

## New Kansas Law Creates Uncertainty and Risk for Employers Complying with Federal COVID-19 Vaccination Requirements

Alert

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On November 23, 2021, Kansas Governor Laura Kelly signed [House Bill 2001](#), following a special session called by the Kansas legislature. This new law presents potential conflicts with federal vaccine requirements for federal contractors, as required by President Biden's [Executive Order 14042](#), and for employers subject to the Centers for Medicare and Medicaid Services' [interim final rule](#) requiring vaccinations for covered staff of health care facilities and suppliers.

The Kansas law creates broader grounds for employees who seek to be exempt from employer vaccine requirements on medical and religious grounds and removes certain employer rights and protections under those laws. Federal law requires certain employers to impose vaccine requirements on employees, except in limited circumstances where an employee is legally entitled to an accommodation. Those exceptions allow employers to provide reasonable accommodations for employees with a qualifying disability under the Americans with Disabilities Act, and for sincerely held religious beliefs and practices under Title VII of the Civil Rights Act of 1964. These federally-required accommodations provide grounds for employers to grant employees exemptions from COVID-19 vaccination requirements.

The new Kansas law presents challenges and uncertainty for employers who are required to impose COVID-19 vaccination requirements for their employees.

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## Vaccine Exemptions

The new law requires that, if a Kansas employer imposes a COVID-19 vaccination requirement, the employer shall exempt an employee from such requirement without punitive action, if the employee submits a written waiver request to the employer stating that complying with such requirement would either (1) endanger the life or health of the employee or an individual who resides with the employee, or (2) violate the employee's sincerely held religious beliefs. The law broadly defines religious beliefs to include, but not limited to, "theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views." In addition, the new law requires that employers shall grant an exemption to COVID-19 vaccine requirements based on sincerely held religious beliefs "without inquiring into the sincerity of the request." Employees seeking a medical exemption under the new law must provide a written statement by a physician, or similar practitioner, supporting the request for exemption.

## Unemployment Protections

The law also provides that employees who lose their job for failing to comply with an employer's vaccine requirement, and assert that their employer violated the new provisions of the law, will not be deemed ineligible for or disqualified from receiving unemployment benefits on grounds that the employee violated an employee work rule in refusing to be vaccinated against COVID-19. Unemployment benefits for such employees can be paid retroactively during the period September 9, 2021 through the effective date of the law.

## Penalties and Enforcement

Employees who are aggrieved by violations of the law are permitted to file a complaint with the Kansas Secretary of Labor (KDOL), and the Secretary must complete its investigation within 60 calendar days after the complaint is filed. The KDOL is tasked with determining whether (1) the employer imposed a COVID-19 vaccine requirement, (2) the employee submitted a written waiver, and (3) the employer committed a violation of the act.

Once its investigation is complete, the KDOL is tasked with issuing an order containing findings and conclusions regarding whether the employer violated the provisions of the law. If the KDOL issues a final order finding that an employer violated the section, the Kansas attorney general shall secure the enforcement of the order by filing an action in the district court to impose civil penalties. Civil penalties can total up to \$10,000 per violation for employers with fewer than 100 employees and \$50,000 per violation for employers with 100 or more employees. However, the law provides that the attorney general shall not file a civil action against an employer if the employer reinstates the terminated employee with back pay from the date the complaint was received by the secretary of labor. The new law sets forth factors

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to consider if a civil penalty is enforced, and the enforcing court should consider:

- Whether the employer's action was knowing and willful
- Whether the employer showed good faith in attempting to comply with the law
- Whether the employer took action to correct the violation
- Whether the employer had previously been assessed civil penalties
- Whether any other mitigating or aggravating factors affect the imposition of the penalties

## Challenges

This new law presents challenges and uncertainty for employers who are required to impose COVID-19 vaccination requirements for their employees.

- **Conflicts with federal law.** Employers who impose policies requiring employees to be vaccinated against COVID-19 are subject to federal non-discrimination laws, which prohibit discrimination based on religion and disability. Title VII, the federal law which prohibits religious discrimination, allows employers to consider reasonable accommodations for employees with sincerely held religious beliefs that create a conflict with the employer's policies or other aspects of the employees' work. Title VII also permits employers to evaluate the sincerity of the employees' stated beliefs, consider whether proposed accommodations are reasonable, and consider whether any proposed accommodation would cause an undue burden on the employer, including for safety reasons. As written, the Kansas statute does not permit employers to consider the sincerity of an employee's religious belief or evaluate whether an accommodation request is reasonable or causes an undue burden. This creates a potential conflict between the state and federal laws related to reasonable accommodations.
- **Different definitions of "religious belief."** The new Kansas law adopts a definition of religious belief which may be more expansive than the protections afforded by federal law. While the definition set forth in the Kansas law largely mirrors guidance related to federal non-discrimination laws, the Kansas law also provides an open ended definition of religious belief that is "included but not limited to" the definitions set forth by the Equal Employment Opportunity Commission in its interpretation of federal law.

Because HB 2001 was signed into law and published in the [Kansas register](#) on November 23, 2021, making it effective immediately, employers will need to consider ways to act in compliance with the requirements of both Kansas and federal law pending expected challenges to the validity of the new law.

## CONTACTS

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