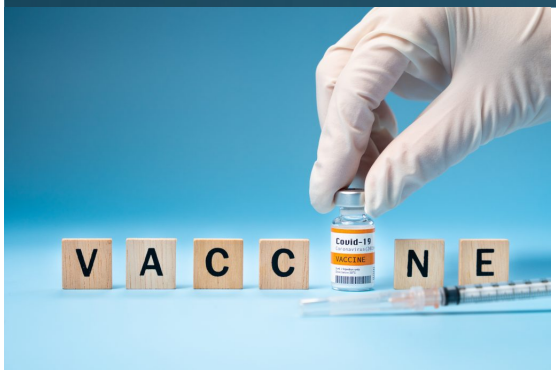
Is Now the Time to Consider Mandating Covid Vaccinations or Are There Better Alternatives for Your Organization?



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Recent Developments

There has been a flood of recent developments with regard to Covid vaccines. First, the FDA has given full approval to the Pfizer Covid-19 vaccine with indications that full approval for the Moderna vaccine likely coming soon. The Delta variant continues to spread exponentially among the unvaccinated and some hospitals are at or near capacity. The federal government is requiring members of the military to get vaccinated, and most other federal employees and state and city employees in some locations who are not vaccinated now have the choice of getting vaccinated or getting weekly Covid tests if they want to continue their employment.

These recent developments have led many employers to take a second look at whether to require their employees to receive the Covid vaccine. These changes have been dramatic. A survey by Littler in January of 2021 disclosed that less than 1 percent of employers were mandating vaccinations and just 9 percent were planning to in some form. However, a recent August 2021 survey by Littler of 1,630 in-house lawyers, C-suite executives and HR professionals found that while just 9 percent of employers were currently mandating vaccines for some or all of their employees, another 12 percent were planning to impose a mandate in the near future (8 percent) or for a specific subset of employees (4 percent). While a significant majority (63 percent) are still planning on encouraging – rather than mandating the vaccine, significantly 46 percent are more strongly considering a new vaccine mandate due to the recent rise in Covid cases, 27 percent are unsure, while just 22 percent say they have firmly decided not to institute a mandate. USA Today reported on August 26, 2021, that half of American workers are now in favor of workplace vaccine requirements, and only a quarter are opposed, according to a new poll by The Associated Press-NORC Center for Public Affairs Research.

Employers who are reconsidering whether to impose a vaccine mandate are still weighing the impact of such a requirement on morale, the strong resistance of some employees to the vaccine, the tight labor market where the possible loss of employees who resign or are terminated for refusing to get vaccinated could hurt the employer's ability to continue to maintain operations at current levels, and whether encouraging the vaccine is better than mandating it. Some employers will conclude that mandatory vaccinations are not the right choice for their organization for any number of business reasons.

What to Keep in Mind as You Consider a Covid Vaccine Mandate

The percentage of employees already vaccinated and the extent of Covid infections in your locality.

Federal, state and local legal requirements, especially EEOC guidance[1] and any state or local prohibition on vaccine mandates.

Whether to only require the vaccine for certain employees (for example, employees who can't work remotely).

What type of proof of vaccination will be required and whether any state or local laws prohibit an employer from requiring a particular form of proof of vaccination.

Exemptions for employees who cannot take the vaccine because of medical/disability reasons or because of a sincerely held religious belief.

Paying employees for time spent getting the vaccine or for time spent getting tested for Covid.

Is a mandate going to cause some employees to quit or be terminated?

How much advance notice of the mandate will employees be given?

Other Options and Considerations

Consider encouraging rather than requiring vaccination through education and financial incentives.

Consider giving employees the option of taking the vaccine or getting tested for Covid once per week if they are coming into the workplace.

Consider imposing a health insurance surcharge on employees who are unvaccinated. For example, Delta recently decided to impose a $200 per month health insurance surcharge on employees who are not vaccinated by November and decided to provide pay protection for missed time due to Covid-19 only for fully vaccinated employees experiencing breakthrough infections starting the end of September.

We are prepared to assist you with legal advice on these issues, including whether to adopt mandatory vaccinations for some or all of your employees, helping you navigate through federal, state and local laws, and we can help you develop policies and forms to facilitate whatever decision you make. This email should not be construed as a recommendation that employers should impose a vaccine mandate because we recognize that one size does not fit all.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm's COVID-19 Resource Center. Readers with legal questions should consult the authors, John Vering (jvering@sb-kc.com), John Neyens (jneyens@sb-kc.com) Shannon Johnson (sjohnson@sb-kc.com), Mark Opara (mopara@sb-kc.com), or other shareholders in Seigfreid Bingham's Employment Law Group, including: Brenda Hamilton, Julie Parisi, or Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460.

[1] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K