;
- To claim an exemption based on periodic testing, the employee must present an exemption statement indicating that the employee agrees to comply with regular testing for the presence of COVID-19 at no cost to the employee; and
- To claim an exemption based on employer-provided personal protective equipment, the employee must present an exemption statement indicating that the employee agrees to comply with the employer's "reasonable written requirement" to use employer-provided personal protective equipment when in the presence of other employees or other persons.

Once an employer receives a completed exemption statement in accordance with the above, the employer must allow the employee to opt out of the employer's COVID-19 vaccination mandate.

Remedies

Employees may file a complaint with the Department of Legal Affairs (the "Department") alleging that an exemption has not been offered or has been improperly applied or denied, and if found to be the case following an investigation, the Department will notify the employer of its determination and allow the employer the opportunity to cure the noncompliance. If an employee is terminated (or the "functional equivalent" of same) in violation of the law's provisions, the state Attorney General may impose a fine of up to $10,000 per violation (for employers with fewer than 100 employees) or up to $50,000 per violation (for employers with 100 or more employees). However, employers may avoid a fine prior to the issuance of a final order by reinstating a terminated employee with back pay to the date that the complaint was initially received by the Department.

Employees who are terminated for refusing to comply with a COVID-19 vaccination mandate where the employer did not offer and properly apply the exemptions may be eligible for reemployment assistance in additional to any other remedy available to them.

Emergency Rule and Guidance

On December 2, 2021, the Department issued a Notice of Emergency Rule as directed by the statute (the "Rule"). Among other things, the Rule:

- provides a definition for "independent contractor" for determining whether such an individual is not covered by the law or is in fact a covered employee;
- defines the "functional equivalent of termination" as being found "when it is determined that (i) the employee resigned under duress; or (ii) the employer, through its actions, made working conditions so difficult or intolerable that a reasonable person in the employee's position would feel compelled to resign";
- establishes a web-based form for reporting violations of the statute (the form may also be emailed or mailed to the Department); and
- sets forth more detailed procedural rules for the Department for receiving, investigating, and adjudicating complaints under the statute.

The Department also issued frequently asked questions guidance on the law. While the FAQs largely focus on the process for reporting and investigating complaints and largely reiterate information contained in the statute and the Rule, the guidance does note that the Department does not have the authority to order reinstatement, but may only impose fines for termination of an employee or "adverse action against [an employee] that is the functional equivalent to a discharge" in violation of the statute.

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We will continue to monitor and report on new developments with regard to this and other COVID-19 vaccine-related laws.

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