

Gov't Vaccine Mandates Pave Way For Private Sector Policies

By Anne Cullen

Law360 (July 27, 2021, 8:07 PM EDT) -- The U.S. Department of Veterans Affairs, the state of California and New York City all announced COVID-19 vaccination mandates for their employees Monday, taking steps that experts say will boost private employers' confidence to install their own vaccine requirements.

Under a policy unveiled Monday by the Veterans Affairs Department, health care personnel within the agency will have eight weeks to get fully vaccinated or be penalized. California and New York City also issued directives Monday that government employees either get inoculated or face weekly COVID-19 testing.

On top of these mandates, the U.S. Department of Justice issued guidance this week concluding that federal law doesn't bar public or private entities from imposing vaccination requirements. And President Joe Biden told reporters Tuesday that a potential federal government-wide mandate is "under consideration right now."

Management-side employment lawyers said the public sector focus on requiring municipal workers to get inoculated could drive private employers to follow suit in their own workplaces.

"Most employers already are encouraging their employees to become vaccinated, and these recent announcements may cause some employers to shift from a policy of encouragement to a policy of mandating vaccines," said Marc Bernstein, a partner at Paul Hastings LLP and chair of the firm's New York employment law department.

Vaccine Mandates on the Rise Regardless

Experts said an increasing number of private sector businesses have recently been implementing vaccine mandates notwithstanding the recent public sector movement on the issue.

"Over the last several weeks, probably bordering on a month, more and more private employers are considering vaccine mandates for employees and in some cases implementing vaccine mandates for their employees," said Proskauer Rose LLP partner Evandro C. Gigante.

Gigante, who co-leads the firm's employment litigation group, said it's "a trend I expect to continue."

Sharon Masling, a partner at Morgan Lewis & Bockius LLP and a director of workplace culture consulting

at the firm, said attitudes have changed just within the summer alone.

"I think we are seeing a pendulum shift toward mandatory vaccines that we did not see two months ago," Masling said.

Experts attribute the shift to the rise in infections nationwide and the risks of the highly contagious delta variant, plus increasing evidence showing COVID-19 vaccines are safe.

"The news that we're hearing about the transmissibility of the delta variant is causing people to think twice about policies that would enable unvaccinated individuals to come to work," Gigante said.

"Another factor is that over the course of time, people have become more attuned to the benefits of the vaccine than they were six months ago when it first came out."

Mandates' Scale Gives Businesses Comfort

Many experts pointed out that the Veterans Affairs Department, California and New York City are massive employers, with hundreds of thousands of individuals on payroll each, so their plans operate as a large-scale test of vaccination mandates.

"When you have such large public mandates, the COVID vaccine mandates will have a pretty big impact on both the individuals and the employers," said Brooke Schneider, a senior associate at Withers LLP.

The VA is the nation's largest health care system, employing more than 350,000 full-time health care professionals and support staff, according to its website. In Manhattan, roughly 300,000 government employees will be subject to the new policy, New York City Mayor Bill de Blasio said.

And California's new rule would apply to about 250,000 state employees as well as the millions of health care workers and long-term care workers in the public and private sectors, according to the governor.

Experts said applying these mandates to such a broad swath of workers boosts private employers' ability to install a similar requirement.

"I think every time an employer, be it public or private, decides to require that their employees get vaccinated means that it is a little bit easier for the next employer to do so," said Morgan Lewis' Masling.

"So to the extent that there are employers that have been on the fence about whether or not to require vaccination, this gives them comfort that there are large employers that are in fact requiring it," she said.

Gauging Government Employees' Response

Private employers that are undecided on mandatory vaccine policies will now have a chance to evaluate the effectiveness of the public sector requirements, such as whether they prompt a spike in employee vaccinations or spark a mass exodus.

Withers' Schneider said private employers will be eyeing any retention and turnover issues faced by the Veterans Affairs Department, California and New York City in the wake of these announcements.

"I think you'll find that a lot of private employers who have been hesitant to require the vaccines for

their employees are going to be keeping a careful watch to see how it does impact the subsets of government in this regard," she said.

Since the policies start going into effect next month, Schneider predicted that by October, private employers will have a clearer idea than before of how these kinds of directives impact workforces on a large scale.

"They'll have facts, they're not operating in a vacuum at that point," Schneider said. "The governments have taken action so now we can see, is there turnover, is the government able to bring people back to the office."

Municipalities Taking the Litigation Lead

In that same vein, experts said these requirements could operate as a kind of bellwether for businesses to see how these requirements will fare in the legal system.

"Having state and city governments push this forward may lead to more enforcement action and litigation there first," said Epstein Becker Green partner Nancy Gunzenhauser Popper. "That may be a testing ground for private employers to see the difficulties they may run into trying to enforce a policy when it's not legally required."

Right now, the legal precedent on these issues is thin. Suits resisting COVID-19 vaccinations are, like the vaccines themselves, a relatively new phenomenon.

There has been some litigation over mandatory vaccination policies in workplaces — including a high-profile case against a Houston hospital where the vaccination rule was upheld — and experts say it's inevitable that more suits are in the pipeline as these policies gain steam.

"Litigation is certainly always on the horizon," Popper said. "We've already seen that happen with cases particularly in the health care industry where there was pushback."

The mandates from the municipal sector could very likely face court challenges, and experts said if the judiciary continues to back the policies, it may sway businesses to install their own.

--Additional reporting by Hailey Konnath, Cara Bayles and Clark Mindock. Editing by Abbie Sarfo.