

# 10 Considerations for Employers Contemplating Mandatory Vaccination Policies

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If you're an employer contemplating implementing a mandatory COVID-19 vaccination policy for your workforce, you aren't alone. With COVID-19 cases surging around the country and leading to new Centers for Disease Control and Prevention (CDC) masking guidance and statewide mandates, many employers who were initially hesitant about imposing a vaccine mandate are now reconsidering their stance.

A series of court victories for employers on this issue and the recent announcement from the Department of Justice (DOJ) clarifying that the current Emergency Use Authorization status of the COVID-19 vaccinations doesn't prevent employers from implementing such mandatory policies has helped to ease many employers' fears regarding the associated legal liability as well.

Notwithstanding this, however, there are several important considerations that employers must take into account when rolling out a mandatory vaccination policy, including the following:

**1. Notice and Timing.** Employers who decide to proceed with a vaccine mandate should carefully consider how best to communicate this policy to their employees, including the timing of when such policy will go into effect and how much notice to provide to employees before enforcing the requirement. In doing so, employers should note that pursuant to CDC guidelines, individuals are not considered "fully vaccinated" until after: (1) two weeks have passed since their receipt of a second dose in a two-dose vaccination series, such as the Pfizer or Moderna vaccines, OR (2) two weeks have passed since their receipt of a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine. In light of this, and the fact that the manufacturers of the Pfizer and Moderna vaccines recommend a three-four week waiting period in-between an individual's receipt of their first and second dose, employers must take care to provide employees who may not have yet received any vaccine doses with sufficient time to attain "fully vaccinated" status prior to enforcing any mandate.

**2. Accommodation Obligations.** Accommodation obligations may exist under both state and federal law for employees who are unable to receive the COVID-19 vaccine due to disability, pregnancy, or sincerely held religious beliefs. Accordingly, employers who roll out vaccine mandates should also develop a clear and comprehensive reasonable accommodation policy to address any such issues, and should be ready to engage in an interactive process with any employee who requests an

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accommodation to their vaccination requirement for legitimate disability-related or religious reasons.

**3. Compliance with State and Local Law.** Before implementing a mandatory vaccination policy, it's also important for employers to first confirm that there aren't any state or local laws that prohibit them from doing so. In Montana, for example, employers are prohibited from requiring employee vaccination or discriminating against employees or job applicants based on their vaccination status.

**4. Proof of Vaccination and Record Keeping.** Employers who collect proof of vaccination from their employees as part of their mandatory vaccination policy need to ensure that they are treating this information as confidential to the same extent that they would with any other employee medical information. This means that any documentation kept by employers reflecting employee vaccination status should be maintained in a confidential file, separate from the employee's personnel file, and should only be shared with those individuals within the company with legitimate business or health and safety reasons to access it.

**5. Hiring and Retention Issues.** Particularly in the current labor market, employers should think carefully about the impact that implementing a mandatory vaccination policy may have towards employee retention and hiring efforts.

**6. Workplace Mask Wearing Policies.** Employers who implement mandatory vaccination policies shouldn't be too quick to scrap their mask wearing policies in the workplace. As a best practice, employers should continue to adhere to the most up-to-date guidance from government health authorities, regardless of the vaccination status of their workforce. Notably, on August 13, 2021, the Occupational Safety and Health Administration (OSHA) updated its guidance for employers to mirror the CDC's most recent guidance regarding mask wearing for vaccinated persons. Specifically, the updated OSHA guidance now recommends that fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers. It also advises that fully vaccinated workers who have close contacts with people with COVID-19 wear masks for up to fourteen days unless they have a negative coronavirus test at least three to five days after contact.

**7. Impact on Diversity Efforts.** Employers should be cognizant of the potential impact that a mandatory vaccination policy may have on the diversity of their workplace, particularly if the vaccination rates of some groups of employees are disproportionate to those of others.

**8. Liability and Public Relations Concerns.** Prior to implementing a mandatory vaccination policy, employers should assess their company's overall risk tolerance towards the potential liability and public relations backlash that may result from such efforts. Although legal challenges by employees to employer vaccination mandates have thus far been substantially unsuccessful, they nonetheless

have continued to increase as more employers roll out such mandates. Employers should also anticipate and prepare for certain levels of resistance and backlash from subsets of their workforce, which could potentially result in negative commentary on social media or in the press.

**9. Education.** Many people are flooded with misinformation about COVID-19 vaccines from social media, word of mouth, and unreliable news sources. Accordingly, employers who decide to mandate vaccination should also consider making efforts to proactively address such misinformation in their workforce through informational campaigns and by sharing credible and accurate information. The CDC has compiled a “Workplace COVID-19 Vaccine Toolkit” that provides a multitude of free resources and literature that employers can utilize to help to educate their employees about the safety and effectiveness of vaccination.

**10. Wage and Hour Issues.** Employers should consider the related logistics of implementing vaccine mandates, including compensation issues that may be implicated for the time spent by employees traveling to and receiving the vaccine. Employers should also consider whether to allow employees to get vaccinated during working hours or to provide paid leave time for employees to get vaccinated.

If you have any questions about implementing mandatory vaccination policies and ensuring that such policies comply with applicable law, please remember that the Labor & Employment team at Bailey Glasser stands ready to assist you.

### **Attorneys**

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### **Practice Areas**

Labor & Employment