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With Mandatory Vaccine Policies On the Rise, Should Your Business Implement One?

USA | August 18 2021

The highly-anticipated “summer of freedom” from the COVID-19 pandemic has turned much more muddled. Despite approximately 70 percent of Americans 12 years and older getting at least one vaccination dose and 51 percent fully vaccinated, the pandemic that does not seem to end has led the Centers for Disease Control and Prevention (CDC) to modify its guidance slightly from earlier in the summer. The CDC now is recommending even fully vaccinated people wear masks indoors in locations with high COVID-19 transmission rates. The changing mask guidance and still lower than optimal vaccination rates have many employers grappling with whether to mandate vaccination as a condition of employment. Recent developments, including legal opinions, court decisions, and steps by state governments, may assuage employers’ concerns about imposing such mandates.

The Equal Employment Opportunity Commission (EEOC) provided employers with some comfort when it issued guidance in May 2021 on mandatory employer COVID-19 vaccination programs. The EEOC clarified its previously murky stance on this issue, expressly stating that “federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19,” *as long as* employers *allow for reasonable accommodation* of their vaccine mandate *for medical or religious reasons*. Like all requests for accommodation, the EEOC confirmed employers may avail themselves of the “undue hardship” exception for denying an employee’s request for accommodation.

Some employers remained reluctant to issue mandatory vaccine policies for varying reasons, including because the vaccines were only authorized under an “Emergency Use Authorization,” but recent developments may provide further support for employer mandates.

The DOJ clarifies the impact of “EUA” status on mandatory vaccine policies. Initially, employers viewed the U.S. Food and Drug Administration’s (FDA) “emergency use authorization (EUA)” for vaccines as an impediment to mandating vaccines before the FDA granted full authorization. On July 26, 2021, however, the U.S. Department of Justice’s (DOJ) Office of Legal Counsel issued an opinion that EUA status does not prevent public and private employers from imposing vaccine requirements.

Several courts have upheld mandatory vaccination policies. For example, on June 2, in *Bridges v. Houston Methodist Hospital*, a Texas district court applying Texas-state law held that the hospital employer’s vaccination mandate was lawful and that the hospital could terminate employees who refused to comply with the policy. Helpfully, the Texas court provided a similar analysis as the subsequent DOJ’s opinion by concluding that the EUA risks and limitations do not apply to private employers. The court applied Texas state law in the healthcare

context; however, the court emphasized that a private employer has the right to mandate vaccines and terminate employees who refuse to comply with the mandate. This broad holding should provide guidance to employers with employees in other states and industries.

Another recent case challenged Indiana University's mandatory vaccination policy for students, which required students to be vaccinated to matriculate for the upcoming school year. A federal district court in Indiana rejected the challenge, holding that the vaccine mandate did not violate the 14th Amendment but was a reasonable and legitimate interest of public health. The students' attempts for temporary relief from the decision from both the Seventh Circuit Court of Appeals and the U.S. Supreme Court have been unsuccessful.

It remains to be seen whether similar vaccination mandates will be upheld in other states, but the trend seems to favor enforcement of mandatory vaccination programs.

Various government employers have mandated vaccines for government employees and certain industries. Recently, federal and some state employers, including in California, Oregon, and Washington, have announced mandatory vaccination programs for government workers, and several states have mandated vaccination for certain health care workers. See here for Lane Powell's Legal Update further discussing these mandates. These government mandates have led many private employers to consider doing the same. However, private employers who adopt mandatory vaccination policies still must consider employees' requests to be exempt from the policy for medical and religious accommodation reasons and still face some legal risks.

Key Highlights of the EEOC's Guidance

- From the EEOC's perspective, a mandatory COVID-19 vaccination program is permissible if it is job-related and consistent with business necessity based on safety concerns arising from COVID-19.
- Employers must engage in the interactive process with employees who seek reasonable accommodation to the mandatory vaccination. Reasonable accommodations may include: requiring an unvaccinated employee to wear a face mask or work at a social distance from coworkers or non-employees, working a modified shift, remote or telework, or accepting a reassignment.
- If an employee cannot get vaccinated because of a disability or religious belief, the employer may not require vaccination for that employee unless the employer can demonstrate that the employee would pose a "direct threat" to the health or safety of the workplace.
- Employers should ask only for vaccination status. And employers should not ask employees *why* they are not vaccinated, as doing so may be a medical inquiry under the Americans with Disabilities Act (ADA).
- Documentation or other confirmation of COVID-19 vaccination status is confidential medical information, and it must be kept confidential and stored separately from the employee's personnel files.
- Employers may offer incentives (both reward and penalty) to employees for voluntarily receiving a vaccination. As discussed below, employers administering a vaccination program must limit the types of incentives they offer to avoid running afoul of the federal ADA and Genetic Information Nondiscrimination Act (GINA).

Employers Who Are Considering Mandatory Vaccination Policies Should Weigh the Other Legal and Practical Considerations

- *Consider Voluntary policies:* Voluntary, as opposed to mandatory, COVID-19 vaccination policies have fewer restrictions and pose few compliance obligations. The EEOC guidance also discussed employer-provided incentives for voluntary vaccination programs.
- *Full Approval Coming Soon:* The FDA suggests full approval may come soon for some vaccines. Employers and employees may take more comfort in mandatory vaccination policies when the FDA grants full approval of the vaccines, which is expected to happen soon.
- *Disparate Impact or Treatment Allegations:* Because some individuals or demographic groups may face greater barriers to receiving the vaccination than others, employers requiring vaccines may need to address these concerns and offer solutions to increase vaccine access.
- *State Privacy Laws:* Employees' vaccination status may also be protected under state privacy laws. In California, collection of employees' vaccination status data could also trigger the notice requirement for employee data under the California Consumer Privacy Act (CCPA).
- *Impact on Employee Morale:* Mandatory vaccination policies may impact workplace morale, and could create employee relations and public relations challenges, as well as perceived retaliation or ostracization for those employees who do not get vaccinated.
- *Remote Workers:* Because a vaccination requirement must be job-related and consistent with business necessity based on safety concerns, employers should consider whether it is appropriate to require remote workers to receive vaccinations if those workers will never come into the office or worksite; unless an overarching government-issued mandate applies. For example, under the new Washington mandate, certain government and healthcare workers must receive a vaccine even if they work remotely.
- *Public Employers:* Public employers may face constitutional challenges from employees based on due process, free speech, and religious rights, particularly because the reaction to COVID-19 has created political divides.

Considerations for Employer-Administered Versus Third-Party Vaccination Programs

- *Vaccine Pre-Screening Questions May Be Medical Inquiries:* The screening questions an employer or its agent asks before administering the vaccine might be medical inquiries. Employers who administer the vaccine (either directly or through a third party) may only ask pre-screening questions that are "job-related and consistent with business necessity," such as limited questions about the employee's symptoms or exposure.
- *Workers' Compensation Risk:* Employers who administer vaccinations to employees (directly or through a third party) may be responsible for workers' compensation claims stemming from vaccine-related injuries and illnesses.
- *Wage and Hour Issues:* Depending on the nature and logistics of a vaccination program, employers may be responsible for compensating employees for time spent obtaining mandatory vaccinations.
- *Incentives:* If an employer administers the vaccine, the employer's incentive cannot be so substantial that it is coercive. Employers cannot incentivize employees in return for an employee's *family member* getting vaccinated without running afoul of GINA.

- *Collective Bargaining:* Employers with unionized workforces may need to bargain with unions prior to implementing vaccination programs.

What Should Employers Do Now?

- *Evaluate Current Mandates:* Government entities are issuing new vaccine mandates. Review the new mandates to determine if any new laws apply to your business. To learn more, see [this Lane Powell Legal Update](#).
- *Take Stock:* Consider whether a vaccination program is appropriate for your business needs in light of the risks above, and, if so, whether a voluntary or mandatory program is the right fit. For employers who still have a largely remote workforce, this need may not be as urgent.
- *Continue to Educate Employees on Vaccines:* If you haven't already, consider providing employees with access to state and federal government websites that discuss the benefits, risks, and logistics of vaccinations.
- *Incentivize Carefully:* Consider tailored, business-specific minimal incentive programs that remove hurdles to vaccination for employees who choose to get vaccinated while avoiding penalizing employees who opt-out for medical or religious reasons.
- *Notify Employees of the Reasonable Accommodation Process:* Communicate to your employees in writing that you will consider requests for reasonable accommodation for exemptions from the mandatory vaccination program. Provide managers, supervisors, and those responsible for implementing the program with clear information about recognizing and handling those requests appropriately.
- *Safeguard Employee Confidential Vaccination Status Data:* Ensure that information relating to employees' vaccination status is maintained in separate confidential files.
- *Monitor OSHA Guidance:* OSHA has issued COVID-19 related safety guidance but still has not issued guidance suggesting a vaccine is required for a safe working environment.
- *Stay Tuned:* This is a rapidly evolving area where federal and state guidance seems to change by the day, and many of the court decisions discussed above have been appealed. Keep up-to-date by [subscribing](#) to Lane Powell's Legal Updates.

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