



VACCINE MANDATES: Practical and Legal Considerations for Small & Midsize Businesses

With news that the Pfizer vaccine has now obtained full FDA approval, more businesses are likely to make vaccinations mandatory, creating safer spaces for their employees and customers. Smaller enterprises, without Risk and Legal departments, have been especially challenged, fending for themselves to interpret national and state guidelines, and feeling pressure to follow the protocols set by corporations, like Facebook and Google, but each business should evaluate what works best for them.

Factors to consider before instituting a mask mandate in your workplace:

- Is the company in an area of high community transmission?
- Does the workforce have significant in person interaction with the public or other employees?
- Do current state guidelines ask that masks be worn indoors for the vaccinated and unvaccinated?

If you answered yes to any of these questions, then mask mandates or strong incentivization of mask use may be considered for your organization.

Vaccination Concerns

The decision to mandate vaccines should first be vetted with an experienced HR or legal advisor such as the HR Consultants at Engage. Having a policy, even if it does not explicitly mandate vaccines, helps the employer set expectations, allowing everyone the opportunity to plan.

A vaccine mandate may allow for collaboration at the worksite, the potential for less COVID-related sick leave, and employees may feel safer returning to the office. On the contrary, some companies may find employees looking for other work because they are uncomfortable with the mandate. There is additional legal risk because a mandate will trigger a legally required evaluation for individuals requesting exceptions to the vaccination for medical or religious reasons. Medical exceptions will require the employer to engage in what's known as the interactive process with the employee to see if a reasonable accommodation is available under the Americans with Disabilities Act as amended ("ADA"). Likewise, bona fide religious exceptions must be evaluated under Title VII. These risks can be minimized if vaccines are "encouraged" or incentivized.

VACCINE MANDATES – Q&A

Can a private business legally mandate vaccines?

At the federal level, the EEOC and the DOJ support employers mandating vaccines. The DOJ specifically stated that employers were not prohibited from mandating vaccines because they were authorized under EUAs. While not legally binding, this support offers strong evidence on how either agency would treat a complaint regarding a vaccine mandate. It is vital that employers who implement a vaccine policy do so consistently in an anti-discriminatory manner without disparately impacting any particular group.

Since the FDA has now fully approved the Pfizer-BioNTech vaccine, employers can breathe a little easier in that at least one basis for challenging such policies, their EUA status, has been removed. Furthermore, the full approval status will likely help more employers feel comfortable taking a definitive stance and make more workers

comfortable with taking the vaccine.

Employers should take a neutral stance on which vaccine their employees decide to obtain.

At the state level, it depends. Some states have implemented legislation regarding employer vaccine mandates. Montana enacted legislation curtailing a private employer from mandating vaccines, while other states, like New Jersey, have enacted or are considering legislation requiring employers, especially in industries like healthcare and hospitality, to mandate vaccination or institute regular COVID-19 screen testing.



If an employee cannot receive the vaccine, what are my legal obligations as an employer?

As previously noted, an employer mandating vaccines may need to engage in the interactive process under the ADA. Employers with 15 or more employees are covered by the ADA. If an individual has a medical reason for not taking the vaccine, the employer would need to provide a reasonable accommodation, like PPE, telework, or a waiver. If these accommodations cause an undue hardship to the employer, then it's possible the employer won't need to provide them, but an employment lawyer should be consulted. Businesses with fewer than 15 employees may still have similar requirements under state or local laws.

Similarly, if an individual has a bona fide religious belief against taking the vaccine, they may need an

accommodation under Title VII, which also has a 15-employee threshold. As with the ADA, even if the federal law does not apply to a small business, most state laws have a lower employee threshold.

It is equally important that employers take steps to protect employees who are unable to take the vaccine because of a medical disability or religious exception from harassment or a hostile work environment.

In addition to the ADA and Title VII, what other legal concerns should a small business consider?

When obtaining vaccine information, make sure to keep the information confidential and on a need-to-know basis. Privacy employment laws protect employee information, and disclosure could expose the company to liability. When an employer requires proof of vaccination, they must ensure that they are requesting it from all employees consistently, and that they don't receive unrelated medical information, which could end up triggering an improper inquiry under the ADA or Genetic Information Nondiscrimination Act.

Employers should designate a few individuals to receive this information who have additional training for medical accommodations and religious exceptions. These designated individuals should also have access to legal counsel.

Mandating vaccinations will also trigger considerations under the National Labor Relations Act (NLRA) for unionized workforces as it may be considered a mandatory subject of bargaining. It is also possible that a nonunionized workforce voicing concerns or boycotting vaccination in a concerted way could be protected activity under the NLRA.

What are my options if I don't mandate vaccines for everyone?

Employers should provide a safe workplace, continuing with cleaning, masking, and distancing protocols. Many companies are requiring unvaccinated employees to take screening tests regularly.

The Families First Coronavirus Response Act (FFCRA) and states provide paid time off for individuals who receive a test due to exposure or for the time spent obtaining a vaccine. However, regarding screen testing, it is possible that this testing time will be considered paid time in most jurisdictions, which could trigger overtime and other pay considerations.

Employers should be prepared to communicate with employees about why they have instituted this policy, as employees may be resistant to screening. As with other COVID-19 testing and vaccine status this information will still need to remain confidential.

With the situation still changing daily, employers should be prepared to act quickly to implement or update any COVID-19 workplace policies. Just as important is keeping employees continuously informed. Be proactive, open to feedback, and mindful of being consistent and keeping employee information confidential.

REMINDER: Workplace Safety Practices

A replay of the July/August Engage HR Webinar – *Lessons Learned and Best Practices for Safety* – is available on the Engage HR webinar archive found [HERE](#).