



Vaccines, Return to Work Policies, and the Need for EPL Coverage

Introduction

As of June 20th, at least 177 million Americans had received one vaccine dose and 150 million Americans are fully vaccinated.¹

With those figures translating to roughly 50% of Americans being vaccinated, more and more COVID-19 restrictions are being lifted or dialed back. With states beginning to open back up, albeit on different schedules, many businesses are seeking guidance on how to implement policies that will allow employees to return to work that both take into account their potential liability and the health of their employees.

Despite growing vaccination numbers, there is a large percentage of Americans refusing vaccination for various health, religious, or personal reasons. As such, businesses have been put in a difficult position and are being forced to grapple with questions regarding whether to implement a return to work policy requiring employees to be vaccinated and what kind of liability this may expose them to.

Bridges v. Houston Methodist Hospital

On June 12, 2021, a federal district court in Texas dismissed an employees' lawsuit challenging its mandatory COVID-19 vaccination policy.² This ruling appears to be the first federal court decision regarding a private employer's right to require its employees be vaccinated. The opinion is consistent with previous guidance from the EEOC, stating such policies are generally permissible under federal law as long as certain accommodations exist.³

The lawsuit was filed by 117 employees of Houston Methodist Hospital, who argued the hospital's plan to terminate any unvaccinated employees (except those seeking an accommodation) violated Texas and federal law. In rejecting the claimants' arguments, the court began its analysis by noting Texas law only protects employees who refuse to commit an illegal act which carries criminal penalties. While the plaintiffs likened the requirement to forced medical experimentation during the Holocaust, the judge found this analogy reprehensible. An appeal has already been filed and their attorney vowed to file suit in state court as well, meaning additional judicial opinions on this subject are only just the beginning.⁴

In spite of this decision, similar challenges to mandatory vaccination policies are all but certain. For instance, other employee groups have already filed lawsuits arguing COVID-19 vaccinations cannot be required because the vaccines only received emergency use authorization (EUA), rather than full approval from the FDA.⁵ Similar to how the judge viewed this argument, the EEOC has stated the "legal implications of EUA or the FDA approach" are beyond its jurisdiction.⁶ However, the Methodist Hospital ruling could be a key factor in establishing legal precedent for future cases challenging employer vaccination policies.



What is the Right Choice?

As companies weigh their options on implementing mandatory vaccine policies, many factors will need to be considered. For example, employers in high risk settings or those who have responsibility for public safety that have traditionally required employees to be inoculated against other maladies (e.g. flu shots) will most likely be the first to implement mandatory vaccines policies. Vendors and other companies doing business with such entities will also likely have to take a hard look at whether mandatory vaccination is in the best interests of the business as a whole. However, just as every individual needs to make their own personal choice, companies will need to weigh the pros and cons associated with implementation of a formal policy against both the legal liability it presents along with the publicity that could ensue.

PROS

- + Employers can lower the risk of operational problems resulting from the spread of COVID-19 in the workplace
- + Employees in favor of vaccines may experience increased morale from knowing they are working at a company with like minded individuals.
- + Employees are more productive when they feel safe
- + Employers can safely benefit from the intangible synergies and improved company culture that comes from employees collaborating in person
- + Vaccinated employees will generally not need hospitalization if infected, helping to avoid short or long-term leave claims
- + Mandatory vaccinations will allow employers to avoid 2 sets of at-work safety protocols for the vaccinated versus unvaccinated
- + If return-to-work mandates occur, a mandatory vaccination policy may allow employers to avoid certain COVID-19 related risks such as work-comp claims

CONS

- Like Houston Methodist Hospital, you could be opening your company up to litigation that is both costly and time consuming
- Company morale could be negatively impacted if a large percentage of your workforce is not in favor of the vaccines
- It might be difficult to attract applicants with a formal policy in place
- If you work with companies that are adopting these policies and you do not, it might become difficult to retain their business
- If there is a rule in place, unvaccinated people may claim discrimination or preferential treatment of vaccinated employees to the detriment of the unvaccinated
- If an employee gets vaccinated in compliance with a company requirement and has a severe adverse reaction to the vaccine, it's possible the employer could be held liable for any damages caused



Conclusion

Legal Counsel – Employers considering requiring COVID-19 vaccinations should work with internal or outside counsel to ensure compliance with the EEOC policies, as well as federal and state law. Employers will also need to be aware of any newly implemented state or local laws pertaining to mandatory vaccination policies given that many states are currently considering legislation on this subject.

EPL Insurance – Even though all employers should consider Employment Practices Liability Insurance (“EPLI”), those looking to implement mandatory vaccine policies should especially consider purchasing this product. EPLI coverage can provide some financial security for employers concerned about claims alleging wrongful termination, harassment, or discrimination because of mandatory vaccine policies. If you have more questions about this, please reach out to an IMA team member for more assistance.



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1 <https://covid.cdc.gov/covid-data-tracker/#vaccinations>

2 <https://s3.documentcloud.org/documents/20860668/houston-methodist-lawsuit-order-of-dismissal.pdf>

3 <https://imacorp.com/benefits/news/eooc-updates-employer-vaccine-guidance/>

4 <https://www.houstonchronicle.com/news/houston-texas/health/article/Unvaccinated-Houston-Methodist-employees- appeal-16249282.php>

5 <https://news.bloomberglaw.com/daily-labor-report/vaccine-mandate-lawsuits-sparked-by-shots-emergency-status>

6 <https://www.jdsupra.com/legalnews/federal-government-says-employers-can-6988905/>

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