

ANALYSIS

COVID-19 VACCINATION PROGRAM CONSIDERATIONS FOR EMPLOYERS AND BOARDS

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The interlocking directorate prohibition was enacted due to concerns that competitors could use boardroom activities to facilitate collusion.

With the COVID-19 vaccine now widely available in the United States, many employers are wondering whether they can and/or should require employees to be vaccinated as a condition of returning to work. The U.S. Equal Employment Opportunity Commission (EEOC) clarified in May 2021 that nothing in federal employment nondiscrimination laws prohibits an employer from mandating that employees physically entering the workplace be vaccinated for COVID-19, subject to reasonable accommodation provisions of certain employment laws. However, the EEOC also stated that it was deferring to the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) with regard to its realm of jurisdiction—legal implications of emergency use authorization (EUA) or FDA approach to vaccines. The FDA's authorization of COVID-19 vaccines to date is limited to EUA. Therefore, the question of whether an employer may mandate a COVID-19 vaccine prior to obtaining full FDA approval remains an open issue. Notably, there is no precedent for mandating a COVID-19 vaccine with only EUA status other than a recent decision of a district court judge in Texas, whose decision was specific to Texas law and the broad latitude it provides to employers. That decision is on appeal. Moreover, some Americans remain reluctant to receive the vaccine at all, further complicating how employers and boards of directors may be thinking about this issue and the practical implications of mandating a vaccine if it could mean loss of a portion of a workforce that refuses to become vaccinated.

EUA Status of the COVID-19 Vaccine

The COVID-19 vaccines available at this time are marketed under EUA—meaning they are not fully approved by the FDA but have been approved for use in an emergency after satisfying certain criteria. The EEOC highlighted in its guidance, updated in May 2021, that it lacks jurisdiction to discuss the relevance of the vaccines' current EUA status and points to the [FDA's EUA guidance](#). The EUA guidance requires that the FDA "ensure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product."

EUA status for a vaccine is relatively unprecedented—and mandating a vaccine with only EUA approval is even more so. In the early 2000s, the U.S. Department of Defense mandated that certain service members receive an anthrax vaccine that had not received full FDA approval for anthrax inhalation, but this policy was [challenged](#) by the service members and enjoined by a federal district court in *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (2004). The Department ultimately changed its policy to make the EUA anthrax vaccine voluntary.

Recently, some employees have brought legal challenges against employer-mandated EUA vaccines. On June 12, 2021, a federal district court in Texas issued an order dismissing such a lawsuit against a Houston hospital, reasoning that Texas employment laws did not prohibit an employer from terminating employees for refusing to be vaccinated, notwithstanding the EUA status of the vaccines. See *Bridges v. Houston Methodist Hospital*, No. 4:21-cv-01774 (U.S. District Court for the Southern District of Texas). The court reasoned that firing an employee for refusing to get the COVID-19 vaccine would not amount to a wrongful

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termination under Texas law. The court further concluded that mandating the vaccine would not violate the federal law requiring the Secretary of HHS to ensure that EUA product recipients are informed of “the option to accept or refuse administration of the product” because this provision “does not apply at all to private employers like the hospital in this case.” The decision is being appealed to the Fifth Circuit.

A California court currently faces a similar issue with school teachers and employees arguing that the FDA provisions preempt the local school district’s policy of mandating vaccines. See *California Educators for Medical Freedom et al. v. The Los Angeles Unified School District et al.*, No. 21-cv-02388 (C.D. Cal. March 17, 2021). A similar claim is also pending against Dona Ana County in New Mexico, where a detention center employee alleges he has been threatened with termination for refusing to receive the vaccine. See *Legarreta v. Macias*, No. 21-cv-00179-MV-GBW (D.N.M. February 28, 2021). It remains to be seen how such challenges will fare.

Current Federal Guidance Regarding the COVID-19 Vaccine

EEOC Guidance. In December 2020, the EEOC issued guidance regarding the interplay and impact of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and the Genetic Information Nondiscrimination Act (GINA) on the administration of the COVID-19 vaccine. Nowhere in the December 2020 guidance did the EEOC state unequivocally that employers can mandate that their employees receive the vaccine.

In May 2021, the EEOC [updated](#) its December 2020 guidance to state that “[t]he federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations....” In other words, under the ADA, Title VII, and other federal employment nondiscrimination laws, an employer may require employees to be vaccinated for COVID-19 as long as they provide reasonable accommodations for employees who do not get vaccinated because of a disability or sincerely held religious belief, practice or observance. What remains unclear is the interplay between the EEOC’s guidance and the FDA provision regarding EUA products. The EEOC specifically stated that the legal implications of the vaccine’s EUA status or the FDA approach to vaccines were “beyond the EEOC’s jurisdiction,” and its guidance is limited to compliance with federal equal employment opportunity laws.

CDC Guidance. The U.S. Centers for Disease Control and Prevention (CDC) has issued [general guidance](#), last updated on June 11, 2021, stating that everyone 12 years of age and older is now eligible to get a COVID-19 vaccine and encourages vaccination as a “safe and effective” tool to help stop the pandemic. Additionally, the CDC has issued [guidance](#) stating that fully vaccinated people may “[r]esume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.” Nevertheless, the CDC also explains that it is “still learning” how long the COVID-19 vaccines protect people and how effective the vaccines are against new variants of the virus, among other things. Moreover, the CDC has not yet addressed whether employers may mandate EUA vaccines.

OSHA Guidance. The Occupational Safety and Health Administration (OSHA) issued [guidance](#), updated on June 10, 2021, reiterating that employers have a responsibility to provide a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. OSHA has not yet stated outright whether employers can or should mandate the vaccine as part of their general duty to maintain a safe and hazard-free workplace. OSHA recommends that employers grant paid time off for their employees to get vaccinated. Furthermore, OSHA states that, with a few exceptions, “most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure.”

Under the ADA, Title VII, and other federal employment nondiscrimination laws, an employer may require employees to be vaccinated for COVID-19 as long as they provide reasonable accommodations for employees who do not get vaccinated because of a disability or sincerely held religious belief, practice or observance.

What Does this Mean? In light of this background, and federal law requiring that individuals be informed of the option to refuse an unapproved product under EUA status, mandating the current COVID-19 vaccines could pose legal and/or reputational risks—notwithstanding the updated EEOC guidance that federal discrimination laws do not prevent a mandate. Certain vaccine providers have begun the process of obtaining full FDA approval. Employers should monitor this process, given that FDA-approval status will affect legal and practical considerations.

State and Local Law Considerations

In addition to considering federal guidance and other authority, employers must review and comply with applicable state and local laws that could apply to employer-mandated vaccination programs. To date, many states are considering (and some have adopted) legislation that addresses whether employers can require a COVID-19 vaccine. Some state guidance (e.g., [California](#)) applies only to FDA-approved vaccines and is silent on EUA vaccines. Several other states have pending or passed legislation banning “vaccine passports” and prohibiting businesses from requiring customers or employees to show proof of vaccination.

Separate from the discussion around mandating the vaccine, several states and localities have also issued orders and guidance that loosen restrictions for fully vaccinated individuals. Lifting such restrictions could significantly affect the bottom line for businesses, as having fully vaccinated employees generally would mean, subject to applicable law, less time such employees need to be away from work due to illness or mandatory quarantine. Even more, some states have issued authority on how to maintain information regarding vaccination—such as proof of vaccination—and the fact that it must be stored separately as confidential medical information. Others have issued authority on eliciting vaccine status. Cal/OSHA in California has mandated that employers must ascertain the vaccine status of all employees if those employees seek to take their masks off in the workplace. Where an employee refuses to state their status, the employee will be considered unvaccinated. Yet in other states, employers are prohibited from inquiring. Employers, particularly those with multistate workforces, will have to monitor all of these state and local developments.

Encouraging Vaccination in Lieu of a Mandate

Many employers are considering (or are already implementing) the alternative of encouraging rather than requiring employees to be vaccinated, including by offering vaccination clinics onsite; allowing employees to get vaccinated during work hours; providing transportation to and from vaccine sites; appointing vaccine ambassadors; and creating a communications strategy. Other methods of encouraging vaccines implemented by employers include providing financial incentives such as extra paid time off, one-time cash bonuses and gift cards.

This approach has several advantages. First, from a practical standpoint, it is unlikely that employers want to terminate portions of their workforce who simply do not want to be vaccinated, particularly where the lack of a vaccine does not pose a direct threat to the workplace. Second, there is the administrative burden of evaluating the inevitable requests for disability and religious accommodations that will ensue as well as the risk of discrimination claims from those excluded from the workplace. Thus, encouraging and not requiring employee vaccination may help avoid the administrative burdens of tracking vaccines and the privacy considerations that accompany obtaining and storing personal medical information. In this vein, the EEOC’s May 2021 guidance did confirm that employers generally may offer incentives to employees for receiving the COVID-19 vaccine or providing proof of vaccination. In the context of an employer-administered vaccine, the EEOC stated that any incentive cannot be “so substantial as to be coercive” but did not offer more guidance on what could be considered “coercive.”

State agencies and legislatures are implementing orders and guidance regarding vaccination and considering a variety of contradictory measures that will affect workplace vaccination policies even after the vaccines receive FDA approval.

As employers return to work, they must consider federal, state and local developments relating to the vaccine. The analysis for each workforce will be context-specific and depends on workplace dynamics as well as applicable state and local law.

The Board's Role

While management bears the day-to-day responsibility for managing a corporation's COVID-19 vaccination program, the board of directors should play an important oversight role given the high stakes. The program implicates many areas of the business that are critical to the corporation's success, including employee health and safety, employee morale and retention, an inclusive corporate culture, and litigation and reputational risk management. Oversight of the program may be undertaken by the full board or handled by a board committee—most logically the committee tasked with overseeing human capital management matters. The board (or committee) should assess whether management is taking appropriate action with respect to the vaccination program—but also office reopening plans and workforce strategy more broadly—and provide guidance and direction to the extent the board determines is prudent. The board should also ensure that there is a robust, confidential system in place for employees to raise concerns and a firm policy against retaliating against an employee who refuses to be vaccinated. To be most effective, the board must stay well-informed of developments within the corporation as well as the rapidly changing situation externally.

COVID-19 as an epidemic continues to evolve, and, with this evolution, employers and boards must continue to consider their risk tolerance, the legal issues and the practical implications of their decisions.

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