Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider

Aug 24, 2021

Categories:

Coronavirus Response Team
Publications

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As the Delta variant spreads and positive cases continue to rise, employers are yet again questioning their current COVID policies. Understandably, employers are concerned about the safety of their workforces and maintaining production levels that likely took a hit in 2020. This raises the question – can private employers mandate the vaccine for their employees? The answer? Likely yes, with some caveats and some additional considerations.

"COVID-19 and the Workplace: Legal Requirements Employers Should Know."

This article is part one of our four-part series.

Part 1: Thinking About Implementing a Mandatory COVID 19 Vaccine Policy? Here Is What to Consider
Part 2: Maintaining Employee Medical Information and COVID-19
Part 3: Nursing Homes: Spread of COVID and Vaccine Mandates
Part4: Coming Soon

On May 28, the Equal Employment Opportunity Commission (EEOC) announced that "Equal Employment Opportunity (EEO) laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19." This approval has also gained recent traction in the courts. The Supreme Court recently declined to review a lower court decision permitting Indiana University's vaccine mandate. This allows the university to push forward with the vaccine requirement for all students and faculty. Similarly, a Texas federal district court upheld the termination of an employee who refused to get the vaccine as required. The court noted the employee could "freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else."

While the EEOC and courts are in alignment on this issue, there are still legal and practical implications to consider before mandating

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the vaccine for employees. Employers should consider the possibility of providing an accommodation for employees. Employees may request an accommodation under the Americans with Disabilities Act for a disability that prevents them from getting the vaccine. Likewise, it is possible that an employee's sincerely held religious belief may prohibit vaccines. In these situations, employers must go through the accommodation process with the employee.

Employers with a unionized workforce must also consider requirements under the National Labor Relations Act (NLRA). Section 8(a)(5) of the NLRA requires employers to bargain with the union regarding changes to wages, hours, and other terms and conditions of employment. Mandating that all employees receive the COVID vaccine to maintain employment would likely be a change to a term or condition of employment and require bargaining prior to implementation.

Aside from the legal considerations, employers must consider the practical implications before rolling out a vaccine mandate. Workplace culture is vital to a successful company. Mandating vaccines may anger a segment of employees. This could lead to increased complaints and lower morale. Those companies that have successfully implemented mandatory vaccination policies have also implemented campaigns that provide information about the COVID-19 vaccines and set deadlines that provide sufficient time for compliance with the mandates.

For more information, please contact Fred Gaona, Brice Smallwood, or any attorney with Frost Brown Todd's Labor & Employment practice group.

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