

AG Brnovich Issues Legal Opinion on COVID-19 Vaccine Requirements

Friday, August 20, 2021

Can an employer make you get a COVID-19 vaccine?

PHOENIX-- Attorney General Mark Brnovich issued a legal opinion today regarding COVID-19 vaccine mandates for employees, patrons of businesses, and airline passengers under existing state and federal laws. The Attorney General's Office (AGO) Opinion finds there is no one-size-fits-all answer and that government and private businesses have varying legal requirements.

Attorney General Brnovich emphasizes the importance of relying on the constitution during a crisis when personal liberties are most at risk. While public health measures may be pursued during emergencies, they cannot trample constitutionally guaranteed liberties. Arizonans should be free, without coercion, to make medical decisions regarding vaccination that they feel are best for themselves and their families. Recent actions by government and private employers mandating Emergency Use Authorization (EUA) vaccinations demonstrate that a proper balance may have yet to be achieved by policymakers.

"We must hold the Constitution close in times of crisis because that's when our rights are most at risk," said Attorney General Mark Brnovich. "In all medical and health decisions, Americans have the right to try and the right not to try; we cannot have one without the other."

Today's opinion answers the following three questions:

1. Whether an employer can require a COVID-19 vaccine as a condition of employment?
2. Whether a business can compel an individual to prove that they have received a vaccination before that person can patronize the business?
3. Whether, under a contract of carriage, a domestic airline can require proof of vaccination as a prerequisite for flying?

As explained below, Attorney General Brnovich determined that, under Arizona law, the government cannot mandate COVID-19 vaccines for public employees. This includes schools, public universities, community colleges, and state and local government. Private businesses can require COVID-19 vaccines for employees but must allow for reasonable accommodations. Per federal law, private entities that carry out an EUA activity like administering COVID-19 vaccines must inform those to whom they are administering the vaccines (which may include employees) that they have an option to decline.

1. Whether an employer can require a COVID-19 vaccine as a condition of employment?

Government

Schools, public universities, community colleges, and state and local governments are statutorily prohibited from requiring employees to obtain COVID-19 vaccinations. While some of these statutory prohibitions will take effect on September 29, 2021, existing Arizona law (A.R.S. §§ 36-114, -184), prohibits state and county governments from imposing vaccine mandates.

Private Businesses

Under federal and state law, private businesses can mandate vaccinations for employees but must provide reasonable accommodations for employees who cannot obtain the COVID-19 vaccine due to a disability or a sincerely held religious belief.

2. Whether a business can compel an individual to prove that they have received a vaccination before that person can patronize the business?

Private Businesses

Under federal and state law, private businesses that mandate vaccination for patrons must provide reasonable accommodations to patrons who cannot obtain the COVID-19 vaccine due to disability, and they must not discriminate against customers who cannot obtain such a vaccine due to a sincerely held religious belief.

Students

Under Arizona law, effective September 29, 2021, certain educational institutions will be prohibited from requiring proof of COVID-19 vaccination from students. Currently, public, private, and parochial schools are limited in conditioning student attendance on documentation of vaccines when parents have a personal objection or if a vaccine would be detrimental to a student's health.

3. Whether, under a contract of carriage, a domestic airline carrier can require proof of vaccination as a prerequisite for flying?

Domestic airlines in the United States are primarily governed by federal law. Currently, there is no federal law that allows a domestic airline to require proof of a COVID-19 vaccine or refuse transportation of a passenger out of fear he/she might have a communicable disease. Under federal regulation, an airline may not refuse a customer based on a communicable disease unless the customer (1) actually has a communicable disease (2) that is a direct threat to other passengers, and (3) cannot obtain a medical certificate setting forth preventative measures. It will be difficult for an airline to establish these requirements with respect to COVID-19 when airline service has continued throughout the pandemic with masking and ventilation as the primary preventative measures.

In sum, this historic opinion provides a comprehensive summary of current protections for employees and others from vaccination mandates. An Attorney General Opinion must explain the law as it currently exists, and not how the Attorney General or others might desire it to be.

Only a member of the legislature, a public officer of the State, or a county attorney can submit an opinion request to the AGO on legal questions pertaining to their office. The AGO cannot issue opinions for private citizens, nor offer legal advice to private citizens.

Copy of opinion here (</sites/default/files/docs/press-releases/2021/briefs/2021-08-20%20AG%20Opinion.pdf>).

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