



Higher Education Decides Whether To Mandate COVID-19 Vaccine For Next School Year: What Should Your Institution Consider?

Insights

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As colleges, universities, and other institutions of higher education grapple with how best to return to campus with some sense of pre-pandemic “normalcy” for the 2021-2022 academic year, the issue of whether to require students receive the COVID-19 vaccine is at the forefront. On March 25, the Queen’s College, Rutgers University announced that, with limited exceptions, all students planning to attend in-person for the Fall 2021 semester must show proof of vaccination. In what may be the first such mandate among higher education institutions, the university pointed to the availability of multiple vaccines, the proven safety and effectiveness of those vaccines, and the “shared responsibility” of each member of the university community for the community’s health and safety. Now that the first institution has announced plans for a COVID-19 vaccine mandate, it’s up to you to begin making plans for the fall and whether to enforce a similar mandate. What should you consider when making this decision?

Rutgers’s Decision

In its March 25 announcement, Rutgers University noted several benefits reaped from requiring students to be vaccinated:

- a faster return to “pre-pandemic normal”;
- additional face-to-face classes and experiences;
- a wider range of campus events and activities;
- expanded dining and recreation options; and
- greater interpersonal collaboration between students, faculty, and staff.

One of the many hopes among higher education institutions is that requiring the vaccination of students might help to avoid COVID-19 outbreaks experienced in many schools’ residence halls, apartments, and other student housing. Requiring immunization might also permit athletics departments to return to a more regular structure and schedule, especially considering recent CDC guidance that vaccinated people with no COVID-like symptoms do not need to quarantine or to be tested following exposure to someone with suspected or confirmed COVID-19.

When deciding whether to require a COVID-19 vaccination, higher education institutions should consider many factors to determine what is best for their students and institution.

Enforcement

Requiring college and university students to be vaccinated is not a new concept. In fact, many colleges and universities in the United States already require students to be immunized for various health conditions. These already-mandated immunizations typically include those for measles, mumps, and rubella (MMR), bacterial meningitis, diphtheria, tetanus, pertussis, polio, varicella, hepatitis B, and, in some instances, influenza.

However, if an institution plans to add COVID-19 to its list of required immunizations, the school should start by consulting its existing applicable institutional policies and state law. Some states may allow an institution of higher education to add the COVID-19 vaccination to its existing requirements, while others may require another body (the institution's board, the department of health, or another state administrative agency) to make that determination.

Schools should also keep an eye on pending legislation. Several states have introduced legislation regarding COVID-19 vaccine mandates in higher education. The intent of this legislation varies from state to state, with some bills aimed at prohibiting schools from requiring COVID-19 vaccination and others aimed at requiring university students be vaccinated as a condition of in-person attendance. Other legislation would simply modify (by expanding or limiting) currently recognized exemptions to vaccine requirements.

When deciding whether to require vaccinations for any condition, institutions cannot overlook required and/or recognized exemptions to such a requirement, including medical, religious, and personal belief vaccination exemptions. As noted above, pending legislation specific to COVID-19 immunization requirements could impose different rights and responsibilities, including broader exemptions for immunization requirements. An institution should consult with legal counsel to better understand this pending legislation and the effect it might have on requiring its students to receive the COVID-19 vaccine.

Pending and Future Litigation

Beginning last spring, many higher education institutions made the difficult decision to convert classes into a fully-online model. Afterward, an assortment of students and student groups brought lawsuits, including class actions, against institutions across the country on a "breach of contract" theory. They argued that the institutions promised face-to-face instruction or other campus life experiences that they did not deliver because of the conversion to a fully-online model of instruction.

To the extent possible, an institution should be cautious that its justification for a COVID-19 vaccination requirement does not negatively affect any litigation currently pending against it. For example, an epidemiological-based justification that emphasizes the higher and more efficient rate

of COVID-19 transmission among the typical age group for higher education students may be preferable to one that emphasizes the value of a student's campus life experience.

Requiring COVID-19 immunizations for students returning to campus for face-to-face instruction will undoubtedly result in litigation (by contrast, not requiring one could also result in litigation). Accordingly, institutions should consider what they can do to minimize legal exposure going forward. For example, institutions should insert language into enrollment agreements that permits them to require proof of immunization before execution, while institutions that offer multi-year enrollment agreements should review with legal counsel how best to approach such a revision.

Finally, while institutions should exercise caution regarding applications for a religious exemption, the analytical and legal framework for a religious exemption specific to the COVID-19 vaccine is likely already in place. Those states that recognize a religious exemption should apply the same standards to a COVID-19 vaccine, and those states that do not recognize a religious exemption for mandatory vaccines have likely already litigated the related justifications and may similarly treat a COVID-19 vaccine mandate similarly.

However, as noted above, many states have pending legislation specific to COVID-19 vaccine mandates. An institution should consult with legal counsel to better understand this issue before implementing any requirement that students show proof of COVID-19 immunization as a condition of in-person attendance.

Constituent Considerations

Before requiring students to be vaccinated, institutions of higher education must also consider the likely response to such a requirement from their constituents. If our national experience with mask mandates provides any guide, and given the politicized nature of vaccinations, some institutions can expect to receive a positive community response, while others may be completely opposed. Institutions should engage their boards on the front end of this issue to ensure the necessary support is in place for a vaccine mandate and develop an appropriate communications strategy.

Conclusion

From a public health standpoint, there appears to be light at the end of the COVID-19 tunnel. However, many challenges will likely continue for some time. Under normal circumstances, campus interactions create a unique energy and vibrancy not found anywhere else in our society. Mandating a COVID-19 vaccine maybe the most effective way to return to the in-person interactions between students, faculty, and staff that make higher education campuses special, while avoiding significant disruptions.

However, such a mandate will come with a degree of legal risk and likely with some legal court challenges. For that reason, institutions should consult with their Fisher Phillips attorney or any member of our Higher Education Practice Group before implementing a vaccine mandate to limit an

institution's legal exposure to the greatest extent possible. For further information, visit our [Vaccine Resource Center for Employers](#).

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