

Preparing for a Legal and PR Crisis After Company Vaccine Mandates

By Steve Cody and Mike Lasky

Among the many disruptions that COVID-19 has visited upon the business world, the pandemic has made many corporate crisis management playbooks obsolete when it comes to managing interconnected legal and reputational risks.

What's different about today's crisis landscape that makes organizations vulnerable to new, unprecedented problems? The most inflammatory issue is clear: COVID-19 vaccine policies.

Every large company is scrambling to understand the U.S. Department of Labor's (DOL) impending order mandating employers with 100-plus employees to require COVID-19 vaccinations or weekly testing. Many questions remain as to how organizations will comply with this directive. When the order is issued, it will almost certainly be challenged in court

by employers and others who do not want to require mandatory vaccinations, adding more uncertainty to the planning process. However, potential challenges to the DOL's order would not itself affect a private employer's right to mandate vaccination for all of its employees.

If and when the mandates go into effect, companies will have to navigate a legal and reputational minefield. According to a Washington Post-ABC News poll released Sept. 10, only 18% of unvaccinated people whose employers don't currently have mandates said they would get vaccinated if their employer required it. 35% of the unvaccinated said they would seek a medical or religious exemption, and 72% of those people said that if they couldn't get an exemption, they would probably quit rather than submit to the requirement.

Davis & Gilbert colleague, David Fisher, recently wrote about this challenging issue. He pointed out that organizations that enact legal mandatory vaccination and testing policies can fire employees for refusing to comply, but



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they should be uniform in how they treat their employees. For example, if an employer makes special accommodations for a high-performing employee who refuses to be vaccinated or tested—such as allowing her to work at home—the company opens itself to potential legal action by those who were terminated for refusing to comply.

When it comes to medical or religious exemptions, businesses must carefully vet each individual request and, under the law, provide reasonable accommodations for these employees. However, employers may deny requests for an exemption for other personal reasons—and fire employees who refuse to be vaccinated or tested for non-protected reasons.

In all of the above cases, companies can and should expect legal and reputational backlash from employees who are terminated or whose exemptions are rejected. They should act now to prepare to respond to legal threats, nuisance lawsuits and employees making their allegations public to colleagues, on social media and in the press.

One lesson learned occurred in May, when Houston Methodist Hospital made headlines after a group of nurses sued the hospital system for requiring vaccinations as a condition of employment. While a judge dismissed the suit, ultimately more than 150 employees were fired or quit. This created a PR and HR quagmire for the employer, with media outlets around the world picking up the story. Even months after the lawsuit was dismissed, the Houston Methodist controversy was still active on social media.

Proactive Preparation

Given the new business world we are in, where uncertainty is one of the few certainties, how can legal counsel and communications experts advise organizations to protect themselves and their reputations in the event of a crisis? Legal and communications teams should be involved from day one to help ensure company policies with regard to vaccines, testing and exemptions are properly aligned with current legal thinking, as well as corporate purpose, company

culture, and communications and business goals.

Policies also must be viewed through the lenses of legal and reputational risks. This strategy involves closely orchestrating legal, human resources and communications both internally and externally to look ahead to how stakeholders might react negatively and pinpoint what leverage opponents could gain based on how policies are designed and worded.

The COVID-19 pandemic has created a very different crisis landscape than anything the corporate world has seen before, making organizations vulnerable to new, unprecedented problems and rendering most crisis management playbooks obsolete when it comes to managing legal and reputational risks.

Whatever policies are being implemented, this interdisciplinary team must map out what can go wrong, and how the company will react quickly and effectively. Think of this strategic program as defensive driving, and keep in mind the words of Louis Pasteur: "Chance favors the prepared mind." Increasing an organization's odds of successfully managing a crisis is not a question of chance. It's about being prepared for any eventuality.

This process can begin with developing a matrix that

comprehensively covers the following:

- List every potential legal and reputational crisis scenario that might reasonably occur, among them employees pushing back internally, staging protests, leaking information to the news media, posting on social media, calls to boycott your company, lawsuits and others.
- For each crisis, the business should identify which stakeholder audiences will be impacted and which channels to use to contact them. The obvious groups to consider include employees, customers, investors and the news media. But do not overlook stakeholders that will be affected indirectly, such as business partners, suppliers, vendors, nonprofit organizations supported by company and people living in the communities where the organization does business.
- For each potential crisis, legal counsel should provide advice and play a key role in developing the legal strategy for each group of stakeholders. It is key for businesses to communicate steadiness, empathy and authenticity with stakeholders, while not inadvertently doing or saying something that increases the company's legal risk.
- Determine who on the team is responsible for communicating with each audience and how quickly they need to

reach out. For example, HR and internal communications likely should handle employee outreach immediately to control the narrative among staff. However, those draft communications should be vetted by legal counsel before being sent.

With these steps in the process complete, it is critical that the company's cross-functional team stress test the matrix by coordinating one or more crisis simulation exercises. These run like a three-act play, with the simulated crisis occurring in act one and escalating in acts two and three. For example, employees submit a protest petition to management. This is leaked to the news media. When the news hits, social media users call for a boycott of the company. The C-suite should be involved from act one, so their actions (or non-actions) can be evaluated. For example, they must be reminded to not overlook any constituent groups as they deal with the macro crisis issues.

Have staff members role play different stakeholders and imitate their worst reactions to poke holes in the decision-making process and messaging. Work with objective outside legal and communications experts to judge the outcomes of the simulation and work on improving the crisis response plan. Did key messages fall flat? Were reaction times too slow? Was a stakeholder group ignored?

Maintaining Attorney-Client Privilege

An important consideration during this crisis planning process is to make certain that everyone involved knows precisely what should and should not be done to maintain attorney-client privilege. It can be devastating to a company's legal and reputational standing if crisis plans, discussions and documents cannot be kept confidential in the event of legal action.

First, while it may seem obvious, organizations should keep in mind that they have an unfettered right to seek legal advice before and during a crisis situation. When an attorney advises the business on crisis planning, communications seeking or providing that advice may be privileged.

If and when a crisis does occur, involving outside counsel immediately may help an organization maintain privilege. To protect the work of crisis communications professionals, internal or external legal counsel should engage the communications firm to assist counsel in providing legal advice. Counsel should be able to demonstrate that the input from the communications firm on reputational and public opinion issues has a bearing on the legal advice and strategy the attorneys will employ. Attorneys should include language to this affect in their engagement letter with the communications firm.

In addition, the communications firm should segregate (and separately invoice) the services it is providing to assist legal counsel from other services that the communications firm may be performing for its client. This is one of the many factors that will help demonstrate that the attorney-client privilege is able to be extended to work of the communications firm in assisting in the development of legal advice and legal strategy.

Similarly, the work performed by the communications firm for internal or external legal counsel (including emails) should include the heading "Attorney-Client Privileged Communications." Thus, the parties should not simply rely on the language in the engagement letter. Rather, their actions need to be consistent with the terms of the engagement letter in order to maximize the ability to maintain the attorney-client privilege.

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