

Debevoise Coronavirus Checklists— Top 10 Considerations for U.S. Employer Mandatory Vaccination Policies

September 17, 2021

Mandatory vaccination policies are top of mind for many employers, particularly now that the White House announced mandatory vaccinations or testing requirements for private employers with 100 or more employees. The forthcoming mandate, which soon will be formalized in an Emergency Temporary Standard (“ETS”) from the Occupational Safety and Health Administration (“OSHA”), is a part of the Biden administration’s “Path Out of the Pandemic” plan available [here](#). Although the details are evolving, and the exact timing for the new requirements remains unclear, employers can begin preparing for the new ETS now and how they might implement it. Here are ten considerations to keep in mind when planning to implement a mandatory vaccination policy whether in response to the forthcoming ETS or otherwise.

Understand Your Workforce. In order to plan effectively for adopting a mandatory vaccination policy, employers should consider how their employees are likely to react to it. Employers can collect data on employee vaccination status through workforce surveys. Guidance from the U.S. Equal Employment Opportunity Commission (“EEOC”) states that asking an employee about vaccination status is permissible. It is not considered a medical inquiry because asking a yes or no question about whether someone has been vaccinated is not likely to elicit information about possible medical conditions. Therefore, it is generally best to avoid open-ended survey questions.

Consider Whether to Allow Weekly Testing. The forthcoming ETS is expected to require covered employers to require their employees to either get vaccinated or provide a negative test result on at least a weekly basis in order to come to work. Employers are, however, permitted to disallow the testing option and require all employees entering the workplace to be vaccinated for COVID-19 (provided that reasonable accommodations are made available for disability or a sincerely held religious belief, practice or observance, as discussed below). If implementing weekly testing requirements, employers must consider the logistics of collecting timely test results and enforcing the policy as well as the potential costs of weekly testing. Employers must pay employees for time spent receiving testing during work hours or at the employer’s direction.

Be Mindful of Discrimination Risks. As always, employer policies and decisions concerning the terms and conditions of employment must comply with anti-discrimination laws. Vaccination policy requirements should apply to all similarly situated employees as well as applicants and requirements should not be applied in a way that treats employees differently based on legally protected characteristics. Exemptions from vaccination should be considered for those employees and applicants requiring a reasonable accommodation due to a bona fide disability or sincerely held religious belief.

Develop a Process for Considering Requests for Reasonable Accommodations.

Unless an employer offers all unvaccinated employees the option of submitting to weekly COVID-19 tests, employers must be prepared to engage in the interactive process required by the ADA and applicable state and local laws with all employees who request reasonable accommodations and to grant reasonable accommodations when warranted. Employers are legally required to conduct individualized assessments, which can result in a challenging and burdensome process for employers depending on the number of employees requesting accommodations. For disability accommodations, employers may request medical documentation to support the employee's request. Similarly, for religious accommodations, employers may request documentation if the sincerity of a religious belief, observance or practice is questionable.

Collect Proof of Vaccination. While disability-related inquiries and medical examinations are usually prohibited under the Americans with Disabilities Act ("ADA"), the EEOC has stated that asking employees to show proof of a COVID-19 vaccination is not a disability-related inquiry or medical examination. Employers can require—and the forthcoming ETS will likely require—employees to show proof of receipt of a COVID-19 vaccine (e.g., a copy of a CDC vaccination card). Employers should nonetheless treat vaccine records as confidential medical information and store the records securely and separately from the employee's personnel files. Employers should also remind employees not to share any other medical records with the proof of COVID-19 vaccination.

Provide Paid Leave for Vaccination. President Biden indicated as a part of his administration's "Path Out of the Pandemic" plan that the plan will provide paid time off for vaccination for most workers in the country. The details and mechanics of the paid leave are currently unclear. Additionally, some states, such as New York, have already enacted laws requiring paid vaccination leave. Even if not legally required at the present time, employers should consider offering paid vaccination leave as a part of any employer-sponsored vaccination policy and allowing employees to receive the vaccine during regularly scheduled work hours.

Be Prepared to Discipline Employees Who Refuse to Follow the Rules. There will undoubtedly be some employees who refuse to be vaccinated or refuse to submit to weekly COVID-19 testing. Employers are going to have to address employees' objections and noncompliance in an equitable manner. Employers may wish to try to give employees a second chance and send employees home without pay or using their PTO, if any until they come into compliance. On the other hand, employers need not accommodate those who violate work rules, and in some circumstances, prompt termination of employment will be appropriate.

Prepare a Written Policy. The details of an employer's mandatory vaccination policy should be documented in a written policy that is shared or otherwise made available to employees. At a minimum, the written policy should cover the basic requirements (e.g., whether weekly testing is an option and when and how test results should be submitted), the availability of disability and religious accommodations and the process for requesting them, the paid leave that is available and how to request it, and the potential for disciplinary action for violations. Given the fluid nature of the pandemic and related legal requirements and guidance, employers should also note that the policy is subject to change.

Make Educational Resources Available to Employees. Employers may educate employees on the safety and efficacy of COVID-19 vaccines. This can include providing employees with CDC or FDA literature or web sites or retaining medical professionals from the community to attend a town hall or group meetings with employees to discuss the available COVID-19 vaccines and employees' questions.

Communication Is Key. Effective employee communications can often mitigate legal risks. When announcing a mandatory vaccination policy, employers should take steps to effectively communicate the requirements with employees, including through FAQ documents or emails, memos to employees distributed at the worksite, and virtual or telephonic town halls. Establish clear points of contact for employees to direct questions and concerns.

* * *

Many of the decision points for developing and administering mandatory vaccination policies involve business and legal judgments. If you have any questions or require assistance with developing a mandatory vaccination policy or concerning particular issues that arise when implementing one, please do not hesitate to reach out.

NEW YORK



Jyotin Hamid
jhamid@debevoise.com



Tricia Bozyk Sherno
tbsherno@debevoise.com