

BUSINESS INSURANCE

Vaccine mandates come with risks to employee pool

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Among the limiting factors for employers considering mandating COVID-19 vaccinations are attracting and retaining talent and the prospect of employment litigation, experts say.

The call to mandate vaccinations for workers following the U.S. Food and Drug Administration's Aug. 23 approval of the Pfizer-BioNTech vaccine came from several federal entities, including President Joe Biden himself, spurring employers to decide whether to require the shots.



Even prior to the FDA's approval, a study by employment law firm Littler Mendelson found that 46% of 1,600 employers surveyed between Aug. 4 and Aug. 12 are considering a vaccine mandate more strongly, which survey analyst Devjani Mishra credited to the Delta variant and rising cases.

However, 60% of employers fear the possible loss of staff and difficulty operating due to the termination or resignation of employees who don't wish to be vaccinated, the survey found.

"Every employer has to make its own decision based on its own circumstances, its workforce, and who it can afford to lose ... either because they do mandate vaccinations or because they don't," said Hugh Murray, employment and labor partner at McCarter & English in Hartford, Connecticut.

"The idea that you'd fire somebody who is a pretty good employee, or even an excellent employee, sometimes causes employers to back off a little bit when they realize that it's a tough job market to find qualified people for many of these positions," Mr. Murray said, adding that the business risks are "probably higher" than the legal risks.

The Littler Mendelson survey confirms that possibility, as 75% of employers said they are concerned about facing resistance from employees who refuse to be vaccinated, and 68% are worried about the impact of a mandate on company culture and employee morale.

Several organizations that represent the nursing home industry are sounding alarms on the implications of an announcement from President Biden that all nursing home staff will be required to be fully vaccinated.

The American Health Care Association and the National Center for Assisted Living sent a letter to the Department of Health and Human Services and the Center for Medicare and Medicaid Services on Aug. 20, urging the agencies charged with creating such a policy to provide alternatives to mandates and to consider "the potential impact on the profession's already challenging workforce situation." Such a mandate will "cause a mass exodus from the nursing home profession," according to a joint statement by the organizations.

A surge in Equal Employment Opportunity Commission litigation could also be on the horizon.

Amy Blaisdell, attorney at Greensfelder, Hemker & Gale P.C. in St. Louis, said the primary issue with mandatory vaccine programs is that employers must still accommodate exemptions based on "sincerely held" religious beliefs and medical contraindications.

“I think that to some extent, that is what has also made employers hesitant,” she said. “Employers are then left to sift through sometimes hundreds, if not thousands, of exemption requests to determine if religious beliefs are sincere or whether a medical exemption request is valid.”

Ms. Blaisdell added: “Areas of litigation to continue to watch for will be suits arising from the refusal of employers to grant exemptions for mandatory vaccines, claims that employers failed to properly safeguard confidential medical information (including vaccine status), and claims that employees were retaliated against as a result of their decision or inability to be vaccinated.”
