

To mandate or not to mandate? That is the vaccine question



Miriam L. Rosen | Thursday, July 29, 2021

Since December 2020, employers have generally taken a “wait and see” approach to mandating COVID-19 vaccines for employees. This measured approach recognized the potential impediments to vaccine mandates, including the legal authority to impose such a requirement, the vaccines’ Emergency Use Authorization (EUA) status, and significantly, the consequences of employee dissent.

Now, with the Delta variant raging, most legal issues clarified, and large employers eager to get back to offices in the fall, the tide seems to be turning on mandates and related requirements. Already this week various public employers announced vaccine mandates and/or testing requirements, including the Department of Veterans Affairs and the State of California. New York City implemented a requirement for vaccination or regular COVID-19 testing for their healthcare workers and the state has followed suit. Large health systems and tech companies are jumping on the bandwagon as well, with both Google and Facebook announcing that vaccines will be required in their U.S. offices in the fall. Significantly, President Joe Biden is expected to announce a vaccine requirement along with regular testing protocols for all federal employees and contractors.

For those employers contemplating a vaccine mandate, here are some issues to consider.

Can an employer mandate COVID-19 vaccinations?

According to the EEOC, federal law permits an employer to require vaccines, subject to reasonable accommodations for disabilities and other EEO considerations, such as religious beliefs. Employers with a

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union-represented workforce should also consider bargaining obligations before any mandate.

What are an employer's obligations to employees who can't be vaccinated for medical or religious reasons?

In its COVID-19 guidance document, the EEOC notes that in some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. In those circumstances, employers need to engage with employees to identify possible reasonable accommodations (e.g., masking, weekly testing).

The EEOC has also noted that employees who are not vaccinated because of pregnancy may be entitled to workplace adjustments, if the employer makes modifications or exceptions for other employees. These modifications may be the same as reasonable accommodations based on disability or religion.

What about the vaccine's EUA status? Doesn't that impact vaccine mandates?

Critics of vaccine mandates point to the shots' EUA status as a basis for rejecting mandatory employer requirements. However, at least two federal courts have found that the qualified EUA approval -- as opposed to full FDA approval -- is not a barrier to imposing an employer vaccine mandate.

In addition, just this week the Department of Justice's Office of Legal [stated its opinion](#) that it is legal to mandate vaccines distributed under emergency use authorization. Specifically, the DOJ noted in a non-binding opinion:

We conclude that [EUA] concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUA.

For good measure, the DOJ's opinion also notes that the FDA agrees with its interpretation.

Can employers ask employees if they are vaccinated and require proof of vaccination?

To enforce vaccine mandates, employers need to know who is and who is not vaccinated. Once again, the EEOC has provided guidance on this issue. The EEOC indicates that asking employees about vaccine status is permissible and is not a disability-related question.

Similarly, employers can require employees to provide proof of vaccine status (e.g., vaccine card). Note, however, that once an employer has information on vaccine status, it is considered confidential medical information under the Americans with Disabilities Act and must be stored separately from employees' personnel files.

Is mandatory weekly COVID-19 testing for unvaccinated employees permissible?

Some employers are imposing weekly COVID-19 testing mandates for those employees who won't (or can't) get vaccinated. Under the current circumstances, a regular testing protocol is permissible as a required safety practice. As with any employment policy, employers should apply such testing requirements in a consistent, non-discriminatory manner.

What information should an employer convey when mandating vaccines?

Employers should develop a clear communication plan to make implementing the requirements easy for employees to understand and follow. Employers will want to consider and communicate about the following:

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- The rationale for the mandate - keeping employees, business associates, and the community safe
- Timing for being fully vaccinated
- Notification regarding exemption/accommodations for medical or religious reasons
- Process for providing proof of vaccine status
- Consequences for failing to comply with the mandate or alternate requirements

What should an employer expect when mandating vaccines?

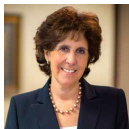
First, employers need to be realistic and prepared for the fact that some employees may quit. Regardless of an employer's best safety intentions, studies show that some employees simply will not get vaccinated. Employers choosing to implement a mandate need to consider this in their planning. The better news, however, is that some employees will get vaccinated. The good news is that vaccinated employees will be pleased that the employer has taken this step to protect the workforce.

Also, be prepared to address public relations issues associated with the mandate decision. Employers should have responses prepared and should be ready to withstand unhappy employees and (generally) unhappy 3rd parties who may take to social media. With the number of employers mandating vaccines increasing daily, the PR fall out is likely to decrease over time.

To mandate or not to mandate?

To mandate or not to mandate is not a decision that any employer takes lightly. The decision to implement a vaccine mandate along with related requirements should be informed by safety, legal, and employee relations considerations. Employers should work with their employment attorneys and other experts to understand the legal issues and other implications of a vaccine mandate on their organization.

McDonald Hopkins' Labor & Employment Law Team will continue to keep employers updated on COVID-19 and return to office developments. Please contact your McDonald Hopkins employment lawyer with any questions.



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Team member bio