

AGENDA

Vaccination Mandates: Legal Risks No Matter What?

By Jennifer Williams-Alvarez August 13, 2021

In the face of heated debate over whether employers should require workers to get vaccinated against the virus that causes Covid-19, companies have adopted widely varying approaches on the issue. However, sources say any move – mandating vaccinations for some or all or not instituting any requirement – may increase a business's legal exposure.

Within the boardroom, it's impossible to ignore the differing points of view from employees on the issue, as well as the potential avenues of legal exposure and the need to protect workers, particularly as companies and boards consider related policies and stances amid a sea of unknowns, said seasoned board member **Alex Cappello**. Mandating vaccinations may spur backlash from employees, he offered. But then again, not doing so could also increase the legal risks, said Cappello, who is chairman and CEO at global investment bank **Cappello Global** and a director on the board at **The Cheesecake Factory**.

While all companies should have the same motivation – to ensure the health and safety of employees, customers and others, according to Cappello – some will inevitably do it well while others will fall short.

“The interesting thing is we won't know who got it right until we look back in history,” he noted. “Hindsight is always 20/20, isn't it?”

The Varying Approaches

When it comes to vaccination mandates, some companies have drawn a line between those in corporate offices and the rest of the workforce, requiring office denizens to get vaccinated but not other employees. Sources say this approach may be legally problematic.

For one, on Wednesday **McDonald's** reportedly said in a memo to employees that it would require U.S. office workers to be vaccinated but not employees in its restaurants, whether corporate-owned or franchised.

Uber Technologies, similarly, has said it will require its white-collar workers to get vaccinated but has stopped short of expecting the same from its drivers. (Whether Uber's drivers are employees of the company has been subject to legal and regulatory battles in recent years.) The company is thinking about driver and rider safety and so has pushed

measures such as mask requirements and the suggestion to leave windows open. But Uber CEO **Dara Khosrowshahi** has expressed that he didn't think it was "right" to put the responsibility of requiring "hundreds of millions" of riders and drivers on a company.

It was an "easy call," on the other hand, to require office workers to get a vaccination, Khosrowshahi recently told CNBC.

Walmart will also require corporate staff in the U.S. and regional managers to get a vaccination but not store workers. With 1.6 million U.S. employees, it is likely that hundreds of thousands of workers have not gotten the vaccine, The Wall Street Journal reported this month. Executives held the view that starting with a smaller group that was concentrated geographically would be easiest, a person familiar with the retail giant's plan told the Journal. What's more, the hope is that requiring it of executives will "influence" company associates, a Walmart spokesperson told the Journal.

The companies did not comment on their plans or the potential for legal risks.

Without opining on the legalities of any specific company's approach, attorney **Walter Foster** said treating groups of employees differently may be problematic. "From an employment law viewpoint, one of the mantras we almost always advise is that any policy should be equally applied," he said. Particularly in circumstances where employees are exposed to one another and to customers on a regular basis, Foster said it "doesn't make a lot of sense" to draw a line between corporate offices and the rest of an employee base.

"It has the potential to create risks," noted Foster, a labor and employment attorney with law firm **Eckert Seamans Cherin & Mellott**. "If there are certain categories of people who fall into those groups ... you can inadvertently cause discrimination," he noted, explaining that the law allows for claims that policies or practices have a discriminatory impact, even if that is not the intent.

Laura Boudreau, an assistant professor at **Columbia** Business School, similarly notes that two-tiered policies may "open the door" to claims that employees are not being treated equally.

From a business perspective, however, Cappello said he can understand the distinction. "In the corporate offices that I'm involved with, we try to set a good example, and we're maybe a little tougher and harsher on the white-collar employees," he explained.

Broadly, vaccination mandates and other efforts to incentivize vaccinations have ramped up in recent weeks. Indeed, 15% of employers indicated this month that they already have a vaccination mandate or were considering implementing one, according to a survey of more than 700 respondents by law firm **Fisher Phillips**. That's up nearly fourfold since May, the firm found, when 4% had the same response.

United Airlines, for instance, revealed this month that, with limited exceptions, all of its roughly 67,000 U.S. employees must be vaccinated by the earlier of Oct. 25 or five weeks after vaccines are given full government approval. **Tyson Foods** has made a similar move, telling 120,000 U.S. workers in slaughterhouses, offices and poultry plants that they must be vaccinated by Nov. 1.

Others, meanwhile, have taken a softer approach, such as **JPMorgan Chase**, which encourages but does not require vaccinations.

Companies can legally mandate that employees get vaccinated as long as reasonable accommodations are made for disabilities and religious beliefs. This is according to guidance issued by the **Equal Employment Opportunity Commission**, and it has been backed up in court. For example, **Houston Methodist**, among the first medical organizations to require vaccination, was sued in May by more than 100 unvaccinated workers claiming that it was unlawful to require vaccination as a condition of employment.

A Texas judge disagreed.

Rather than finding that employees were effectively being coerced into getting a vaccination, U.S. District Judge **Lynn Hughes** determined that the workers could refuse to get a vaccination and would “simply need to work somewhere else.

“If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired,” Hughes wrote in a June 12 order. “Every employment includes limits on the worker’s behavior in exchange for his remuneration. That is all part of the bargain.”

“The momentum has changed; there has been a shift,” Boudreau said, as companies are increasingly opting to mandate vaccination. She expects that trend to continue, particularly once the federal government formally authorizes the vaccines. “That I think will be the next big opening for certain employers that have not mandated but who are thinking about it,” Boudreau said.

Foster agrees. Anecdotally, he said, he has observed that a number of companies are thinking about mandatory vaccination policies coupled with an enforcement stance that is less severe than outright firing employees who do not comply.

What that looks like will vary by company, but it might include requiring unvaccinated employees to get tested at regular intervals, to follow mask guidelines and, when possible, insisting that they work from home, said Foster.

In Foster’s view, the threat of liability is also likely a significant driver behind mandates. The landscape has changed considerably for companies in recent months, as vaccines are readily available at the same time that the extremely contagious delta variant is

spreading throughout the U.S. This, according to Foster, increases the risk that either an employee or a customer will claim that companies created an unsafe environment by not mandating vaccination.

“That’s a whole line of liability that we’ve not seen yet,” according to Foster. “I don’t think we’ve yet seen those repercussions.”

Beyond litigation, there is also the potential for employee backlash, sources say. And this may be true no matter the approach a company goes with. Indeed, in a survey of more than 1,000 working adults, 44% said they would leave their jobs because of a vaccination mandate, while 38% conversely said they would walk away from jobs without the requirement, according to research from **Qualtrics**.

The reality for companies, Cappello pointed out, is that, while some employees are looking for the protections offered by a mandate, still others may revolt because of one.

“As an employer, I would like to encourage all of my employees to wear masks, to get vaccinated and to be very careful. But I don’t want to force them to do anything under penalty of getting fired,” he said. “The more heavy-handed the employer is, the more likely it is to backfire.

“I understand that it’s a company’s prerogative to say what it wants, but I think we’re going to find that the morale in those companies [that require a vaccination] is going to be severely damaged.”

This is especially problematic at a time when some U.S. companies are facing a significant labor shortage. “It’s hard to fill the chairs right now,” and a vaccination mandate may pile on to that problem, said Cappello, who said he has been vaccinated.

Underscoring the struggle felt within companies, Cappello said that, while he holds a personal view that educating on the importance of getting a vaccination is better than mandating it, he can understand why some companies are going that route.

“If you’re operating a business and facing liabilities related to customers and employees, you may feel that you need to mandate because you’ll face liability if you don’t,” Cappello said. “The big variable here is what’s going to happen in the courts in the next few years.

“Do you have more liability requiring it, or do you have more liability in not requiring it? I don’t have that answer.”

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