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FAST BREAK:
VACCINE MANDATES –
LATEST DEVELOPMENTS
AND BEST PRACTICES

September 16, 2021



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TODAY'S PRESENTER & HOST



Dan Kadish



Jake Harper

Vaccine Mandates – Latest Developments and Best Practices

Topics to be discussed today include



Vaccine Mandate Developments



Collecting Vaccine Information



Accommodation Requests

Federal Law Permitting Mandates



Federal law permits employers to mandate COVID-19 vaccination for employees physically entering a workspace.



Federal antidiscrimination laws permit vaccine mandates so long as employers abide by reasonable accommodation requirements in Title VII and ADA for persons with sincere religious beliefs and disabilities.



Emergency Use Authorization (EUA) status of vaccines **does not** prevent an employer from mandating vaccination.

- FDA granted full authorization for the Pfizer vaccine on August 23, 2021.

Courts and DOJ Have Upheld Vaccine Mandates

Opinions from Department of Justice (DOJ) multiple federal courts, including a circuit court, uphold the ability of an employer/state entity to mandate vaccination.

DOJ

"We conclude that the Food Drug and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under EUAs."

Bridges v. Houston Methodist

"Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else."

Klaassen v. Trustees of Indiana University

"University policy isn't forced vaccination. The students have options—taking the vaccine, applying for a religious exemption, applying for a medical exemption, applying for a medical deferral, taking a semester off, or attending another university."

States' Positions on Mandates by Private Employers

Numerous states have issued written guidance advising or at least directly implying that private employers have discretion to implement vaccine mandates – e.g., CA, CO, IL, IN, MD, MA, NV, NJ, NC, OR, PA, VA, WA, and DC.

Governors in a number of states issued orders requiring all healthcare workers to be vaccinated – e.g., CA, NJ, NY, OR, and WA.

- CA and NJ orders extend to non-employees who work in healthcare facilities.

Only one state, Montana, has passed legislation prohibiting discrimination on the basis of vaccine status by private employers.

- Similar legislation has been introduced in other states, such as Texas, but there are no indications that passage in any of those states is likely.

Vaccine passport laws not implicated with respect to employees.

Methods of Collecting Vaccination Information

- Options for Verifying Vaccination Status:
 - Ask employees to upload to HRIS system or email to a designated email box a digital copy of CDC's COVID-19 Vaccination Record Card;
 - Use managers or HR to verify employees' COVID-19 Vaccination Card and record their vaccination status, without collecting the Cards themselves;
 - Ask employees to complete a form, either physically or electronically, providing vaccination information (*e.g.*, name, date of vaccination(s), manufacturer);
 - Use a third party (*e.g.*, a wellness program administrator or an on-site healthcare provider) to collect vaccination information from employees; or
 - Ask employees to self-report and/or attest to their vaccination status.
- An employer's decision on which system to use will depend on the nature of its workforce and the resources available, along with any state or local requirements.

Collecting Vaccine Information



EEOC: Asking about vaccination status is not a disability-related inquiry.

EEOC: Treat “documentation or other confirmation of vaccination” as if it were a confidential medical record under the ADA and applicable state law.

Some state privacy and medical information laws (e.g., California) require that vaccination status information be maintained as confidential.

Information contained in vaccine card (e.g., vaccine manufacturer, date of vaccination, location of vaccination, vaccine batch number) should be kept separate from an employee’s personnel file.

In general, vaccination status should only be shared on a need-to-know basis.

Medical Accommodation Requests

Under the ADA, an employer must provide reasonable accommodations to those unable to be vaccinated due to a medical condition, unless it would pose an undue hardship.

Employers can request documentation from a healthcare professional showing that:

- The person has a medical condition, and
- The person needs the requested accommodation as a result of functional limitations stemming from that condition

Undue hardship is defined as "significant difficulty or expense" or when an individual poses a direct threat to themselves or others.

Religious Accommodation Requests

- Under Title VII, an employer must provide reasonable accommodations to those unable to be vaccinated due to a sincerely held religious belief, unless it would pose an undue hardship.
- An employer **can** request documentation to verify this, examples include:
 - Letter from a pastor
 - Employee statement/explanation of religious beliefs
- Employers only need to provide accommodations that do not impose an undue hardship on the finances or operations of the employer.
 - Undue hardship is defined under federal law as more than "*de minimis*" costs
 - This is **LOWER** than the ADA standard
 - Caveat that state law tests may differ/impose a higher threshold (*e.g.*, California, NYC)
- Employers can also require that employees not pose a safety risk/direct threat.

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QUESTIONS?



Thanks and Be Well!



Daniel Kadish

New York

+1.212.309.6328

daniel.kadish@morganlewis.com

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Dan represents and counsels employers facing employment disputes and has been a leader on Morgan Lewis' COVID-19 compliance and counseling team. He also litigates single plaintiff and complex employment matters, including class and collective actions, before US federal and state trial courts and administrative agencies. Daniel works with his clients to thoughtfully prevent and mitigate risk as well as defend wage and hour litigation, discrimination, harassment, retaliation, wrongful discharge, and breach of contract claims.

Thanks and Be Well!



Jake Harper

Washington, DC

+1.202.739.5260

jacob.harper@morganlewis.com

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Jake advises stakeholders across the healthcare industry, including hospitals, health systems, large physician group practices, practice management companies, hospices, chain pharmacies, manufacturers, and private equity clients, on an array of healthcare regulatory, transactional, and litigation matters. His practice focuses on compliance, fraud and abuse, and reimbursement matters, self-disclosures to and negotiations with OIG and CMS, internal investigations, provider mergers and acquisitions, and appeals before the PRRB, OMHA, and the Medicare Appeals Council.