

PUBLICATION

Vaccine Mandates: What Employers Need to Know

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Governments and private employers continue to grapple with how to achieve a safe workplace for their employees in light of COVID-19 and the Delta variant. Due to recent and ongoing changes in the legal landscape, the trend toward vaccination is becoming somewhat clearer and many employers are implementing vaccination mandates to help reach the goal of a safe workplace, but questions and uncertainty, with some corresponding risk, remain.

Current EEOC Guidance

The Equal Employment Opportunity Commission's (EEOC) May 2021 updated technical guidance on COVID-19 clarified that any vaccination authorized by the FDA is not a "medical examination" for purposes of the Americans With Disabilities Act (ADA). The guidance indicates that employers may condition employment on vaccination status, provided the employer grants reasonable accommodations to employees who are unable to receive the vaccine because of a disability or religious reasons. Thereafter, a small percentage of employers in the U.S. began requiring employees to be vaccinated to return to work or as a condition of employment. Other employers took a "wait and see" approach while the vaccinations are under emergency use authorization (EUA) status with the FDA. We reviewed the top questions from the updated guidance back in May, which you can read about [here](#).

Recent Increases in Vaccine Mandates

The vaccination mandate generally started in the health care field and has already withstood at least one legal challenge. Methodist Hospital in Houston, Texas, successfully defended its policy in federal court in the case of *Bridges v. Houston Methodist Hosp.*. The court cited the updated EEOC guidance favorably and rejected various arguments relating to or stemming from the EUA status of COVID-19 vaccines. The overall tone of the court's opinion was favorable to vaccination: "Methodist is trying to do their business of saving lives without giving [patients] the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. [The plaintiff] can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else." Again, this case arose in the health care field, and other legal challenges, some similar and some not, remain pending in other courts.

On July 6, 2021, the Deputy Counsel to President Biden issued a Memorandum Opinion stating that the EUA status of COVID-19 vaccines does not prohibit public or private entities from imposing vaccination requirements. The Biden Administration followed by requiring federal workers and contractors to be vaccinated or be subjected to mandatory masking, testing, and social distancing. The Biden Administration has directed the Department of Health and Human Services to implement regulations requiring nursing homes to vaccinate all of their employees or else forgo payments from Medicare and Medicaid.

New York City and San Francisco have banned the unvaccinated from some public spaces, including gyms, bars, and restaurants. New York City is now being sued for implementing these measures by several restaurants alleging that the requirement places this burden on restaurants, gyms, and entertainment facilities unequally because not every place of public accommodation is subject to the same rules.

Vaccine Mandates for Unionized Employers

For unionized employers, there are special additional considerations. A required vaccine program would likely be considered a mandatory subject of bargaining in connection with the employer – labor relationship. This means that the employer must bargain with the union to reach an agreement or impasse on the issue before such a vaccine policy is implemented. Risks for failing to follow such a process would include grievances, unfair labor practice charges, and even federal lawsuits for breach of contract. Union leadership has been split on the issue of mandatory vaccine policies. Prudent employers should consider these factors before attempting to implement a mandatory vaccine policy where a collective bargaining agreement exists.

Takeaway

The EEOC's updated guidance, the victory (pending appeal) for Methodist Hospital in Houston, and recent actions by the Biden Administration and various other governmental entities are signaling that private employers can mandate vaccination as a condition of employment, with exceptions based on religious beliefs and disabilities. The list of private employers mandating vaccines for some or all of their workers continues to grow and includes United Airlines, Delta Air Lines, Citigroup, Facebook, Ford, Walmart, McDonalds, and a number of law firms. This should further encourage employers that would like to get their employees back in the workplace as safely as possible by mandating COVID-19 vaccination.

As the Delta variant rages on and society's need to continue business, leisure activities, and education becomes more urgent, we are sure to see more mandates and likely more litigation challenging these mandates. Baker Donelson attorneys will be staying on top of any new updates and guidance regarding vaccine mandates. If you have any questions or concerns on this topic, please contact Drew Hutchinson, Chad Wallace, or any member of Baker Donelson's [Labor & Employment Team](#).

Upcoming Webinar

Additionally, join Baker Donelson shareholders [Jennifer L. Curry](#) and [Donna M. Glover](#) for their upcoming webinar series "COVID-19 Vaccination Mandates: What Employers Need to Know About Religious and Medical Exemptions" where they will discuss topics such as the basics of religious and medical exemptions under the Americans with Disabilities Act and Title VII of the Civil Rights Act to both state and federal vaccination mandates, the implications of a mandate or test protocol, the implications of the federal mandate governing contractors, and more. This two-part series takes place on September 21 and September 22. Click [here](#) to learn more and to register.