



ACCNJ LEGAL & INSURANCE UPDATE

The Latest on Mandatory Vaccinations

A. DOJ Issues Opinion Approving Vaccine Mandates Despite EUA Status

The Department of Justice (“DOJ”) [issued an opinion dated July 6, 2021](#), on whether employers can mandate a COVID vaccine that was approved using Emergency Use Authorization (“EUA”). The EUA process provides the FDA with an expedited method for approving a vaccine and subjects the vaccine to less rigorous requirements. The DOJ opinion determined that the EUA process does not prevent employers (both private and public) from mandating COVID vaccines.

At issue was Section 564 of the Food, Drug, and Cosmetic Act (the “Act”). Under the Act, recipients of an EUA approved drug have a right to be informed of certain things, including “*the option to accept or refuse administration of the product.*” The DOJ determined this section does not afford employment protections. Instead, it only concerns the types of information recipients should receive before receiving the drug. As the opinion succinctly put it – if congress had intended to restrict entities from mandating EUA approved drugs, congress would not have relied on “*embedding the restriction in a provision that on its face requires only that individuals be provided with certain information.*”

B. Government Entities Begin Issuing Vaccine Mandates for Employees

The DOJ opinion coincides with [new mandates](#) imposed by several government entities at the federal, state and local level. Arguably the most significant was [President Biden’s announcement](#) that on-site federal employees and contractors need to “attest to their vaccination status.” In each instance, the mandates typically provide employees with a time frame for becoming fully vaccinated. Each policy’s treatment of noncompliant employees varies. In the case of New York City, employees that do not comply will be subject to weekly testing and masking requirements. The DOJ’s opinion likely influenced these mandates by finally providing clarity on the EUA issue. In May, [EEOC guidance](#) approved employer mandates, but largely avoided the EUA discussion. Because of this, many employers were hesitant to implement mandates. With the DOJ’s new opinion, federal and state agencies now have additional legal support to move forward with mandatory initiatives.

C. Teamsters File Suit Challenging Union Health Fund’s Vaccine Mandate

Also worth monitoring is a lawsuit filed by Teamsters (Local 743) against Central States, Southeast and Southwest Areas Health and Welfare Pension Funds (the “Fund”). The lawsuit, [which was filed on July 19 in the Northern District of Illinois](#), challenges the Fund’s mandate that its employees get vaccinated or face termination. The complaint primarily asserts that the Fund’s vaccination policy required bargaining and that the fund failed to adequately negotiate over the requirement with the union. This lawsuit is one of the first federal complaints that will deal with collective bargaining issues related to

mandatory vaccine policies. For example, the court will likely address whether the employer had a unilateral right to implement a mandatory policy. The lawsuit could provide significant clarity on an employer's collective bargaining obligations as it relates to COVID vaccines. ACCNJ will continue to update members on this litigation and any developments regarding vaccine mandates.

NLRB Ruling Permits Inflatable Rat at Neutral Employer Site

On July 21, 2021, the National Labor Relations Board (“NLRB”) [issued a decision](#) affirming its precedent that displaying banners and a large inflatable rat near neutral employers does not violate the National Labor Relations Act (“NLRA”). Some were hopeful the NLRB would determine such demonstrations were unlawful secondary picketing. However, the 3-1 decision held that [stationary bannering in front of a neutral employer was not unlawful picketing](#) because it did not block the entrance to a neutral business nor did it involve the carrying of picket signs or persistent patrolling. The lack of “intimidation,” “confrontation” and “coercion” made the conduct permissible. The NLRB left open the possibility that bannering or inflatable displays could be “intimidating” (and thus tantamount to picketing) if the public had to pass through a gauntlet consisting of the stationary display and shouting union members in order to enter the premises. It remains to be seen whether the NLRB will explore such scenarios under the Biden Administration. For now, it appears Scabby the rat is here to stay.

Union County Project Can Continue Despite Ongoing Legal Challenge

In last month's Legal and Insurance Update, ACCNJ reported on an [Appellate Court ruling that shut down an \\$80 million renovation of the historic Bergen County Justice Center](#). The ruling determined Bergen County skirted New Jersey public bidding requirements by improperly using a County Improvement Authority to procure the project without regard to Local Public Contracts Law.

During the Bergen litigation, an analogous case was filed against Union County over a \$145 million government project (the “Union Project”). The Union Project utilized a similar procurement method to the one used in Bergen. As a result, the [Union Project was put on hold via an injunction](#) while the Bergen case worked its way through the appellate system. On July 28, a Superior Court [Judge ruled that Union County can continue working](#) on its project despite the Appellate Court's holding in the Bergen case. The Judge's order only lifts the temporary injunction and does not resolve the substantive question of whether Union County avoided public bidding requirements.

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

Upcoming installments of ACCNJ's Legal and Insurance Webinar Series include:

Design Build – **Part 1: September 1 (9:30 am) | Part 2: September 13 (9:30 am)**

- A two-part series that will focus on: (1) New Jersey's expansion of permissible design-build contracts, and (2) practical considerations for contractors when using the design-build delivery system.

EMAIL US

WEBSITE

