

Employers That Mandate Vaccines Defend Their Policies

By Allen Smith, J.D.

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While most employers are encouraging employees to get COVID-19 vaccinations, some organizations are requiring it. The legal risks of this mandate are emerging, but employers are standing their ground.

The law on mandatory vaccinations "is rapidly evolving and differs significantly from place to place," said Robin Samuel, an attorney with Baker McKenzie in Los Angeles.

Anthony Mingione, an attorney with Blank Rome in New York City, added, "This is a very fluid situation." Although employers can mandate vaccinations under federal law, many jurisdictions are looking at enacting their own requirements, he said. "There are political pressures on all sides, and the level of simultaneous legislative and regulatory activity is extremely high, so employers must stay up-to-date on developments."

Under guidance from the Equal Employment Opportunity Commission (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-mandatory-vaccinations.aspx), employers are allowed to require vaccinations and to ask for proof of the vaccination.

"Certainly, for positions that are safety-sensitive or cannot be done remotely, an employer may, as a practical matter, have no reasonable option other than terminating an employee or not hiring an applicant (https://www.wsj.com/articles/want-that-job-offer-a-covid-19-vaccine-is-now-required-11619438580?mod=hp_lead_pos10) where that person is refusing to get vaccinated for a nonprotected reason," said Jennifer Barna, an attorney with Epstein Becker Green in Newark, N.J.

[*Related SHRM article: Employers React to Workers Who Refuse a COVID-19 Vaccination* (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx)]

Some Employers Mandate Vaccinations

Houston Methodist, a hospital system in the Houston area, has made vaccination mandatory for its employees.

"Out of approximately 1,200 in management who were required to be vaccinated by April 15, only two chose to leave the organization," said CEO Dr. Marc Boom in an e-mail to staff. "We are sorry that they made that choice, but by doing so, they are putting themselves before the safety of our patients, which is not consistent with our culture. Part of having a strong 'I CARE' patient-centric culture is recognizing who fits the culture and who does not."

Boom added, "I want to re-emphasize the reason we are making the COVID-19 vaccine mandatory. It is rather simple—as health care workers we must do everything possible to keep our patients safe and at the center of everything we do. Mandating the vaccine was not a decision we made lightly, but science has proven that the COVID-19 vaccines are very safe and very effective."

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(www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Law firm Davis Wright Tremaine (DWT) has come out with a vaccine policy mandating that employees receive vaccines in order to return to the office.

"DWT continues to place the health and safety of all of our lawyers and staff as our highest priority. As vaccines against COVID-19 become increasingly available, we are adopting a policy to safeguard the health of our employees and their families, our clients and visitors, and our communities. We believe it is our responsibility to do our part, and we need everyone's help to be able to get back to more normalized operations as quickly as we can," said Jeff Gray, DWT managing partner in Seattle and San Francisco.

Key elements of the DWT policy include the following:

- Once an employee is eligible based on his or her state's protocols, the employee is encouraged to get vaccinated as promptly as possible.
- Only those who have been vaccinated will be allowed to work in the office or to attend firm-sponsored events. Proof of vaccination will be required.
- Those unable to be vaccinated due to a disability, advice of a medical provider or religious beliefs are to contact HR to explore reasonable accommodations.
- The firm will provide for paid time off to receive the vaccine and recover from side effects, if needed.
- Until the vaccines are widely available and significant portions of the population become vaccinated, employees will continue to work from home unless work requires them to come into the office. If employees do come to the office, they are to observe all firm health and safety protocols—even if the employees have been vaccinated.

Another law firm, Sanford Heisler Sharp, also has announced it will require COVID-19 vaccinations for staff returning to its offices, according to Bloomberg (<https://news.bloomberglaw.com/business-and-practice/sanford-heisler-to-require-vaccinations-for-returning-lawyers>). David Sanford, an attorney with the firm in Washington, D.C., declined to comment to *SHRM Online*.

The consequences for violating mandatory vaccination policies have included termination. One waitress at the Red Hook Tavern in Brooklyn, N.Y., claimed she was fired for declining to get vaccinated out of concern that vaccination could hurt her chances of becoming pregnant, reported *The New York Times* (<https://www.nytimes.com/2021/02/17/nyregion/waitress-fired-covid-19-vaccine-refusal.html>). Red Hook Tavern declined to comment to *SHRM Online*.

A woman who worked for the Harvest Cannabis Dispensary in Conway, Ark., allegedly was discharged for refusing to be vaccinated, according to KARK 4 in Little Rock, Ark (<https://www.kark.com/news/local-news/arkansas-woman-says-she-was-fired-for-refusing-to-get-covid-19-vaccine/>). Harvest Cannabis Dispensary Executive Director Robbin Rahman did not comment directly on the worker's termination but released a statement saying a number of factors played a role.

Legal Risks

Mandating employee vaccinations isn't without legal risks. A nurse reportedly is going to sue Houston Methodist over its June 7 deadline for all staff to be vaccinated. Of the estimated 26,000 hospital employees, the nurse is among an estimated 3,000 rank-and-file workers refusing vaccination so far, reported KHOU 11 in Houston (<https://www.khou.com/article/news/local/nurse-lawsuit-houston-methodist-covid-vaccine/285-ba99beea-cd8e-4151-8771-82299e98b6d6>).

In some states, such as Hawaii, retaliating against an employee because of refusal to take a vaccination could lead to strong claims of wrongful discharge in violation of public policy and whistleblower laws, said Jeffrey Harris, an attorney with Torkildson, Katz, Hetherington, Harris & Knorek in Honolulu. This could subject an employer to liability for compensatory damages, punitive damages and attorney fees, he said.

Montana state legislators have passed legislation that will ban most private employers from requiring employees to receive any vaccine, Baker McKenzie's Samuel noted. Gov. Greg Gianforte is expected to sign the legislation.

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