

Can Employers Mandate a Vaccine Authorized for Emergency Use?

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[This article has been updated]

As employers considered whether to encourage or require workers to get vaccinated against the coronavirus, many had concerns about the legal risks associated with a mandate, particularly since the approved vaccines only have emergency use authorization (EUA). Employment law attorneys said that recent developments may alleviate some of those concerns.

"Consensus in the legal community has been that employers may require at-will employees to be vaccinated, subject to accommodations that may be required for medical or religious reasons," said Kevin Troutman, an attorney with Fisher Phillips in Houston, and Richard Meneghello, an attorney with Fisher Phillips in Portland, Ore.

"No decision is 'risk proof,' but we do not believe EUA status diminishes an employer's authority to require a vaccine," they said in a joint statement.

Brett Coburn, an attorney with Alston & Bird in Atlanta, said there's been a sea change in employer attitudes regarding vaccine mandates in the past few weeks following changes to mask guidelines (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/cdc-masks-indoors.aspx) from the U.S. Centers for Disease Control and Prevention (CDC). Additionally, the federal government and some state governors and large employers announced that they are mandating vaccines (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Employers-Should-Be-Cautious-When-Asking-About-Vaccination-Status.aspx) or requiring employees either to be fully vaccinated or submit to regular testing.

"Many employers seem to have reached their breaking point with soft efforts to encourage vaccination, and they are now starting to think much more seriously about ... mandates," Coburn said.

Here's what employers should know as they consider whether to revise their COVID-19 vaccination and workplace safety policies.

Court Dismissed Challenge

The U.S. Food and Drug Administration (FDA) issued an EUA for the COVID-19 vaccines that are currently being used in the U.S. This allows vaccines to be administered in emergency circumstances even though the FDA has not fully approved them under its standard process.

According to the FDA, the authorized vaccines have met its "rigorous, scientific standards for safety, effectiveness and manufacturing quality," and the "known and potential benefits clearly outweigh [the] known and potential risks."

FEATURED RESOURCE HUB PAGE



COVID-19 Vaccination Resources

(www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Some employees have filed lawsuits arguing that employers can't mandate a vaccine that is approved only for emergency use. A federal court in Texas, however, dismissed this argument in a recent case against Houston Methodist, which required its 26,000 employees to get vaccinated or be fired.

The judge said the employees' claim was "false" and "irrelevant" and that the 117 employees who wouldn't comply were "refusing to accept inoculation that, in the hospital's judgment, will make it safer for their workers and the patients in Methodist's care."

So at least one federal judge has rejected the EUA-based argument when interpreting the federal EUA statute and Texas law regarding wrongful termination claims, Coburn noted. The plaintiffs have, however, filed an appeal with the Fifth U.S. Circuit Court of Appeals.

Employers should note that government officials expect the Pfizer vaccine to receive full approval (<https://www.politico.com/news/2021/08/04/fda-approval-pfizer-vaccine-coronavirus-502397>) from the FDA by early September, which would make the EUA-based argument moot.

EEOC Updated Guidance

The U.S. Equal Employment Opportunity Commission (EEOC) issued guidance (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>) stating that employers generally can mandate COVID-19 vaccinations for employees who physically enter the workplace without running afoul of the federal anti-discrimination laws it enforces.

In response to questions about whether employers can mandate a vaccine authorized under emergency use, the agency said, "It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach."

Employers that require employees to get vaccinated need to consider religious and disability-related objections and explore reasonable accommodations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/takeaways-from-eeoc-latest-guidance-on-covid-19-vaccines.aspx), according to the EEOC.

"Accommodations could take various forms, depending upon the employee's job and setting," Troutman said. Employers may offer remote work, change the physical workspace, revise practices or provide a leave of absence.

"In each situation, the employer must determine whether an accommodation would enable the unvaccinated employee to perform the essential functions of the job without posing a direct threat to anyone in the workplace," he explained.

Department of Justice Supports Mandates

Notably, the U.S. Department of Justice (DOJ) issued an opinion (<https://www.justice.gov/olc/file/1415446/download>) on July 6 addressing vaccination mandates and the EUA status of the currently approved vaccines.

"As access to the COVID-19 vaccines has become widespread, numerous educational institutions, employers, and other entities across the United States have announced that they will require individuals to be vaccinated against COVID-19 as a condition of employment, enrollment, participation, or some other benefit, service, relationship or access," the DOJ said.

The department concluded that the federal Food, Drug and Cosmetic Act doesn't prohibit public or private entities from mandating vaccines that are authorized under emergency use.

More Employers Are Mandating Vaccination

"As cases are on the rise due to the delta variant, an increasing number of private employers are requiring vaccination, including several well-known, large employers," noted Anne-Marie Vercruyse Welch, an attorney with Clark Hill in Birmingham, Mich.

Another emerging trend for companies—as well as the federal and some state governments—is to require employees to provide proof of vaccination or submit to weekly COVID-19 testing and other safety protocols.

"This is different from an outright vaccine mandate," Troutman said. "More frequent testing, screening and precautions are perfectly acceptable alternatives to vaccination, as long as they are consistent with guidance from the CDC, [the Occupational Safety and Health Administration] and community health agencies."

[Does your organization have a vaccination strategy? Take the quiz. (<https://shrm.org/ResourcesAndTools/tools-and-samples/quiz/Pages/Quiz-Does-Your-Organization-Have-a-Vaccination-Strategy.aspx>)]

Welch said private employers may prefer a mandate due to the administrative burden associated with testing. "That being said, some employers are hesitant to require vaccination for fear of alienating a portion of their workforce, especially during a labor shortage."

Mark Goldstein, an attorney with Reed Smith in New York City, recommended that employers think through whether they are willing to fire employees (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx) who don't comply. What if the star salesperson will quit in light of a mandate? Employers need to be prepared for such scenarios, he said.

Policies will vary by workforce, industry and geography, and may be implemented only for a portion of the workforce, if that makes the most sense for the organization, Goldstein said.

He suggested that employers have an open conversation with employees who are hesitant to get vaccinated and educate employees on why the company chose its policy.

"Make sure you're being fair," he said. Focus on "consistency, consistency, consistency."

[For the latest information on COVID-19, visit SHRM's COVID-19 and Coronavirus resource hub page

(www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx). Want to learn more about COVID-19 and workplace safety? Join us at the SHRM Annual Conference & Expo 2021 (<https://annual.shrm.org/>), taking place Sept. 9-12 in Las Vegas and virtually.]

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