



Mandatory Vaccination Policies Spark Strong Responses, Even Among Healthcare Employees – What Your Hospital Should Consider

Insights

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While many expected healthcare employers to be among the first to mandate COVID-19 vaccination, the vast majority still appear to be opting to encourage or incentivize vaccination instead. Employee relations concerns, including vaccine hesitancy and potential legal intricacies, are among the most significant reasons for this approach. Nonetheless, trends may be shifting as a number of providers have begun to institute mandatory COVID-19 vaccination requirements. For employers (in any industry) who are still weighing their options, there are a number of issues to consider before implementing a mandatory vaccination policy.

Is Mandatory Vaccination Now a Trend in Healthcare?

As vaccine rollouts have continued, an increasing number of healthcare employers, particularly senior living and long-term care providers whose patients and clients are among the most vulnerable, have recently started requiring COVID-19 vaccinations in their workplaces. Last month, Houston Methodist became the first major hospital system in the country to announce that it is requiring employees to be vaccinated. Thus, the number of healthcare employers mandating vaccination seems to be growing. It remains to be seen how many employers may follow suit.

Can Employers Legally Mandate the COVID-19 Vaccine?

Although mandatory vaccinations, including those for the flu, have at times been contentious, healthcare and other employers have been permitted to require them. The great weight of current guidance indicates that employers can require COVID-19 vaccinations, subject to the same limitations that have been applicable to flu shots and other vaccines. Those limitations are discussed below. The Equal Employment Opportunity Commission (EEOC) has certainly indicated that employers may require the COVID-19 vaccine. In December 2020 guidance, the EEOC addressed what actions employers may legally take if an employee refuses to receive the COVID-19 vaccine, explaining how employers may inquire about employees' vaccination status and require vaccines without violating the law.

A published study, focusing on the Emergency Use Authorization (EUA) status of available COVID-19 vaccines, also recently examined the legal and the EUA statute provision requiring that individuals must be informed “of the **option to accept or refuse** administration of the product, **of the**

consequences, if any, of refusing administration....” Some have asserted that individuals must be given the option to opt-out of receiving a vaccine issued under EUA status. However, this language does not appear to prevent an at-will employer from making the vaccine a condition of employment. As noted by the study, the statute’s reference to “the consequences, if any, of refusing administration of the product,” could fairly be interpreted to encompass termination of employment or other adverse employment actions. EEOC also expressly references the COVID-19 vaccines’ authorization under EUA status without suggesting that it impedes an employer’s authority to require them.

As to state law, many states place vaccination requirements on certain healthcare workers. Those state laws vary greatly, but so far, no state has prohibited private employers from mandating COVID-19 vaccinations. Several governors have issued orders banning or limiting the use of so-called vaccine passports and some states have pending legislation that could prohibit or limit employers’ rights in this regard. Employers considering mandating COVID-19 vaccination should continue to monitor developing legislation.

At least two lawsuits have been filed challenging employer COVID-19 vaccination requirements, and more may come. Both suits involved public sector employers. This issue may not be definitely resolved except through the courts.

What Should Employers Consider Before Mandating a COVID-19 Vaccine?

Whether to mandate the COVID-19 vaccine is an employer-specific, and sometimes job-specific, decision. For employees who have close, lengthy contact with patients or others, COVID-19 vaccination is a much more critical question than for employees whose work involves less contact with others. However, there are a number of considerations that every employer should evaluate before requiring the vaccine. Some issues are more subjective than others, but all are important. Those issues include the effect of increased vaccination rates; employee relations (including vaccine hesitancy); customer and community concerns; and underlying legal requirements. We will address each of these considerations.

Mandatory Vaccination Policies Increase Overall Vaccination Rates and Workplace Safety

Historically, mandatory vaccination policies result in higher vaccination rates, typically about double the rate reached under a purely voluntary program. According to the CDC, only 37.5% of nursing home staff received at least one dose of COVID-19 vaccine during the first month of voluntary vaccine clinics in nursing homes. Whereas, for example, a senior living center that required vaccines attained a 96% inoculation rate. The CDC emphasis on vaccinations as a way to reach herd immunity and close the door on the COVID-19 pandemic is a significant consideration. And as a practical matter, Houston Methodist correlated a higher vaccination rate with lower employee illness and absenteeism rates, a powerful factor in attempting to safely maintain operating capacity. The analysis is not one-sided, however.

Employee Relations: Healthcare Workers Experience a Higher Rate of Vaccine Hesitancy

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Despite compelling evidence that the COVID-19 vaccines being distributed in the U.S. are safe, a surprising number of workers express concerns about the safety of the vaccine and oppose mandatory policies. They cite above-referenced EUA status of the vaccines and a perception that vaccine development was rushed among their concerns. According to a Washington Post poll, 42% of healthcare workers oppose mandating the COVID-19 vaccine for those who work with patients. Only 30% of non-healthcare workers expressed that opinion. Roughly 30% of those healthcare workers either intend to decline the vaccine or were undecided. Almost two-thirds of that group indicated that they would sacrifice their jobs rather than being vaccinated. Such skepticism is a reason that some healthcare providers are continuing to encourage or incentivize vaccinations rather than requiring them. An anonymous nurse who works for Houston Methodist received considerable media attention in expressing her opposition to mandatory vaccinations and launched a petition seeking support of her position.

Legal Concerns: Mandating Vaccination Triggers Detailed ADA and Title VII Concerns

Employers who mandate COVID-19 vaccination must be prepared to support their position when some employees will inevitably seek exemptions or simply refuse to be vaccinated. Legally, at-will employers can enforce such policies as long as they provide accommodations for certain medical or religious objections. These accommodations requirements arise under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act. In each case, the accommodation process is fact-specific and must be individualized.

When an employee seeks an accommodation based upon a medical condition, the ADA will often apply. In that case, an employer seeking to enforce its policy requirement must establish that COVID-19 vaccination is either a safety-based qualification standard or that an unvaccinated employee in the workplace represents a significant threat of substantial harm that cannot be eliminated by a reasonable accommodation. The process of considering an accommodation request based upon an employee's sincerely held religious beliefs is similar. When an employee requests such accommodations, the employer is legally required to engage in an interactive process to determine whether the issue can be resolved.

The ADA also imposes strict limits on when and how employers can make medical inquiries or conduct medical examinations. Most, but not all of an employee's responses to such medical inquiries constitute confidential information that the employer must safeguard. Even asking an employee whether they have been vaccinated can be tricky, if not handled carefully.

Unionized Employers Will Likely be Required to Provide Advanced Notice and Bargain

If your workplace is unionized and operates under a collective bargaining agreement, imposition of a vaccine mandate likely requires advanced notice to the incumbent union(s) and bargaining over the issue, if requested.

Conclusion

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Although we have yet to see a large number of employers mandate the COVID-19 vaccine, the tides may be turning. Healthcare and other employers who are considering requiring COVID-19 vaccinations should carefully evaluate all of these issues, in addition to planning how to communicate their decision and procedure; who will oversee and coordinate the process; how to deal with accommodation requests; and how workplace COVID-19 protocols may (or may not) change when the workforce is more fully-vaccinated. We will continue to monitor developments related to the COVID-19 vaccines and related workplace questions that arise. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information.

If you have questions about mandating the COVID-19 vaccine or how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers or contact any attorney in on our FP Vaccine Subcommittee.

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