



Employers Get Even More Support for Mandatory COVID-19 Vaccines From Department of Justice

Insights

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Bolstering the renewed emphasis on increasing the number of people who have been vaccinated against COVID-19, a recent [memo from the U.S. Department of Justice \(DOJ\)](#) that just became public confirms that the “emergency use” status of vaccines does not prohibit employers, universities, or other entities from requiring them. Although not legally binding, the DOJ’s position revealed on July 26 undercuts a fundamental argument presented in lawsuits challenging vaccination mandates – and provides further support for employers considering or implementing a vaccine requirement. What do employers need to know about this latest development?

Another Step in the Right Direction

Combined with a recent [decision by federal Judge Lynn Hughes, dismissing a lawsuit by 117 Houston Methodist employees](#) who challenged that Texas system’s vaccine requirement, the DOJ memorandum adds momentum to an apparently increasing trend toward mandates. Just this week, California and New York City both announced that they would require all unvaccinated government employees to be tested on a weekly for COVID-19. The Department of Veterans Affairs also announced this it would require healthcare workers to take the shot, following a growing list of major healthcare systems that have announced plans to require their employees to be vaccinated. Employers in other industries are also announcing plans to mandate vaccines for all employees who work on-site.

[When we surveyed employees in May, less than 5% of employers said they were mandating or considering mandating some or all employees to be vaccinated.](#) That number seems to be increasing steadily, however, due to a combination of legal victories and the rise of the Delta variant. Among those who were not planning to require vaccinations at that time, one-third were concerned that the law may prohibit them from doing so – a concern that seems to be rapidly diminishing.

Legal Support Grows

[As we explained and predicted](#), challenges to employers’ legal right to require vaccinations are not supported under any reasonable reading of the law. Bloomberg Law reported that a Michigan law professor said it was “nonsense” to challenge mandates on the basis that the vaccines were issued under Emergency Use Authorization (EUA). The court’s ruling in Texas, the newly reported DOJ

memo, guidance from the EEOC, and broad consensus among the legal community all support this conclusion.

What's Next?

With the legal pathway to vaccine requirements becoming increasingly clear, what are the remaining obstacles to increasing vaccination rates in the workplace? According to our survey, more than half of employers believed that everyone in the workforce who is willing to be vaccinated has already done so. Financial incentives have apparently achieved mixed or limited results.

OSHA and CDC guidance that may continue to permit at least some fully vaccinated employees to unmask in the workplace seem to have some impact. This factor, along with an uptick in OSHA inspections, may require employers to abandon the use of any “honor systems” related to vaccination and COVID-19 protocols. This would make it more important than ever to require employees to present proof of their vaccination status before permitting them to unmask.

Beyond those issues, a large segment of the nation’s population – ranging from one-fourth to nearly one-half – apparently remains unconvinced that the benefit of vaccinations outweighs the associated risks. Anecdotal information and reports indicate that many employers are reluctant to risk upsetting or alienating a significant portion of their workforce by mandating vaccinations, especially at a time when labor shortages are acute and recruiting/retention remains a stiff challenge.

What Should You Do?

To meet this challenge, employers who want to continue to drive up their vaccination rates will likely need to focus more on addressing employee questions, worries, and misconceptions about vaccines. This is best accomplished by continuing to encourage employees to discuss vaccines with their doctors and may be supported by bringing qualified medical professionals on-site to explain the vaccines and answer questions. If your organization decides to proceed with a mandatory vaccine policy, you should consult our list of top seven considerations to take into account before doing so and coordinate with your Fisher Phillips attorney.

As usual with COVID-19, the winding path toward the end of the pandemic still contains significant challenges and probably more surprises.

We will continue to monitor developments and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Insight system to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, contact your Fisher Phillips attorney, the author of this Insight, or visit our Vaccine Resource Center for Employers.

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