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Industry Insights

Mandatory vaccines: a shot in the arm for US businesses?

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Faced with the reality of living with COVID-19, officials across the U.S. have attempted to increase vaccination rates. This effort culminated in 2021 at the federal level when President Biden issued to an Executive Order requiring federal employees be vaccinated, unless exempt due to medical or religious reasons. The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard requiring private companies with 100 or more employees require employees to be vaccinated against COVID-19, or otherwise agree to weekly testing.

The requirements were aimed at addressing the economic impact of the pandemic through reducing the number of unvaccinated workers, and further reducing the risk of transmission through testing of those who remain unvaccinated. After legal challenges from several states, disputes regarding the constitutionality of the mandates were ultimately heard by the U.S. Supreme Court, which held in a 6-3 decision to lift the vaccine or test requirement for large companies. The Court did, however, uphold the Centers for Medicare and Medicaid Services (CMS) Rule for vaccinations of healthcare workers, which is applicable through medical facilities' participation in the Medicare and Medicaid programs.

CMS vaccination requirements

The CMS guidelines state that the two-dose vaccination requirement applies to all staff (regardless of patient contact) employed at any Medicare or Medicaid certified facility that participates in Medicare or Medicaid programs.[i] This includes independent contractors, volunteers, interns, administrative employees and any other contracted employees. The requirement extends to off-site healthcare facilities such as home health agencies, but does not apply to clinicians who provide 100% remote telemedicine services. Additionally, emergency medical services (EMS) workers are not subject to the vaccination

requirement, but may be subject to vaccination requirements on a contractual basis with the healthcare entity.

There remain a number of states that continue to challenge the CMS mandates. However, the CMS Rule preempts any state laws that conflict with its Rule. Employers covered by the CMS Rule should consult with legal counsel regarding state laws that may impose additional or conflicting requirements. Note that some states have later deadlines than others as CMS endeavours to allow facilities time to comply with the requirements following the judicial ruling.

From an insurance perspective, the risk of employment practices liability (EPL) litigation with relation to vaccine mandates at healthcare entities has been brought sharply into focus, with claims stemming from:

- Alleged religious or medical/disability discrimination if a claimant is unable/unwilling to be vaccinated for a protected reason;
- Alleged religious or medical/disability discrimination if a claimant is unable/unwilling to be vaccinated for a protected reason;
- Potential Qui tam (False Claims Act (FCA)) claims - knowingly submitting false claims to the government or attempting to defraud the government (to the extent that CMS entities bill Medicare or Medicaid)

Please refer to CMS.gov for complete information regarding deadlines for certain states.

Patchwork of regulations for large non-healthcare private employers

Despite the Supreme Court's decision to lift the vaccine or test requirement for large non-healthcare companies, these employers still face many hurdles including a patchwork of local & state regulations on vaccination requirements for employees and business patrons.

Following this decision, some corporations like T-Mobile decided to impose a vaccination requirement on corporate employees, but not retail staff. Others, like Delta Air Lines, require all new US hires to be vaccinated but current employees that are unvaccinated must participate in weekly COVID-19 testing and incur additional monthly insurance charges. Some cities, like New York City and Chicago, require COVID-19 vaccines for all individuals over 5 to participate in indoor activities, like eating out in a restaurant or entering a museum.

This patchwork of regulations increases the likelihood that a company may be sued by an employee or business patron, with alleged religious or disability discrimination claims the most common complaint. Additionally, the Equal Employment Opportunity Commission (EEOC) stated that the federal anti-discrimination laws it enforces don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for COVID-19. Employers that require vaccinations must consider reasonable accommodations when employees refuse to get vaccinated for medical reasons or based on sincerely held religious beliefs, unless an accommodation would cause undue hardship for the business.

Recommendations to Insureds

CMS and the EEOC require employers to allow for exemptions to staff as a reasonable accommodation for:

- a disability,
- a sincerely held religious belief, observance, or practice, or
- medical reasons.

Best Practices for Exemptions/Accommodations

- Best Practices for Exemptions/Accommodations
- Designate a department/person (decision makers) to review and respond to requests
- Act consistently in review and responses to exemption requests, as well as in any appeals process
- Document an individualized interactive process
- Forms of accommodation include: remote working/telework, regular testing, face mask and shield, work at a physical distance from others, accepting a reassignment to another position
- Taking early advice from specialists who can advise on the insurance, legal, regulatory implications of an approach before going ahead is advisable.
- Reviewing local, state and federal guidelines which vary with a qualified specialist is the best way to ensure compliance.
- Follow the EEOC's guidance on ADA and Religious accommodations related to COVID-19

It is likely that pandemic-related employment litigation will increase over the coming months, and this will almost certainly include some directly related to mandatory vaccination policies. It is important for organizations to understand that, even though some measures will be government mandated, the risk of litigation arising from missteps is very real, and the impact on their business could be significant.

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1 https://www.cms.gov/files/document/covid-19-health-care-staff-vaccination-requirements-decision-tree-graphic.pdf
2 https://www.ebglaw.com/insights/medicare-and-medicaid-providers-take-note-new-cms-rules-require-health-care-workers-to-be-fully-vaccinated-by-january-4-2022/

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