



December 10, 2021

Re: COVID-19 Vaccination Requirements in the State of Tennessee

To all Tennessee employers and employees:

Many employees in the state of Tennessee still have questions regarding their rights and privileges under state law regarding vaccination requirements by employers. Our hope is that this letter provides some clarity where both state law and recent federal actions are concerned.

**Vaccination requirements by all employers in Tennessee.**

On October 30, 2021, the Tennessee General Assembly passed HB 9077 ([CC9002](#)) and the bill was signed into law by Governor Bill Lee on November 12, 2021. That law now resides in Title 14 of the Tennessee Code Annotated.

T.C.A. § 14-2-102(a) states the following:

A private business, governmental entity, school, or local education agency shall not compel or otherwise take an adverse action against a person to compel the person to provide proof of vaccination if the person objects to receiving a COVID-19 vaccine for any reason.

Please note that this state law *does not affect employees that work directly for the federal government or serve in the armed forces (please see the section of this letter dealing with Federal employees)*. But this law does protect employees working for *any and all private businesses and/or corporate entities* in the state of Tennessee including all employees working in the public sector as employees of the state.

Regarding concerns about a requirement from OSHA that companies with 100 or more employees have a requirement for vaccination for COVID-19, that [regulation has been halted by OSHA](#).

Your employer CANNOT require that you receive a vaccination for COVID-19 as a condition of employment. Period.

**Treatment of employees by vaccination status.**

It is important to note that the law specifically cites that employers may not take “adverse action” against a person based on their willingness to provide proof of vaccination status.

*Adverse action* is defined in the law in T.C.A. § 14-1-101(1) as:

(1) "Adverse action" means to:

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

(B) 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;

Here are the nuts and bolts of what this means in terms of how the law applies to the treatment of employees who refuse to receive a vaccination for COVID-19.

1. Employers may not treat unvaccinated employees differently from any other employee or withhold any privileges of employment.
2. Unvaccinated employees may not be required to work remotely or offered any other type of accommodation that provides a *different or unique* work environment.
3. Unvaccinated employees may not be required to regularly test for COVID-19.
4. Unvaccinated employees may not be required to wear masks or any other type of prescribed PPE by the employer.
5. Bottom line, unvaccinated employees **MUST** be treated exactly the same as all other employees.

In the state of Tennessee, the law does not prevent a private business from requiring that their employees wear masks (or other types of PPE) or submit to regular testing for COVID-19. In our opinion, this should be further addressed by the General Assembly.

However, if an employer chooses to implement these types of requirements, they must do so for **all employees regardless of vaccination status**. Singling out *unvaccinated* workers would be a type of “adverse action” now prohibited by state law.

### **Employees working remotely in the state of Tennessee.**

In almost all cases imaginable, any company that has part-time or full-time employees in the state of Tennessee and it is clear that those employees are *not temporarily* in the state (typically meaning 20 calendar days or less) has created a **nexus** with the state and must comply with all state employment regulations.

Meaning, if you work from home or in a remote location within the state of Tennessee for a company whose main office is in another state and you are a permanent resident of Tennessee, your employer must follow state law and is subject to the new guidelines set forth in Title 14 of the Tennessee Code Annotated.

### **Employees working for federal contractors.**

One unfortunate part of the omnibus bill, HB 9077, which became law on November 12, 2021, is that it included an exemption for federal contractors who can show that they are at risk of losing federal funding if forced to comply with these state regulations. T.C.A. § 14-6-102(a) states the following:

(a) A provision of chapter 2 or 6 of this title 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 chapter 2 or 6 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...

There are two primary problems with these types of exemptions. One, state legislators have communicated to the federal government that they are willing to submit to federal overreach rather than employ state sovereignty by securing the rights of its citizens. They have cheapened our state constitution and shirked their responsibility as our directly elected representatives with a sworn oath to uphold the rights of citizens.

Two, they have left the determination as to whether Tennesseans have rights up to the courts. Several legislators are on the record stating their hesitancy to pass a law *with no exemptions* out of fear that such a law would be found unconstitutional in the courts. Let us be clear.

### **Courts do not make laws.**

Despite the legislature's confusion on whose responsibility it is to make law and secure rights, federal courts have recently ruled against federal vaccine requirements.

Biden issued [Executive Order 14042](#) on September 9, 2021 which issued guidance that federal contractors would now be required to have their employees vaccinated for COVID-19 in order to comply with federal contracts.

On November 30, 2021, a federal court in [Kentucky granted a preliminary injunction](#) against federal requirements for employees to be vaccinated per federal contracts. Subsequently on December 7, 2021, a federal court in [Georgia granted a similar preliminary injunction](#) regarding federal contracts and stated that its court order would apply nationally.

In the state of Tennessee, per the allowance for exemptions to be granted, Comptroller Jason Mumpower had granted 69 exemptions to federal contractors operating within the state. Because of these rulings in federal courts and a stay on federal enforcement, the Comptroller's office has [suspended all exemptions previously granted](#) as of December 1, 2021.

What is the bottom line? If you work for a federal contractor, you are protected by Tennessee law and your employer must comply with all guidelines discussed in the first section of this letter.

### **Healthcare workers.**

Similarly to federal contractors, the law provides an exemption to healthcare providers should they need to require vaccinations in order to comply with federal regulations from CMS (Medicare and Medicaid). On November 5, 2021, CMS issued its [Interim Final Rule for COVID-19 Health Care Staff Vaccination](#).

This exemption can be found in the definitions of “Governmental Entity” in T.C.A. § 14-1-101(8) and “Private Business” in T.C.A. § 14-1-101(15) stating the following:

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 title, except a person in a position covered by the definition of emergency medical services personnel in § 68-140-302;

Does not include a healthcare provider enrolled in Medicare or Medicaid that is subject to fines or penalties for nonadherence to federal rules and regulations, 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 title;

Since then, two key federal decisions have been handed down by courts in Missouri and in Louisiana granting preliminary injunctions and blocking enforcement of these CMS regulations. The [court order](#) from a Monroe, Louisiana federal district court issued a national stay on the CMS rule. As such, on December 2, 2021, CMS indicated that it was [halting any enforcement](#) of the mandate put forward by the Interim Final Rule due to the recent court orders.

In the CMS Memo, it indicated the following:

Health care facilities, of course, may voluntarily choose to comply with the Interim Final Rule.

Please note that in the state of Tennessee, this is **not the case as without mandatory compliance required by CMS, all healthcare facilities are now bound by Title 14 and may not require vaccinations for employees and take adverse action against employees.**

There is however one exception to the rule and that is found in T.C.A. § 14-1-101 as follows:

Does not include an assisted-care living facility, a home for the aged, a nursing home, or a residential hospice, as those terms are defined in § 68-11- 201;

It is still legal under Tennessee law for nursing homes, hospice care, and long-term care facilities to mandate a vaccination for COVID-19 as a condition of employment regardless of any federal requirements, or lack thereof.

### **Federal employees and members of the military.**

In the case of federal employees and members of the military, we must rely on federal law. And currently, we are unaware of any federal court that has granted relief on any basis except to uphold the right to a religious exemption in a [Sixth Circuit case involving student athletes and Western Michigan University](#).

All federal employees, per the 1<sup>st</sup> Amendment, must be afforded the right to claim an exemption to a requirement for vaccination based on the free exercise of religion.

We also contend, along with many other medical professionals around the country, that the supposed [FDA approval](#) for Comirnaty has not granted a full [biologics license](#) for the drug and is still authorized for *emergency use only*. As such, this drug is still subject to *informed consent* requirements for emergency use products and should never in any case be mandated by a government or an individual.

45 CFR 46.116(a)(1-2):

- (1) Before involving a human subject in research covered by this policy, an investigator shall obtain the legally effective informed consent of the subject or the subject's legally authorized representative.
- (2) An investigator shall seek informed consent only under circumstances that provide the prospective subject or the legally authorized representative sufficient opportunity to discuss and consider whether or not to participate and that *minimize the possibility of coercion or undue influence*. (emphasis added)

### **Cause of action and enforcement.**

It is important to note that Title 14 gives employees in Tennessee legal recourse when their rights are violated on the basis of their vaccination status. T.C.A. § 14-6-103 states:

A person injured as a result of a violation of chapter 2 or § 14-4-103 of this title 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.

If an employer in the state of Tennessee is requiring a vaccination for COVID-19 as a condition of employment or found to be taking *adverse actions* against an employee because of their vaccination status (or perceived status), they could be held liable in court for damages.

Employees should not be shy about standing up for their rights in the face of any requirements from employers concerning vaccinations for COVID-19.

For Liberty,



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