

Vaccine Rollout in the US: Risk and employer responsibility

Nameer Zaheer and Megan Feyereisen, underwriters at Beazley

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The Covid-19 vaccination program in the United States is now well underway, with 64% of adults having received at least one dose of a vaccine at time of writing (June 11th 2021).¹ In this phase of the pandemic response, the safe and equitable distribution of vaccines has required cooperation between the private and public sectors to deliver and to reassure a sometimes reluctant public – an exercise in winning hearts and minds (and arms) arguably even more challenging than the development of vaccines. In the race to protect the US population, this spring saw an unprecedented push to ensure shots reached the vulnerable before the wider rollout.

As the focus has turned to the wider population, employers have stepped in to help staff obtain access, with some employers offering company sponsored clinics, paid time off or other incentives. Many employers, from large health systems to small and mid-sized enterprises, have adopted strategies to encourage vaccinations,

aimed at both helping staff and their families, and encouraging a wider economic recovery. However, despite the good intentions of employers, incentivizing or mandating the vaccine can present unintended risk and expose a company to complex legal and ethical issues.

Different approaches

Employers' approaches to their workforce's vaccinations have largely fallen into three broad categories:

- Leaving the matter to employees
- Encouraging vaccination through incentives, such as paid time off (PTO) or financial incentives such as cash or vouchers
- Some organizations have mandated that all employees obtain the vaccine by a specific date, or risk losing their jobs or areas of responsibility.

The majority of employers fall into the first two categories, with most reluctant to mandate vaccinations, however all three approaches present challenges and employers should be careful to ensure they don't fall foul of the complex landscape of local, state and federal laws.

Potential claims expected

As the vaccine rollout continues, actions that are intended to positively support employees in getting vaccinated may present significant liability. And so, as insurers, we continue to carefully monitor the employment litigation landscape and to identify potential exposures facing employers, depending on their choice of approach. Potential drivers of litigation include:

- Employees claiming religious or disability discrimination if they are unable to be vaccinated for a protected reason, and the employer fails to engage in the interactive process with employees who request accommodations
- Employees who are unable to get vaccinated due to a protected reason and are not eligible for an incentive
- Employees claiming discrimination in the recruitment process if a vaccine is mandatory for being hired
- Employees alleging retaliation for not receiving the vaccine e.g. less schedule time or a feeling of harassment.

Healthcare specific challenges

The issues noted above become more complex in the healthcare sector where providers have faced unique challenges as they weigh employee rights and patient safety. There are already legal cases arising out of such decisions whereby employers have mandated vaccines on reasons of patient and employee safety, then running the risk of their decisions being interpreted differently and as having human rights implications.

This pandemic is not the first time that insurance companies have seen employment issues arising from mandating vaccines. In the past few years, Beazley has seen employment related litigation against health systems where employees have alleged religious discrimination and lack of accommodations for violating policies that mandate vaccines. For example, there was a recent case where a doctor refused to comply with hospital policy, which required all staff providing care to have the flu vaccine or not be allowed to work during a period the hospital determined as "flu season". The physician asserted they could not be vaccinated due to religious beliefs and sought an accommodation in wearing a mask during "flu season" and not coming to work if he exhibited any symptoms. The hospital determined this was not reasonable after review based on the efficacy of immunization and the physician's potential exposure. Although the hospital clearly and consistently applied their policy, the resulting litigation was still expensive and time consuming.

As hospitals, senior living facilities, and physician practices work to protect patients, they may face potential employment issues around discrimination, rising tensions in the work environment and retaliation in the form of legal action from employees reluctant to get the vaccine.

Recommendations

Given the huge collective effort to get back to a new form of normality, it is important that organizations are aware of the potential risks and take measures to protect their reputations and their balance sheets from a new wave of employment related litigation. Taking a measured approach can help mitigate potential lawsuits:

- Tread carefully – there is no one size fits all approach when it comes to good employment practices and certainly this is the case when it comes to the pandemic response. What works for a large employer may not be practical for a small business.

- Take early advice from specialists who can advise on the insurance, legal, regulatory implications of your approach before you go ahead.
- Review local, state and federal guidelines which vary and change with a qualified specialist to ensure you stay compliant.

Responsibility and risk

In these unprecedented and untested circumstances pandemic-related employment litigation likely to increase and these include those directly related to vaccination policies. While we would not expect these potential claims to materialize for some time, we are already seeing increased employment litigation arising from the lack of accommodation for employee safety.

It is important for organizations to understand that their best intentions can have unintended consequences and when it touches on the health or wellbeing of employees, the risk of

litigation arising from missteps can be significant.

With many household names mandating vaccines for staff, companies must consider their legal grounding as well as staff sentiment before deciding to follow suit. All organizations are different and it is important that each takes a measured approach to the return to work and vaccinations, suitable for their workforce and business, takes the “temperature” of the current situation and consults with their risk, insurance and legal advisors.

Given the huge collective effort by employers, citizens, governments and health agencies to get the country up and running again, it is important that hard-pressed organizations take sensible measures to prevent a slew of employment issues that could have been avoided.

¹ <https://covid.cdc.gov/covid-data-tracker/#county-view>



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