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Labor & Employment Alert

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Delta strain has employers reconsidering vaccination mandates: Employers do have options

By Rachel L. Conn and Benjamin J. Kim

Increasing numbers of employers are reconsidering vaccination mandates—we highlight legal concerns that private employers must assess as they weigh their options.



What's the Impact

- / Many courts are ruling in favor of vaccination mandates
- / Employers must ensure that confidentiality is maintained and vaccine mandates are not implemented in a discriminatory manner
- / Public health guidance and laws relating to COVID-19 vaccinations continue to develop, and any mandatory vaccination program should evolve accordingly

As the Delta variant of SARS-CoV-2 (COVID-19) continues to wreak havoc around the country, particularly for the unvaccinated population, more and more employers are reconsidering vaccination mandates.

Even the federal government recently announced that it will require vaccination or regular testing for employees. States like New York and California have announced similar requirements for state employees and health care workers. More and more companies in various industries

have also recently announced that they will require vaccines for their workforce. Under the Occupational Safety and Health Act, employers have a duty to keep employees safe, including from COVID-19.

Vaccination mandates have also picked up speed after some recent legal decisions. The Department of Justice released a [slip opinion](#) finding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3, which authorizes the Food and Drug Administration to issue an "emergency use authorization" (EUA), "does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs."

In addition, courts to date have backed employer mandates in large part. In a recent federal court decision, *Bridges v. Houston Methodist Hospital*, Docket No. 4:21-cv-01774 (S.D. Tex. Jun 01, 2021), a judge dismissed an action against a hospital requiring vaccines for all workers, subject to medical or religious exemptions. The decision has been appealed. While not legal precedent, which other judges must follow, the *Bridges* case is the first case upholding an employer's vaccine mandate as lawful under federal and Texas law. In another recent decision, *Klaassen v. Trustees of Indiana University*, the U.S. Court of Appeals for the Seventh Circuit upheld a lower court decision rejecting a request by a group of students to enjoin and stop Indiana University from imposing a vaccine mandate that also had exemptions for religious beliefs or medical conditions. While the decision focused on arguments raised by students against the University's vaccine mandate, many of the arguments could apply similarly in the employment context. The courts in both *Klaassen* and *Bridges* followed *Jacobson v. Massachusetts*, a U.S. Supreme Court precedent from 1905, holding that a state may require the smallpox vaccine.

Before a private employer considers vaccine mandates for its workers, however, there are several primary legal considerations.

- / Employers must ensure that any vaccine mandate is not implemented in a discriminatory way. In May 2021, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated [guidance](#) stating that federal anti-discrimination laws do not prevent an employer from mandating vaccination, but employers need to assess whether any such policy could have a disparate impact on certain groups who "may face greater barriers to receiving a COVID-19 vaccination than others."
- / Exceptions must exist for any mandate. The EEOC in its guidance stated that employers do need to provide reasonable accommodations to employees who cannot get vaccinated due to a disability or sincerely held religious belief, practice, or observance unless the employer can show an undue hardship. The EEOC guidance provided some examples of reasonable accommodation, such as "an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or nonemployees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment." The *Bridges* decision made note of the EEOC guidance and these requirements to provide reasonable accommodations. Employers need to examine what they would do if an executive or high-performing employee flat out refuses the vaccine.

- / The confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination, is important. The EEOC has noted that although the equal employment opportunity laws “do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination,” such information must be kept confidential and stored separately from the employee’s personnel files.
- / Employers should consider the impact of vaccination mandates for third parties, such as vendors, clients, visitors, etc. If an employer will be requiring vaccination for employees, then questions could be raised if the same employer does not require vaccination for visitors and vendors who come to the worksite. The employer may need to explain the justification for any distinctions made between employees and visitors.
- / Various contractual obligations could affect the implementation of any vaccine mandates. For example, some collective bargaining agreements may affect decisions on vaccine mandates. Requirements and obligations under third-party contracts with vendors, subcontractors, etc. also could affect such decisions.
- / Employers also will need to examine whether they will reimburse for the cost of the vaccine; pay hourly, nonexempt employees for the time it takes to get vaccinated; and pay employees time off for recovering from side effects from the vaccine. All of these issues could vary based on state and local laws. For example, in March 2021, California passed a new [law](#) requiring employers with more than 25 employees to provide 80 hours of COVID-19-related sick leave to cover vaccination time and any recovery from vaccine-related side effects. The City of Los Angeles also issued an [order](#) with additional requirements.
- / Employers should determine if the mandate will apply to all employees or only those in specific positions. For example, an employer will have less of a basis to mandate vaccines for employees that may never enter their physical offices or facilities. Again, consideration must be given to applying the mandate in a non-discriminatory way.

Finally, the above list is not exhaustive. Depending on the jurisdiction, various other issues could arise. Employers also should note that public health guidance and laws relating to COVID-19 vaccinations continues to develop, and so any mandatory vaccination program should continue to follow all developments, even after implementation.

Once an employer has decided to mandate vaccines, it must decide how to verify an employee’s vaccination status. There is a spectrum of options.

- / The “Honor” System. This completely relies on employees to get vaccinated or take precautions (such as masking) if they are not vaccinated. As a consequence, this approach has the greatest risk of noncompliance by employees. To counter this risk, employers should include in their policy that the employer reserves the right to request verification of the employee’s vaccination status at any time to ensure compliance with safety rules. The policy should also put employees on notice that noncompliance could lead to disciplinary action up to and including termination of employment.

- / Self-Attestation Forms. This written document, usually filled out by employees, requires a signature to confirm that the person is fully vaccinated. Any such form should define “fully vaccinated” to be consistent with the Centers for Disease Control and Prevention and applicable local health department guidance. The form also should list the date the person became fully vaccinated and require a date for the signature. Similar to the above, the form should put employees on notice that any falsely submitted forms could lead to disciplinary action.
- / Written documentation of visual verification of vaccination cards. Some employers have implemented a verification check during which an administrator (usually a human resources professional or a third-party vendor) visually verifies employees’ vaccination cards and notes the vaccination status on an internal confidential document.
- / Collecting copies of vaccination cards. While this may seem like the easiest and surest means of verification, storing the copies of vaccination cards and protecting confidentiality of these records may require more protections and safeguards than lesser forms of verification.

For the last three choices, employers should maintain the confidentiality of the documentation, and the information should be shared only on a need-to-know basis. These general considerations are also subject to state and local laws that may require or prevent employers from taking actions. For example, Los Angeles County, Washington, DC, and San Francisco have implemented indoor masking for all people, regardless of vaccination status. Some states like Alabama and Florida have passed laws that prevent anything akin to a “vaccine passport” in certain circumstances. Employers will need to verify and ensure compliance with the requirements of state and local laws before implementing a vaccine mandate.

Employer-mandated vaccines appear to be the latest trend, but before following suit, employers should analyze the available options, based on their own operations, business model, and jurisdictions and other considerations.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Rachel L. Conn](#)

415.984.8216

rconn@nixonpeabody.com

[Benjamin J. Kim](#)

213.629.6090

bkim@nixonpeabody.com
