

United's New Vax Approach Legally Sound, Experts Say

By **Amanda Ottaway**

Law360 (September 15, 2021, 6:11 PM EDT) -- United Airlines' recent decision to put workers with approved religious or medical exemptions to its COVID-19 vaccine mandate on indefinite unpaid leave may have raised eyebrows, but experts say the airline is on solid legal ground.

In a letter to employees from company human resources vice president Kirk Limacher, provided to Law360 on Sept. 9, the company cited the safety of both employees and customers as its rationale for the new policy. That focus on safety is key when it comes to assessing whether United overstepped by mandating unpaid leave, according to attorneys.

"Airlines have one priority: to safely fly their passengers. That's sort of undermined by unvaccinated airline workers spreading COVID. And they clearly are putting the safety of their passengers above perhaps what might be perceived as individual worker rights," said Otterbourg PC's Bill Moran.

Here's why experts say United's new approach appears legally valid.

Exemptions Are Not Accommodations

Employees have the right to request carveouts from vaccine mandates. They can cite the federal Americans with Disabilities Act for a medical exemption, such as an allergy, or Title VII of the Civil Rights Act of 1964 for a religious exemption.

But there's a key distinction between granting a vaccine exemption and granting a workplace accommodation to allow an unvaccinated worker to do their job anyway, experts agreed. Just because the former is possible doesn't mean the latter will be.

"They're just taking a very strict position that 'Until we figure this out, there's no reasonable accommodation we can provide'" unvaccinated workers, said The Reddock Law Group's founder and managing partner, Angela Reddock-Wright, referring to United.

Employers have a duty under Title VII and the ADA to make reasonable accommodations for workers with exemptions unless those changes would cause "undue hardship," which the U.S. Equal Employment Opportunity Commission has described in guidance as "significant difficulty or expense." That undue hardship calculus differs for religious and medical exemptions, the EEOC said.

In the letter, United — which instituted its mandate Aug. 6 — said if it shoots down an exemption request, the employee must either get the shot or get the boot.

Employees with an OK'd medical exemption, meanwhile, will be put on "temporary, medical leave" beginning Oct. 2. Those with approved religious exemptions will have to take "temporary, unpaid personal leave" beginning the same date, while the airline figures out safety measures, according to the letter.

"We can no longer allow unvaccinated people back into the workplace until we better understand how they might interact with our customers and their vaccinated co-workers," the letter said.

It's a new tactic, experts said.

"I haven't seen policies that are this aggressive, I guess I would say, or just really putting the onus on employees to either get the vaccine, or basically be put in some sort of limbo," said Colin Good, senior counsel at the Wisconsin worker-side firm Hawks Quindel SC.

"Anytime you're not paying somebody, that looks an awful lot like an adverse employment action," Good also noted.

He pointed out that employers have to clear only a low bar to claim undue hardship for a religious accommodation claim under Title VII, while the Americans with Disabilities Act requires them to point to a more "significant cost."

Reddock-Wright, who works as an employment mediator, arbitrator and investigator, noted that while airlines have some employees who work in offices and don't interact with customers, the main business of an airline is dealing with the public.

On that basis, United has a strong argument to claim it would be an undue burden to pay unvaccinated workers to stay home until the pandemic is less of a threat, she said.

Employees Will Still Have Options

Both Reddock-Wright and Good said that since the leave period for some United employees is indefinite, those with approved exemptions will likely be able to collect unemployment benefits. That's something United likely considered before implementing the policy, Reddock-Wright noted.

Although such benefits can be denied to employees who are fired for violating policy or for other misconduct, unvaccinated United workers whose exemption requests went through should be eligible, experts said.

"So while it may seem drastic that they're taking those measures, I'm sure they're thinking, 'OK, it's not like they'll be without any pay at all,'" Reddock-Wright said.

The Family and Medical Leave Act may also come into play for some workers with medical exemptions, Good noted. And the letter acknowledged that certain groups of United employees are also covered by collective bargaining agreements.

A United spokesperson said in an emailed response to a Law360 question about whether some employees would receive paid leave under the policy based on their CBAs that "each group's collective bargaining agreement governs the various leave policies," and declined to comment further.

If legal challenges come, Good said he thinks unions will lead the way, because the policy implicates mandatory negotiating topics such as wages.

Otterbourg's Moran said he thinks the policy ultimately will have its intended effect.

"I do think that this will, among other things, bring people to the vaccine," he said.

Safety Concerns Front and Center

Hawks Quindel's Good noted that the United policy's structure anticipates objections.

"It probably portends what they would assert as potential defenses if this were to be litigated, because the bookends of this document are its safety concerns," he said.

"And the safety concerns go directly to the idea that either employees that are unvaccinated, or are vaccinated and may experience severe illness, constitute a direct threat under the Americans with Disabilities Act," Good said.

The ADA's direct threat defense — a high bar for employers — allows them to say that even though they've tried to accommodate a person, they still believe that person poses a "direct threat to health or safety," according to the EEOC.

Good said United is also using as its "sword and shield" a promise that unvaccinated people will be transferred to other jobs, or eventually be restored to their own jobs, even though the policy says that won't happen for some groups, such as those in customer-facing roles, until "the pandemic meaningfully recedes."

Reddock-Wright pointed out that rising virus cases in recent months have changed the game for employers when it comes to vaccine mandates.

"The duty that's being placed on employers, both by federal and state government, to ensure that they create a healthy, safe work environment for everyone — that bar has been raised for employers," she said.

Otterbourg's Moran said it'll be up to the courts to ultimately decide whether a company can lawfully put workers on unpaid leave for being unvaccinated despite having approved their vaccine exemptions.

"COVID has put everyone in all employment industries on new ground, and it's all being tested as we speak," he said.

--Editing by Haylee Pearl.

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