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Employment Law Insider Alert

In Stunning Reversal, Many More Employers Now Require the Vaccine

Biden Administration's "Path Out Of The Pandemic" Plan Adds To Growing Number Of Vaccine Mandates



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Key points:

More than 50% of employers have implemented vaccine mandates

The Biden administration is pushing OSHA to finalize a rule requiring employers with more than 100 employees to implement vaccine-or-test mandates

Businesses need to consider the implications of implementing a vaccine mandate

In the June 2021 issue of the Employment Law Insider Alert, we cited a study which found that only 17% of employers were requiring their employees to obtain the COVID-19 vaccine. Since June 2021, the number of COVID-19 cases has spiked, spurred on by the prevalence of the Delta variant. A more recent study revealed that, as a result, over 50% of employers now require their employees to be vaccinated in order to come into work.

President Biden Issues Vaccine Mandate

Over a year and a half into the COVID-19 pandemic, new variants of the coronavirus have emerged, prompting the Biden Administration, on September 9, 2021, to announce its "Path out of the Pandemic" plan.

The plan is a six-pronged approach, geared towards combatting the rising level of COVID-19 cases across the country. To strike a balance between resuming normal, every-day life and stemming the rising number of COVID-19 cases, much of the plan is focused on the



workplace, in both the private and public sectors.

Thus, it is important for employers and employees to understand their respective rights and obligations with respect to vaccine mandates, and the implementation thereof, at the workplace.

Employers with 100 or More Employees

The Department of Labor's Occupational Safety and Health Administration ("OSHA") is developing a rule that will require all employers in the United States with 100 or more employees to

either: (1) ensure their workforce is fully vaccinated; or (2) require unvaccinated workers to produce a negative test on a weekly basis before entering the workplace. It is unclear exactly when OSHA will implement this rule, but the rule is expected to be announced in the coming weeks and will constitute an Emergency Temporary Standard. The Biden Administration projects that this measure will affect over 80 million businesses in the private sector.

Any employer in violation of this new rule could face stiff penalties of up to \$14,000 per violation.

Vaccine Mandates Are Up Since the Beginning of 2021

Even before the Biden Administration's announcement regarding the "Path out of the Pandemic" plan, the Equal Employment Opportunity Commission ("EEOC") issued guidance, advising employers that (1) they can require employees entering the workplace to be vaccinated (2) as long as employers comply with the reasonable accommodation provisions of the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964.

As a result, employers either continued recommending but not requiring employees to get vaccinated; required employees to get vaccinated or show proof of a negative COVID-19 test; or eliminated the testing option altogether, requiring employees to get vaccinated, unless they are exempt due to medical reasons or a sincerely held religious belief.

A recent survey, which polled 961 U.S. companies that collectively employ roughly 9.7 million people, found that by the end of 2021, over 52% of employers will have one or more vaccine mandate requirements for their employees,

a 30% increase from the third quarter of 2021. Some of the largest companies in the country have announced some form of vaccine mandate for employees, including Google, Facebook, Bank of America, Delta Airlines, Ford Motor, and Johnson & Johnson.

Before Implementing One or More Vaccine Mandates, Employers Should Consider the Implications

Generally, employers are free to mandate that their employees be vaccinated, unless an employee is exempt due to medical reasons or a sincerely held religious belief.¹ But before implementing one or more vaccine mandates, employers should consider the implications. Those with more than 100 employees, which will all but certainly soon be required to issue mandate, should prepare for potential conflict.

Just last week, the Lewis County General Hospital in Lowville, New York announced that it was suspending maternity services because dozens of staff members quit over the hospital's vaccine mandate, leaving the hospital short-staffed.

Similarly, in April 2021, Houston Methodist announced a policy requiring employees to be vaccinated. As a result, over 100 employees sued the Hospital in a Texas federal court. Ultimately, the district court dismissed the employees' lawsuit, which is now on appeal in the Fifth Circuit. Nevertheless, over 150 health-care workers (out of 22,000) have resigned or been terminated by Houston Methodist for refusing the vaccine.

Several other lawsuits have been filed across the country regarding vaccine mandates. For example, in *Norris v. Stanley*, No. 1:21-CV-756, 2021 WL 3891615 (W.D. Mich. Aug. 31, 2021), an

Before implementing one or more vaccine mandates, employers should consider the implications and prepare for potential conflict.

employee of Michigan State University sued the University over its COVID-19 vaccine mandate. Likewise, in *Ron Hency, et al., v. United Airlines, Inc., et al.*, No. 21-61702-CIV, 2021 WL 3634630 (S.D. Fla. Aug. 17, 2021), eighteen pilots sued United Airlines over the airlines' vaccine mandate or resources available.

While the Plaintiffs in each lawsuit have, to date, been denied injunctive or other relief, both Michigan State University and United Airlines were forced to hire counsel and incur costs, and may ultimately lose valued employees over their vaccine mandates. While such decisions are certainly not taken lightly, some employers are able to withstand a reduction in their workforce. But, like Lewis County General Hospital, some employers are not able to withstand such departures, either because the occupation is a specialty, or because an employer only has a limited amount of employees.

Federal vaccine mandate requirements may also collide with state laws banning private employers from issuing mandates. To date, only Montana has enacted such a law, but similar legislation is pending in Ohio and Pennsylvania. Bloomberg Law reporters infer that "Florida, Missouri, and Texas are notable states to watch [] given their governors' stated opposition to public health mandates such as vaccination and mask requirements." More broadly, several Republican governors have promised to sue to block implementation of the Biden administration mandates.

For all these potential complications and conflicts, federal guidance and pending regulation should provide substantial protection to employers that impose vaccine mandates – particularly those with more than 100 employees, for whom mandates will likely soon be a

federal requirement, with stiff penalties imposed for noncompliance.

As the COVID-19 pandemic continues, vaccine mandates will continue to be a polarizing issue. Employers should continue to monitor these developments, particularly as lawsuits make their way through the court system. We too will continue to monitor these developments. ▲

ENDNOTES

¹ *It should be noted, however, that we are aware of no mainstream religion that has a recognized dogma prohibiting the vaccine.*

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