

HOW BUSINESSES CAN MANAGE MANDATORY VACCINATION POLICIES



David Fisher

is Counsel to the Labor + Employment Practice Group of Davis+Gilbert LLP.

He may be reached at dfisher@dglaw.com or 212 468 4861

The Biden administration has tasked the Department of Labor with issuing an order that will require employers with more than 100 employees to mandate COVID vaccines or weekly testing.

This new directive aligns with the thoughts of many advertising agencies that, even prior to the president's announcement, were considering mandatory vaccination policies given the rise in delta variant cases, FDA approval of the Pfizer vaccine and government and court rulings upholding vaccination requirements by employers. In implementing such policies, agencies need to consider their potential legal and business ramifications and—especially—need to understand that enforcement must be consistent.

For those businesses that elect to adopt a mandatory vaccination policy, here's what they need to know:

Businesses must accommodate employees who cannot be vaccinated against COVID-19 for health or religious reasons. Employees who refuse vaccination for non-protected personal reasons, however, can be legally fired—and treatment of such employees must be uniform.

To legally provide reasonable accommodations for those who cannot be vaccinated for health or religious reasons, employers must perform an analysis of each individual employee, taking into consideration:

Their essential job functions

Whether accommodating their inability to be vaccinated would pose an undue hardship to the organization

Whether the business can establish that unvaccinated employees pose a direct threat to the safety and health of colleagues

As part of this analysis, employers need to determine what accommodations may be available to these employees:

Can they work remotely?

Can they enter the office if required to wear masks, socially distance and provide weekly negative COVID tests?

If these accommodations would pose an undue hardship, can they be placed on an unpaid leave of absence and, if so, for how long?

Businesses are also required to engage in an interactive dialogue with each employee in order to determine what reasonable accommodation is possible for that particular employee.

Businesses must also determine what proof of vaccination will be required. Proof of vaccination may be collected in a few different ways. Employers can collect and retain images of vaccination cards or other approved proof of vaccination (such as under the NYC COVID Safe App or NYS State Excelsior Pass). Alternatively, the human resources department could check vaccine cards and keep a record of their verification without retaining copies.

Some businesses may prefer to have employees execute an attestation affirming they received the vaccine, often in conjunction with the collection of some other form of proof (given the unfortunate prevalence of fraudulent vaccination cards). For those agencies that do collect proof of vaccination, they must maintain those records in confidential files (as they would other medical information) kept separate from personnel files.

Finally, businesses need to anticipate and prepare their response to employees who refuse to get vaccinated for unprotected reasons.

Some companies that have implemented mandatory vaccination policies are dealing with backlash from employees who don't want to get vaccinated for personal reasons unrelated to health or religion. To be clear, employers that implement lawful mandatory vaccination policies can terminate employees who refuse to get vaccinated for personal reasons, but they need to be uniform in their treatment of those employees.

If agencies start to make exceptions, they can lead to discrimination claims (i.e. that the differing treatment is based upon another protected characteristic such as race or gender) and undermine the reason for such a policy—that it is necessary to promote and protect the health of the workforce.

Businesses must also be prepared to manage a morale issue among employees—particularly among long-tenured and/or valued employees—who are reluctant to be vaccinated.

Businesses must anticipate all the potential impacts—legal and business—of implementing a mandatory vaccination policy. And they should speak with legal counsel to ensure that the policy fully complies with all legal requirements, not only in the language of the policy itself, but also its implementation.