

The Shot Heard Around the World: The Impact of the COVID-19 Vaccine in the U.S. Workplace

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There are a multitude of unknowns as health officials across the country race to administer the long-awaited COVID-19 vaccine. Employers must also evaluate a number of factors as they decide whether or not to mandate that their workers get vaccinated.

Employers have the opportunity to make choices that may impact the course of the pandemic when it comes to workforce inoculations. A recent article in *Nature* magazine noted that, based on predictive models, the novel coronavirus is here for the long haul and has the potential to trigger surges in infection for the next four years.

Research shows that attitudes of vaccine hesitancy and avoidance contribute to make COVID-19 vaccine intentions a divisive subject among Americans.¹ While recent polls show that most Americans say they definitely or probably will get the vaccine, a sizable minority have an aversion to it. Likewise, a December poll from Society of Human Resource Management found that 61 percent of U.S. employers intend to encourage — but not require — their employees to get the vaccine, even though two-thirds believe it is very or somewhat necessary for business continuity.²

So while the vaccine will surely play a critical role in the future of the U.S. economy, there are numerous issues businesses must consider carefully before implementing a vaccination policy for employees.

Employers May Implement a Vaccine Mandate

Currently, federal employment law allows employers to require workers to be vaccinated, but they need to develop a plan in advance. The Equal Employment Opportunity Commission (EEOC) paved the way for a mandate in December 2020 when it released guidance that addressed mandatory COVID-19 vaccination policies and how to comply with the law regarding employees with disabilities and religious objections to vaccination.³ In briefest summary of a highly complex issue, the bottom line is that employers may implement a mandatory vaccination policy in most cases, but there are important limitations that must be considered.

As a baseline, an employment policy mandating vaccination must take into account compliance with the ADA and Title VII of the Civil Rights Act of 1964. The ADA generally requires employers to (i)

avoid medical inquiries unless they are job related and consistent with business necessity (but simply requiring proof a COVID-19 vaccination will not be a medical inquiry), and (ii) offer accommodations to workers with disabilities which are reasonable and do not pose an undue hardship to the employer, unless the employer can show that an accommodation would pose a direct threat to the health of the employee or to others (which is a high burden). Title VII requires employers to consider reasonable accommodations to policies based upon sincerely held religious practices or beliefs which do not pose an undue hardship to the employer.

While we believe employers will be in a reasonably strong position to argue that mandatory vaccination policies will generally comply with the ADA and Title VII, these analyses must always be conducted on an individualized, case-by-case basis. Employers must keep in mind that there is no absolute rule that will always apply in every case.

Because the current vaccines are being allowed by the Food and Drug Administration under emergency use authorization (EUA), recipients must be informed that they have a right to refuse or accept administration of those vaccines. Employers could leave themselves vulnerable to claims of wrongful discharge in violation of public policy if they fire an employee who refuses a vaccine under the emergency use authorization status.

What to Watch For

While the EEOC has provided guidance for employers who want to move forward with a mandate at this time, some states are intervening in the interest of protecting individual liberties. Several state legislatures have introduced bills that would restrict government entities and employers from requiring the vaccine, with a goal of ensuring that it remains a personal choice.

Employers that mandate inoculation should have a plan in place for circumstances where employees request exemptions due to medical or religious reasons. Companies may need to make a case that granting an exemption would create a direct threat to others — a potentially effective argument given how contagious and dangerous COVID-19 is — and/or cause an undue burden for the employer.

Companies also need to have a plan for wage and hour compliance, much like they have for requiring workers to get COVID-19 tests. Notably, employers who mandate vaccination must consider the need to pay non-exempt employees for the time spent getting vaccinated, particularly if they obtain the vaccination outside of regular working hours.

The vaccine's uneven supply chain is another area of uncertainty that employers will need to consider. Some estimates say that it could be late summer, or even the fall, before there are enough doses to vaccinate most of the U.S. population. Employers that mandate companywide inoculation might have to wait several months before getting compliance from the majority of the workforce.

Should You Require the Vaccine?

The issue of “can you mandate” is different than “should you mandate.”

Each employer must wrestle with this question. There are nuanced risk and policy considerations to determine how an organization approaches the vaccine. While vaccines are legally on the market, there are various unknowns about their long-term efficacy, and there are still open questions as to whether pregnant individuals can or should be vaccinated and when a vaccine for children might be available. Those are distinguishing factors between the COVID-19 vaccine and mandates for other

vaccines that have full FDA approval.

Employers should consider their legal exposure if they require workers to get inoculated. What would happen if an employee has an adverse reaction? How do you handle circumstances where a worker refuses to comply, either based on the ADA, Title VII or the vaccine's EUA status? Do you offer on-site vaccinations – which could have ADA implications tied to the collection of information – or incentivize workers to get their shots off-site? How will you make sure employee incentives are not coercive and non-discriminatory? For obvious reasons, a formal, and preferably documented, process is essential.

Conversely, employers also have to look at the potential liability if they do not mandate vaccinations. In many jurisdictions, COVID-19 will be considered a compensable injury under workers' compensation if contracted on-the-job (which itself can be hard to prove, and may be subject to a legal presumption for some jobs in some states, e.g., first responders). The liability for on-the-job exposure is typically limited to that allowed under applicable workers' compensation law, and the employee generally cannot file a lawsuit unless they can prove there was an intentional or grossly negligent act. One unknown to watch in the coming months is whether the COVID-19 vaccine becomes generally mandated by employers or considered "best practice," in which case, one can envision claims of gross or willful negligence against employers who do not mandate vaccinations.

Another legal risk employers face and must consider when opting out of mandatory vaccination is when a worker exposes a third party such as a customer, a patient, or a student to the virus. Or there could be an instance where an exposed worker takes the virus home to their family. As noted above, it is certainly plausible that we'll see litigation claiming an employer was grossly negligent or irresponsible by not having a vaccine mandate, particularly in workplace environments where employees come in regular contact with the elderly or other vulnerable populations. In fact, we have already seen cases filed taking issue with safety precautions at nursing homes and other care facilities.

Final Takeaways

Every employer, in consultation with their legal counsel and other constituent groups, will need to make a decision on this issue. When doing so, it would be prudent to recognize that society will be dealing with COVID-19 for the foreseeable future and that employees will still have to adhere to safety protocols despite the presence of a vaccine. Also remember that there is no one-size-fits-all approach but monitor what other companies in your industry are doing, because what they do could establish a standard of care. Avoid becoming an outlier with policies deemed by others as unreasonable. Finally, keep communication channels open. Messaging and sharing data-driven information is important when getting buy-in from employees on a vaccination policy.

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