



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

November 24, 2021

Dr. Blake Flanders
President, Kansas Board of Regents
1000 SW Jackson, Suite 520
Topeka, KS 66612-1368

Dear Dr. Flanders:

I write to bring to your attention apparent actions by at least some Regents institutions involving COVID-19 vaccine mandates for their employees that now violate a new Kansas law and must be corrected immediately. From observation of their public actions, I am aware that the University of Kansas and Kansas State University, in particular, are in violation of a new state law as described below and must immediately cease and desist from the same. I request that the Board of Regents promptly review whether any further changes in policy or practice are needed to bring KU, K-State or any other Regents institution into compliance with state law or with common-sense timelines.

On November 22, 2021, the Kansas Legislature, after petitioning itself into special session for the first time in state history, adopted the conference committee report for 2021 Special Session House Bill 2001 ("the new law"). On November 23, the new law was signed into law by the governor and published in the Kansas Register. It is now in effect.

The new law establishes several procedural requirements governing how employees may claim a medical or religious exemption from any COVID-19 vaccine mandate, including those adopted by Regents institutions and applicable to Regents institution employees. It establishes a procedure by which any employee aggrieved by a violation of the statute may seek redress, ultimately resulting in potential civil action being filed in an appropriate state court by the Office of the Attorney General to enforce the statute and secure these rights. Among the apparent current practices of Regents institutions that violate those statutory requirements are:

Unlawful inquiry into sincerity of claimed religious waiver: The new law requires that an employee may request a waiver from a vaccine requirement solely by making such request in writing "as evidenced by an accompanying written statement signed by the employee." Sec. 1 (a)(2). An employer must grant a waiver to an employee who requests the same in that manner "without inquiring into the sincerity of the request." Sec. 1(b). This statutory provision effectively prohibits an employer from establishing lengthy and intrusive application procedures and forms that go beyond a mere "accompanying written statement signed by the employee" or are designed to gather information for use by the employer in evaluating the sincerity of the employee's belief in determining whether to grant a waiver.

According to information provided on their respective websites, KU and K-State both currently use intrusive written application materials when evaluating an employee's request for exemption from a COVID-19 vaccine mandate. This information is still stated on their respective websites as of this morning. For example, KU's website states that "[t]o be eligible for a possible exemption, an employee must first establish that the employee's refusal to be vaccinated is based upon a sincere belief that is religious in nature." Both universities provide forms for use by employees in applying for religious waivers, and the forms are similar but not identical to each other. For example, both forms ask the employee to "describe the nature and tenets of your sincerely held religious belief, practice, or observance," and seek third-party documentation that would tend to support the sincerity of the religious belief. The KU form makes further (optional) inquiry into the length of time the employee has held the religious belief. None of this information is necessary except to support an inquiry into the sincerity of the employee's claim, which is no longer relevant.

KU and K-State also have established procedures for inquiring into the sincerity of a requested waiver. For example, KU provides that "[a] committee will review each exemption request and follow up with employees to inform them of whether their request was approved or denied," and K-State states it "has contracted with an HR consulting firm to assist the university in evaluating requests and make recommendations to the university regarding each request." These sorts of inquiries into the sincerity of a requested waiver are inconsistent with the new law.

All Regents universities must immediately cease and desist from any of the policies or actions discussed above (and any others) previously used for the purpose of evaluating the sincerity of an employee's application for a religious waiver. Under the new law, a written statement signed by the employee is the only relevant evidence of the sincerity of the employee's belief. Regents universities should immediately inform their employees of the same.

Arbitrary and legally unsupported timelines: The federal government currently is not requiring employees of federal contractors to be fully vaccinated until January 18, 2022. (https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.) Yet KU and K-State have established a series of apparently arbitrary and, in any event, unjustified earlier deadlines for their employees to take steps to comply with the federal mandate or face adverse action on their employment. For example, both universities state that employees must apply for a religious or medical waiver by November 15, 2021, yet no such deadline exists in the law. In light of the new Kansas law, no such deadline is logically necessary or even helpful in regard to a request for religious waiver because no evaluation of an employee's request for a religious waiver need be performed.

In addition, I would note that KU in particular apparently has elected to maintain December 8, 2021, as the deadline for employees to be fully vaccinated rather than extend that deadline as the federal government has done. Insisting on the earlier deadline has no basis in federal law and appears to be wholly a decision made by KU. But KU, like other state entities, is prohibited by state law from using any state resources to "require an individual to use a COVID-19 vaccination passport within this state for any purpose." S.B. 159, § 59(a) (2021). KU's decision to implement a vaccination requirement with deadlines that are stricter than required by federal law almost certainly runs afoul of that prohibition. KU has necessarily evaluated the legality and prudence of that decision and published that decision using personnel or contractors who are paid at least in part with state funds. It has notified employees of that decision through its website and e-mail system, which are maintained and operated at least in part with state funds, including the salaries of information personnel who maintain and operate them. It no doubt

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will enforce that earlier deadline using human resources and other personnel who are paid at least in part with state funds. By law, KU may not use *any* state funds in any manner to implement a vaccine passport.

In addition, the State of Kansas on my authority has filed a lawsuit challenging the legality of the vaccine mandate for federal contractors. *Georgia v. Biden*, 21-CV-163 (S.D. Ga.). We have moved for a preliminary injunction which, if granted, would have the effect of stopping the federal requirement for Regents employees to be vaccinated as a condition of employment under penalty of Regents institutions losing federal research funding. The court has scheduled a hearing on December 3, 2021, on our motion for preliminary injunction. In light of this timeline, it is imprudent for a Regents institution to insist on its own authority that its employees be fully vaccinated by December 8, 2021, when the challenged federal mandate itself currently allows until January 18, 2022, for compliance.

Any Regents institution implementing a vaccine requirement earlier than required by federal law should immediately abandon those earlier deadlines and inform its employees of the same.

Given the new Kansas law and the above information, I must insist KU, K-State and all other Regents institutions immediately cease and desist from vaccine mandate activities in violation of law. I respectfully request the Board of Regents staff work with the institutions to identify any further violations, or potential violations, and to correct them. Regents institutions that have adopted or announced policies that are in violation of law, including those above, also should immediately inform their employees of changes in policy so as to correct previously communicated information that is now incorrect and to ensure employees have current and accurate information as they make important decisions about their individual health care and employment.

Thank you for your immediate attention to these matters.

Sincerely,

A handwritten signature in black ink that reads "Derek Schmidt". The signature is written in a cursive, slightly slanted style.

Derek Schmidt
Kansas Attorney General

cc: Chancellor Douglas Girod
President Richard Myers