Westlaw Today
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Who is responsible for granting medical/religious accommodations to the COVID-19 vaccination mandate?

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NOVEMBER 9, 2021

As contractors and agencies scramble to comply with the government contractor vaccine mandate,1 there seems to be growing confusion over whether contractors or federal agencies are responsible for evaluating whether contractor employees working at government sites are entitled to medical or religious accommodations.

It is clear that the contractor, not the government, is responsible as the employer.

In some cases, agencies tell contractors that the government, not the contractor, is responsible for adjudicating accommodation requests. In others, agencies are demanding to see the justification for accommodation determinations and independently evaluate those determinations.

This confusion is unfortunate because it is clear that the contractor, not the government, is responsible as the employer. To the extent agencies are usurping contractors' obligation to make these determinations, the government is increasing the likelihood it will be viewed as a joint employer, needlessly exposing both the government and contractors to potential liability.

Employers are responsible for making accommodation determinations

For decades, employees have had the right to request medical accommodations under the Americans with Disabilities Act (ADA) and religious accommodations under Title VII of the Civil Rights Act of 1964. Those requests have always been submitted to their "employer," even when those employees work at an off-site location.

This is consistent with the Safer Federal Workplace Task Force Guidance that sets forth the COVID-19-related obligations applicable to contractors subject to the new FAR or DFARS clause explains:

Q: Who is responsible for determining if a covered contractor employee must be provided an accommodation because of a disability or because of a sincerely held religious belief, practice, or observance?

A: A covered contractor may be required to provide an accommodation to contractor employees who communicate to the covered contractor that they are not vaccinated for COVID-19, or that they cannot wear a mask, because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. If the agency that is the party to the covered contract is a "joint employer" for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor should review and consider what, if any, accommodation they must offer.

Is the government a joint employer?

The Task Force notes that the only time that an agency has a role in an accommodation determination is when an agency is a "joint employer." That situation is not typical in the government contract context, nor is it desired. If an agency is a joint employer, it means both the government and the contractor would be liable for improper denial of an accommodation request.

Although there is no single prevailing test for determining joint-employer status under the ADA or Title VII, the various tests used by the courts analyze factors based on common-law agency principles indicating the degree of control, the economic realities, or a combination of factors based on the totality of the circumstances. Further, the flux of the Fair Labor Standards Act joint employer test has been the subject of recent regulatory action, as the Trump administration had issued a final rule effective March 16, 2020, that limited the situations in which an entity could be found

to be a joint employer. That rule was rescinded2 by the Biden administration, originally effective October 5, 2021,3 reinstating the various individual circuit court tests used by the courts to determine whether a party is a joint employer.

The risk that the government will be viewed as a joint employer and therefore become liable to suits by contractor employers was discussed in some detail over a decade ago by Professor Steven Schooner at GW Law in this excellent article4 published in The Government Contractor. The article discusses the developments that led to the blurring of the line between civil servants and contractor employees and the risks the government becoming a joint employer poses to both the government and contractors.

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To the extent agencies are taking over responsibility for evaluating accommodation requests from contractor employees, which is an employer's responsibility, they are opening the government up to the risk of suits by contractor employees for employment discrimination, wrongful termination, and failure to accommodate, among other employment actions.

As Professor Schooner noted, it also increases the risk for contractors to the extent that an agency views contractors less favorably because their employees are suing the government.

Contractors should also keep in mind that as joint employers with the government, they could become liable for the government's misconduct. For example, suppose the government wrongfully denies a contractor employee's request to be exempted from the vaccine mandate due to a medical condition. In that case, the employee could bring suit against the contractor.

Key takeaways for government contractors

In sum, allowing agencies to usurp the contractor's responsibility for making medical or religious accommodation determinations will likely result in government liability that would otherwise not exist and loss of a contractor's control over a decision for which it will bear responsibility.

Contractors should also keep in mind that as joint employers with the government, they could become liable for the government's misconduct.

So if an agency that your company does business with believes that the government, not your company, should adjudicate accommodation requests, politely explain that by taking on that responsibility, they are creating potential government liability that otherwise would not exist. If that does not suffice, it would be prudent to independently evaluate any religious or medical accommodation requests and raise any disagreements with regard to determinations with the contracting officer.

Notes

[1] https://bit.ly/3CLr0dX

[2] https://bit.ly/3mLkLB8

[3] https://bit.ly/3mGODyC

[4] https://bit.ly/2ZVuHyQ

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This article was published on Westlaw Today on November 9, 2021.