What role (if any) should employers play in mandating or encouraging COVID-19 vaccinations? This question has taken on greater urgency as the Delta variant wreaks new havoc and the Biden Administration moves to require vaccinations, especially in areas where vaccination rates remain low.

Many employers are weighing whether to require employees to get vaccinated or provide incentives to do so. Employers grapple with permitting vaccination
alternatives, such as required testing protocols. Others are simply considering measures to keep track of who has been vaccinated, and imposing mask and testing requirements for unvaccinated employees. These decisions require careful consideration of employee morale (particularly in this competitive hiring environment), the political climate, the changing state of the pandemic, and applicable federal, state, and local law. Each strategy presents compliance challenges and the risk of legal exposure.

Vaccine mandates

Hard-line workplace vaccine mandates remained uncommon through most of the pandemic, but are now rapidly growing in popularity. The recent surge in infection rates, the Food and Drug Administration’s grant of full authorization to one of the standard COVID-19 vaccines, and the Biden Administration’s push to mandate vaccines have sparked a recent uptick.

On July 29, 2021, President Joe Biden announced that federal workers will have to show proof of vaccination or follow strict testing protocols to remain employed. Also, on September 9, 2021, President Biden declared that the U.S. Department of Labor is developing an emergency rule that will require all employers with 100 or more employees to ensure their workforces are fully vaccinated, or show a negative test at least once a week. And, on September 24, 2021, the administration released its guidance on mandated vaccination and mask protocols for federal contractors. A number of state and local governments have issued similar mandates or are considering doing so. At the same time, other states and localities have affirmatively banned vaccine mandates.

In recent COVID-19 guidance, the Equal Employment Opportunity Commission (EEOC) stated that federal equal employment opportunity (EEO) laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19 — provided, of course, that disability or religious accommodations are granted. (The agency was silent on remote workers. The courts, including the federal courts of appeal, also have begun to weigh in. So far, vaccine mandates have been upheld for healthcare employees and for college students returning to campus. The legal dispute is by no means settled, however. The first federal court to decide the issue in the employment context came out in favor of the employer in a June 2021 decision dismissing hospital workers’ challenge to their employer’s mandatory vaccination policy. However, that case is on appeal in the U.S. Court of Appeals for the Fifth Circuit. (Moreover, a court’s analysis may differ when it comes to employers outside the healthcare industry.) Also, although the U.S. Court of Appeals for the Seventh Circuit has upheld a district court’s decision dismissing a student challenge to a public university’s mandatory vaccination policy, another case recently was filed by undergraduates in Massachusetts.

Employers (healthcare organizations in particular) routinely face lawsuits by individual plaintiffs for refusing to grant a religious or disability-related exception to mandatory flu vaccines. COVID-19 vaccinations present contentious political issues and elicit a far greater number of holdouts. As a result, the stakes are much higher, and the causes of action more expansive. One recent complaint by employees who work remotely asserts, in addition to accommodation claims, that their
employer’s vaccine mandate violates their privacy rights under the U.S. and California Constitutions and under the common law.

Additional class litigation is sure to be filed, asserting novel claims and legal theories. A class action filed in late-August 2021, for example, alleges that a public university implemented a COVID-19 vaccine requirement for students and staff without allowing for “a natural immunity medical exemption” for individuals who already have had COVID-19 and thus, the plaintiff contends, have antibodies that make them immune to COVID-19 infection.

**On-site vaccines.** For employers that provide on-site immunizations, there are additional considerations if they opt to make vaccines mandatory. Pre-screening questionnaires required as part of the vaccination procedure will include medical inquiries. Generally, employers that administer vaccines (or contract with a third party to come on-site to vaccinate employees) can only mandate the vaccine if the pre-vaccination screening questions do not include inquiries about genetic information and vaccination is job-related and consistent with business necessity.

**Accommodation laws apply**

Vaccination requirements are subject to the reasonable accommodation provisions of Title VII of the Civil Rights Act, the ADA, and other EEO considerations.

When evaluating disability-based accommodation requests, an employer should consider whether it can demonstrate that a mandatory vaccine requirement is job-related and consistent with business necessity, and whether an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace.

The much bigger issue for employers of late has been requests for exemptions based on religious beliefs or personal conscience. Religious accommodation requests have proliferated; in some cases, large groups of employees have objected en masse to employer mandates, citing religious objections to COVID-19 vaccines. Several lawsuits already have been filed challenging vaccine mandates on religious grounds. Navigating religious accommodation requests can be especially challenging in this contentious environment. If your organization adopts a mandatory COVID-19 vaccination policy, partner with employment counsel to implement a system for fielding and responding to religious objections that complies with Title VII and any other federal or state provisions that apply.

**Vaccines: the wage and hour considerations**

If an employer requires vaccination as a condition of employment, the time spent obtaining the vaccine may be compensable depending on whether the vaccinations are on-site or off-site, and on whether the employer dictates the where, when and how employees are vaccinated. Similar compensability questions apply to mandatory testing programs for employees that have chosen not to get vaccinated.

Is an employer required to factor a vaccine incentive into employees’ regular rate of pay for overtime purposes? While discretionary bonuses typically must be included in the regular rate, the U.S. Department of Labor (DOL) has taken the position that
such incentives are in the nature of gifts and fall under the statutory exception at Section 207(e)(2) of the Fair Labor Standards Act (FLSA) for “similar payments to an employee which are not made as compensation for his or her hours of employment.” Therefore, such payments may be excluded from the regular rate of pay.

**Vaccine incentives**

Other employers have opted for an incentive approach — either a reward or penalty, such as a bonus payment or paid time off — to encourage vaccination. The EEOC guidance advises that such incentives, if tied to a vaccine provided by the employer or its agent, must not be “so substantial as to be coercive.” The agency warned that “a very large incentive could make employees feel pressured to disclose protected medical information.” However, the EEOC did not elaborate, leaving it unclear what the terms “substantial” or “very large” will mean in practice. The EEOC noted that, for a vaccination to be truly voluntary, an employer may not take an adverse action against an employee for refusing to participate in an employer-administered vaccination program.

More recently, some employers have incentivized COVID-19 inoculations by imposing a surcharge on monthly premiums for company-provided health insurance, pursuant to a company “wellness” program, for employees who choose not to get vaccinated. (One large self-insured employer that implemented the surcharge reported that COVID-19-related hospitalizations of unvaccinated employees had cost the company about $50,000 per employee. The company also indicated that it only will provide its COVID-19 pay protections to employees who are fully vaccinated but are experiencing a breakthrough infection.)

Employers should consult with counsel when designing a wellness program with “carrots or sticks” incentives attached. Assess the appropriateness of the incentive and be prepared to identify and provide reasonable accommodations for persons with disabilities and religious objections to vaccination.

**Privacy pitfalls**

Employers must take into account the myriad privacy considerations if collecting employees’ vaccine-related personal information. Employers may seek proof of vaccination. Merely asking whether an employee has been vaccinated is not a disability-related medical inquiry under the ADA, the EEOC has stated. However, such information must be treated as confidential medical information. Moreover, the EEOC has advised that employers may provide incentives for employees to voluntarily provide documentation of vaccination. If the employer is offering the vaccine (or having an agent administer the vaccine) on-site, though, then a pre-vaccination inquiry may be a disability-related medical inquiry and more stringent compliance requirements apply.

Navigating the privacy and confidentiality requirements related to collecting and handling information related to employees’ health and vaccination status is a complex compliance challenge. A number of statutory and regulatory considerations are implicated — particularly when employee benefits issues are involved, as when vaccination incentives are offered pursuant to an employer’s voluntary wellness
programs. An employer should consult with an employee benefits counsel to ensure such programs are properly administered and fully compliant with the ADA, GINA, The Health Insurance Portability and Accountability Act (HIPAA), and other provisions.

**Preferential treatment**

A developing issue is whether employers can face liability for engaging in preferential treatment of vaccinated employees or job applicants. As organizations make difficult policy decisions that distinguish between the vaccinated and unvaccinated, they risk allegations of systemic discrimination tethering “non-vaccinated” status to a legally protected class. The most obvious example is terminating or refusing to hire individuals who have not been vaccinated. Lesser slights, such as requiring (only) unvaccinated employees to wear masks indoors, may also raise concern.

The EEOC points out that all employment policies are subject to disparate impact allegations, and so would a vaccine mandate. The EEOC guidance warns that a mandatory vaccine requirement invites disparate impact concerns. When the EEOC wrote its guidance in the spring, the agency advised employers to “keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.” Currently, the Centers for Disease Control and Prevention’s website states, “Covid-19 vaccines are free and available to anyone who wants one.” Compulsory mask use (a more common employer response) and required daily or weekly COVID-19 tests for the unvaccinated invite similar risk.

State laws also come into play. Montana, for example, made it unlawful for employers to discriminate against an individual based on their vaccination status. The legislation provides limited exemptions for certain “health care facilities.” Industries in which public health and safety is of top concern (e.g., hospitals and public transportation) may be better prepared to defend a mandatory vaccination program. Other employers will likely face stricter scrutiny.

**Reducing the risk**

The COVID-19 pandemic is in a precarious stage and the long-term litigation fallout is unpredictable. Consider these strategies to minimize the risk of exposure:

- Evaluate the best plan for your worksite with respect to vaccines, masks, remote work, and social distancing. Identify (and control for) the risks of each.

- If adopting a vaccine mandate, request supporting information when evaluating whether a disability accommodation is appropriate. However, when considering a religious accommodation, requests for supporting documentation are not advised, unless there is an objective reason for doubting the sincerity of the employee’s request. Consider requiring a simple attestation from the employee specifying their religious belief.
• Maintain reasonable safeguards to protect personal health information obtained for COVID-19 screening purposes, when providing worksite vaccinations, or when requesting proof of inoculation. Make sure that employees understand the privacy safeguards implemented and provide informed consent. Consider streamlined processes for pre-shift COVID-19 screening. In certain jurisdictions, it may make sense simply to compensate employees for this time.

• Employers that utilize biometric technologies for screening must carefully review the privacy laws that apply in the relevant jurisdictions. Provide required notice and obtain the necessary consents. Consider taking these measures as a best practice, even where the law in the jurisdiction does not (yet) require them.

• If returning only some employees to the worksite, clearly articulate the criteria for deciding who will be required to work on-site based on departments, job functions, or other operational reasons. When mandating return-to-work, provide employees the business case for why.

• Review all policies and procedures, including meal and rest period policies, to ensure they are also written from the lens of remote employees.

• Revisit your expense reimbursement policy to ensure it is legally compliant and meets the changing needs of an increasingly virtual workplace.

• Ensure supervisors are trained to look for class and collective action warning signs and to manage discord related to vaccination and return-to-work mandates.

• Remember that rigorous wage and hour compliance remains the most effective buffer against outsized class action exposure.

New questions and compliance obligations will arise: Can employers mandate booster inoculations? Will the rapid move to remote work spur a trend in state expense reimbursement laws? Will resentment over return-to-work requirements provoke an uptick in class litigation? Flexibility and diligence are essential as the pandemic, pandemic safeguards, and the legal and regulatory environment are in flux. It is also advisable to partner with counsel who can offer needed guidance in responding to these challenges.

**Bottom line**

COVID-19 inoculation will play a crucial role in ensuring a safe return to the workplace. However, there are a host of legal and practical considerations to take into account to minimize the risk of class litigation when implementing your organization’s vaccination strategy.

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National Law Review, Volume XI, Number 275