



Ep. 52: Employer Vaccine Mandates—What You Need to Know

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

As businesses prepare to reopen after more than a year, one of the pressing issues for employers is the COVID vaccine, and, in particular, whether it can be made a precondition for a return to the office.

We have with us today Bob Lian, who heads Akin Gump's labor and employment practice, and Lauren Leyden, a partner in the practice. They'll be discussing vaccine mandates and what employers should be thinking about this vital workplace topic.

Welcome to the podcast.

Bob, welcome to the show, and Lauren, welcome back. Big topic, so let's dive right in. Maybe we can start by providing some context for listeners. What have the challenges and complications been for employers in managing the pandemic up to the present day?

Bob Lian:

Thanks, Jose. I think it's important to step back and see where we are as a country because I think that impacts how employers are thinking about some of these issues. As of today, July 22nd, approximately 50% of the country has been vaccinated, and many employers have begun the process of reopening their physical offices. This comes at a time during the pandemic as it continues to evolve. There are ongoing reports of the spread of the so-called Delta variant, vaccine hesitancy, and we saw just the other day the reimposition of an indoor mask mandate in Los Angeles County. This morning also featured an article in The New York Times about numerous hospitals and other health care businesses across the country mandating vaccinations as a condition of employment. So, the rules are changing, the circumstances are changing quickly, and employers, as they've really been since the beginning of the pandemic, have been forced to adapt to rapidly changing circumstances.

The guidance from the CDC and other public health authorities hasn't always been particularly comprehensive, and, like a lot of other things, it's evolved as the pandemic has changed. Another key challenge from a compliance standpoint is that there's no

unitary regulatory authority that speaks to all things COVID. In fact, quite the opposite is true as we'll discuss in a minute. You have federal, state, local and even city- and county-level rules to consider that have been changing really since the beginning of the pandemic almost on a daily basis. Complicating things further has been the way the issues and rules and practices have often become mired in politics, where companies have been concerned about being upfront on particular issues and being called out as being not consistent with whatever latest sense is as to what the right approach might be.

So, in any case, I'm looking forward to our discussion today because we're hopefully going to unpack some of these issues and see where things lead us.

Jose Garriga:

Thank you, Bob. So let's look at that then. I mean, I think that the bottom-line question many listeners will have based on what you're saying and based on maybe what they've been hearing or seeing on TV is, can employers mandate the vaccine? Period. And then, in that vein, can employers ask employees about their vaccination status and also to demand documentary proof or evidence that they've been vaccinated? Let me see what you all have to say about that.

Bob Lian:

Let me take that first question about, at a baseline, can an employer mandate that an employee get a vaccine? I think the proper way to think about the question is, can the employer require a vaccine as a condition of initial or continued employment? I think, as most people know, the rule of employment in this country is the so-called at-will doctrine, meaning an employer can change terms and conditions of an employee's employment, and either the employer or employee can end that employment without cause, without notice for any reason whatsoever. That gives employers tremendous latitude in terms of setting the terms and conditions of employment. The basic rule is, with some minor exceptions, as a general rule, an employer can indeed require employees to receive a vaccine as a condition of employment.

There was a lawsuit filed against Houston Methodist Hospital some weeks back that was dismissed by federal District Judge Lynn Hughes. Judge Hughes put the point on the reasoning somewhat clearly where the employees were arguing that they can't be forced to undergo vaccination, they can't be forced to get what is ostensibly a medical treatment in the form of the vaccine. But Judge Hughes, essentially, rejected the notion that it was coercion and said, in effect, that the hospital is trying to keep employees and patients and their families safe and that employees were not being forced to receive a vaccination. Instead, they had every right to decline the vaccination, but the employer, Houston Methodist, had the right to require employees to receive the vaccination as a condition of employment. If they didn't want the vaccine, they didn't have to accept employment or continue their employment; they could resign.

So, according to that line of reasoning, it's generally the case that an employer can, in fact, require employees to receive a vaccine as a condition of continued employment. There are two very important exceptions to consider from a federal law perspective and, frankly, from state law that might apply as well, and that is there are some employees that may suffer from a disability. That disability may impact their ability to receive a vaccine. They may be allergic to it. They may have other underlying conditions that would qualify as a recognized disability. In those cases, the employer has an obligation to engage in a reasonable accommodation process to determine whether, for that employee, there might be other options and other steps that need to be taken short of mandating a vaccine.

Second important consideration is religious issues as well. Employees who have a firmly held recognized religious belief against receiving vaccinations may also be subject to a similar accommodation analysis as to whether the employer needs to bend its requirements on a vaccine mandate. We'll get, in a minute, to whether vaccine mandates are a good idea, the right thing, or the wrong thing. But at least from a straight legal standpoint, the employer can indeed require it, subject to those conditions that I just mentioned and further subject to other issues that I'll turn over to Lauren to address.

Lauren Leyden: Thanks, Bob. So, I think that's exactly right, but you have to be cognizant of the very fluid nature of this pandemic and what it has done in this country because there are a lot of state and local laws that could impact the decision or limitations that could be placed on employers when trying to mandate the vaccine. Currently, only very few state laws could impact a private employer. It's a very active topic in state and local government right now. So it's very important that, at the time when you're making this decision as an employer, you check with any applicable state and local law.

I think jumping to the related question that was posed about whether an employer can ask employees about vaccination status and require documentation, again, the answer is generally yes, you can ask. And you can ask for proof. The devil's in the details, though, because you want to be cautious about the way in which you ask and the type of information you get both in response to the question of whether someone's vaccinated and the proof that you may require. For the most part, an honor system is okay. And, so, you're not in a position where you have to, by law, require proof, but employers absolutely can require a CDC card or some other type of proof that might be available to show vaccination status.

We generally like to advise clients to create a system, if you're going to ask the question, where you will not receive medical information or any other type of sensitive information that you would not want to have as an employer when asking about vaccination status. It could be a survey. It could be using just email where you have four options to respond to, right? I'm fully vaccinated after two weeks, after your last dose; I am in the process of being vaccinated; I plan to be vaccinated; I do not plan to be vaccinated. And anyone that doesn't respond would be counted as unvaccinated. And doing that in a way in which no other information except which option you're selecting could be provided, and then limiting the number of people that have that information as to what option was selected is important and making sure that you don't open yourself up to any additional risk.

Jose Garriga: Terrific. Thank you both. Let's look at another side of it. Just to say, I think you all have persuasively presented the case that employers can mandate it. Now, I guess the follow-up question to that is, should employers be mandating the vaccine? Bob, what do you think about that?

Bob Lian: This obviously raises some important cultural issues within an organization. I think there's been a lot that's gone on over the past 18 months, or 16 months, really, since the pandemic began, that has reoriented how employees think about their workplace, has reoriented to some degree the relationship between employer and employee. I think there's some very important cultural considerations unique to each workplace that an employer needs to consider in making that determination. Among those issues, in addition to the cultural issues, would be the nature of the workplace, the nature of the exposures that employees are going to come across in the course of their work. Do they have private offices? That sort of thing. And what types of distancing or other measures might be available within the workplace?

Among the things that we're seeing with our clients is mostly strong or vigorous encouragement for employees to get vaccines but something stopping short of a mandate. We have not seen many businesses outside the health care industry where employers have been mandating vaccines and mandating vaccination as a requirement. It makes a lot of sense in the health care setting because hospitals and other health settings are exposing their employees and their treatment providers to the general public and vice versa. So, there's a nature of exposure that's just different than most other workplaces. I'm speaking of private workplaces now, to be specific. So, we're not really seeing that. I think, at the same time, a lot of the people that we speak with who lead companies or general counsels, I think there is a very strong desire to get back to the office and to have employees start coming in on some at least hybrid basis as soon as possible. I think mostly what we're seeing in white-collar workforces is an aim for some time after Labor Day but something stopping short of a formal mandate.

Lauren Leyden: I think something that's been great under the leadership of the group, we've spent a lot of time as lawyers talking about all the considerations that all of our clients and even friends and even ourselves at the firm have thought about when it comes to what to do in this situation. I think that we're seeing, just as Bob said, we'll encourage everyone to get behind wanting to encourage. I think we're seeing more and more people wonder if they should mandate the vaccine or incentivizing, maybe, remote work to have enhanced procedures for unvaccinated employees, more testing, maybe continue with the daily health assessment in places where that's no longer required by law, and a number of other protocols. Because, at the end of the day, everybody wants to provide a safe working environment.

I also think that, going back to a topic we touched on earlier, it is difficult when you think about mandating the vaccine to think through how as an employer you would handle the reasonable accommodation request and what that means. And that's different across industries. It could be easier for businesses that have done very well with working remotely. And then that could be a very natural and non-disruptive reasonable accommodation for someone who maybe has a medical condition and can't be vaccinated. Obviously, that would be very different in an industry like retail where it's very important to be, in a sense, in the office if you're working on the front side of things. There's also a number of practical issues that companies need to think through. If you're going to mandate the vaccine, what does that mean in terms of your stance on boosters? Which is a topic that we're hearing a lot about in the news, but we don't have a lot of detail yet as to when people will need boosters and how often, which is a hard thing to ask given that we don't exactly know what would be required or recommended by the medical community.

Jose Garriga: That's interesting. Thank you. Thank you both. To wrap up, Bob had set the timeframe post-Labor Day, looking into September. What else should employers be thinking about as their employees return to work?

Lauren Leyden: I think something that comes up quite a bit lately is the new normal for schedules. As Bob said, most of the clients we're speaking to are targeting a return for after Labor Day. But what does that return look like? Are people doing hybrid schedules? I've heard a lot about coordinated schedules where you have every team picks three days in the office that they want and two days where they're off. Are employers going to say you have to be there a minimum amount of time? I think you also struggle with where there is still part of your workforce that is working remotely, how do you ensure as an employer that there is equal opportunity for networking and mentoring and training when you have

some people that are physically together and in the office and some people that are not? I think that can be a challenge and a new challenge that we haven't faced yet, that employers are really, really struggling through.

Bob Lian:

Again, I mention some cultural issues and the changing sensibilities about the relationship employees have to the physical workspace, that that's changed quite a bit over the past several months. I heard a story this morning on the radio about how the sale of vacation homes continues to boom as people are getting outside of New York City and other major metropolitan areas and working from more beautiful or idyllic remote locations. But I think the question that I think many employers are going to face is, can I require people to come back if they don't want to, if they're uncomfortable with it, if they have lifestyle issues, or they've realized that they can be effective and have full-time remote capacity? Can an employer require employees to just simply come back to the office?

I think I'd go back to some of the points I raised earlier which is to say the short answer is yes. If you exclude the pandemic, exclude COVID from your consciousness, an employer can certainly require employees to show up for work and to come in. I think the issue now is, how do you do that in the context of all of the other issues that we've been speaking about? I think, in addition to just the cultural issues, employers are going to need to evaluate exactly how they try and sequence issues, especially if we see a continued uptick in the infection rate. And how do employers continue to maintain their operations especially getting back to something approaching an in-office normal without doing another shutdown?

I think one of the things that we learned as a country is that businesses and a lot of workers did not love the 100% lockdown. There was a lot of financial carnage, especially in the restaurant and other industries, that really resulted from that hard lockdown. I think what we're going to see is really an extended effort to try and avoid that sort of thing from happening again. Employers will have a number of tools that they can use both from the standpoint of vaccines and the types of inquiries Lauren was mentioning, and then just utilizing some of the protective measures from masks to distancing to sequencing of when employees come to the office, things of that nature that can help minimize the exposures that employees have to workplace hazards like that.

Lauren Leyden:

I think that also raises a great point, Bob, about being sensitive to where we are, where the workforce is, broader, where the country is in terms of just dealing with the human emotions that come with a pandemic. So, we could be dealing with a situation where you have a vaccinated employee who is ready to come back to the office, and the employer wants them back in the office, but they find out that some employees in the office are unvaccinated or maybe a reasonable accommodation has been made for an employee to continue to come into the office even though they are technically vaccinated because they don't make antibodies. And now you have a vaccinated employee who's raising a concern that's not legally protected, but we can understand where it comes from as human beings that they don't want to come into the office as a result. The situation is going to remain fluid. Things still continue to change, and I think employers will need to have these conversations for some time to come.

Jose Garriga:

Thank you. Listeners, you've been listening to Akin Gump labor and employment practice head Bob Lian and partner Lauren Leyden. Thank you both for coming on the show today to shed light on a question that I'm sure is top of mind for many of our listeners, employer and employee both.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, labor and employment matters, look for "labor and employment" at the Experience and the Insights & News tabs at akingump.com. And then take a moment to read Bob and Lauren's bios on the site as well.

Until next time.

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