

Healthcare Employers Can Mandate Vaccines, but Some Caution Necessary

When the COVID-19 vaccines were released, healthcare employers were uncertain if they could require staff to take the vaccine as a condition of employment. Legal experts said they could not because the FDA approved the vaccines under an emergency use authorization (EUA). Federal law specifically prohibits requiring employees to take such a vaccine.

But the legal outlook has changed. Guidance from the Equal Employment Opportunity Commission (EEOC) indicates healthcare employers can require employees to take a COVID-19 vaccine.¹

However, there are other issues to consider. Requiring employee vaccination comes with additional responsibilities, says **Brian S. Conneely**, JD, partner with Rivkin Radler in Uniondale, NY.

“Based on recent federal court decisions, the EEOC guidance, and the June 2021 Occupational Safety and Health Administration [OSHA] emergency standard for healthcare employers, in our opinion, hospitals can, under current federal law, require COVID vaccines for their employees, subject to certain exemptions and safeguards,” Conneely says. “In fact, in June 2021, a Texas federal district

court upheld mandatory COVID vaccine requirements for employees in a hospital in Texas.”

Similarly, in March, a New York federal district court enforced a mandatory flu vaccine requirement for employees at a hospital on Long Island, Conneely says. Moreover, in December 2020 and May 2021, the EEOC indicated in opinion letters that employers could institute mandatory COVID vaccine requirements as long as there were exemptions and reasonable accommodations for employees based on medical reasons or religious beliefs, and protections for confidential medical information.

Recently, federal OSHA issued an emergency COVID-19 standard for healthcare workers due to the grave danger they continue to face from the COVID-19 pandemic.

“This emergency standard does not require mandatory COVID vaccinations by hospitals of employees, but recognizes the approved vaccines are safe and effective and an important tool in a multilayered protection plan against the risks of COVID in hospitals,” he says. “In fact, NewYork-Presbyterian Hospital just announced a mandatory COVID vaccine requirement for employees, contractors, and

volunteers at this hospital. Hospitals that wish to adopt mandatory vaccine policies should review available scientific data, give reasonable prior notice before implementing the requirement, establish procedures for applying for exemptions based on medical reasons or religious beliefs, establish medical or other review board for applications for exemptions from the requirement, and institute safeguards to protect confidential information related to requests for exemptions.”

Conneely notes hospitals also must comply with the other OSHA COVID-19 emergency standards and protections for healthcare providers regarding interaction with unvaccinated employees, visitors and patients and/or vaccinated employees, and visitors and patients who are immunocompromised as well as any applicable state laws.

Firm Legal Ground

Employers have a strong legal basis under federal EEOC rules to require COVID-19 vaccines, assuming no state or local law prohibits vaccine requirements, says **Richard Tarpey**, PhD, assistant professor of management in Middle Tennessee State University’s Jones College of Business. According to EEOC guidance, employers covered under EEOC laws are not prohibited from requiring onsite employees to be vaccinated.

However, employers may need to “provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do

EXECUTIVE SUMMARY

Guidance from the Equal Employment Opportunity Commission indicates healthcare employers can require employees to receive a COVID-19 vaccine. These mandates come with some obligations and risks.

- A Texas court case supports mandatory vaccination programs at hospitals.
- A mandatory vaccination program must accommodate those who cannot receive the vaccine.
- Some employees are likely to resist vaccination and might pursue litigation.

not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business," according to the EEOC.¹

In most circumstances, employers must consider reasonable accommodations for eligible unvaccinated employees such as mask requirements, schedule changes, telework, or reassignment if the company can demonstrate the employee poses a direct threat to other employees, Tarpey says.

Additionally, employers need to ensure vaccine requirements are applied equally to all employees, Tarpey says. They also need to consider if all demographic groups of employees have equal access to vaccines. Unequal access or negative impact from vaccines will invalidate a vaccine requirement under EEOC laws.

"Companies need to also adhere to possible state and local laws that may prohibit vaccine requirements," Tarpey says. "At present, there are at least 19 states with some form of vaccine requirement prohibition bill in process within state legislatures."

Texas Lawsuit Influential

The Texas lawsuit was influential regarding vaccine requirements, even though it is not binding outside of the state, says **Allison Averbuch**, JD, an attorney with Hall Booth Smith in Atlanta.

On June 12, Judge Lynn N. Hughes, JD, of the United States District Court for the Southern District of Texas dismissed a lawsuit filed by employees of Houston Methodist Hospital challenging the hospital's mandate that all employees receive the COVID-19 vaccine.² The dismissal is one of the first court

rulings on private employers' rights to mandate COVID-19 vaccinations.

"The court rejected the plaintiffs' politicized argument that the mandate required employees 'to serve as human guinea pigs' to increase hospital profits," Averbuch says. "The dismissal also gives teeth to the EEOC's recent guidance paving the way for employer-mandated COVID-19 vaccines under federal discrimination laws."

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The plaintiffs claimed Houston Methodist was forcing them to choose between getting injected with a "gene modification injection" or getting fired, Averbuch notes. The plaintiffs devoted more than nine pages to spreading vaccine misinformation, claiming without foundation the COVID-19 vaccine was rushed, unsafe, and potentially dangerous.

The plaintiffs also alleged Houston Methodist's compulsory vaccine policy violates the Nuremberg Code's mandate against experimentation on human subjects. The court condemned the plaintiffs' comparison of "the threat of termination in this case to forced

medical experimentation during the Holocaust," saying that "[e]quating the injection requirement to medical experimentation in concentration camps is reprehensible."²

"From a public policy perspective, the court held that the plaintiffs' case did not have a leg to stand on, citing a long history of previous public health outbreaks in which the Supreme Court of the United States approved of state-mandated vaccinations or involuntary quarantine to prevent the spread of infectious diseases," Averbuch says. "The court affirmed Houston Methodist's choice to 'do their business of saving lives without giving them the COVID-19 virus,' treating an employer's choice to require COVID-19 vaccination like any other commonplace work requirement."

Averbuch advises employers to ensure uniform enforcement to mitigate the risk of discrimination claims when implementing COVID-19 vaccine policies.

The court held the plaintiffs' claims could not survive on a wrongful termination or a public policy theory, she says. In Texas, as in most states, employment is at-will unless otherwise agreed.

At-will employment means the employment relationship may be terminated at any time by either party, as long as the reason for termination is not unlawful, Averbuch says. The only public policy reason Texas recognizes as an exception to its at-will employment rule is when an employee refuses to perform an illegal act requested by the employer.

The court affirmed Houston Methodist's choice to "do their business of saving lives without giving them the COVID-19 virus," Averbuch says. According to the court, the hospital's choice was "made

to keep staff, patients, and their families safer.” If the plaintiffs make their free choice to refuse COVID-19 vaccination, they “will simply need to work somewhere else.”

The court treated an employer’s choice to require COVID-19 vaccination like any other commonplace work requirement, Averbuch says.

“If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker’s behavior in exchange for his remuneration,” the court noted. “That is all part of the bargain.”²

In other words, just like any other workplace requirement, if an employee does not want to be vaccinated against COVID-19, according to the court, the employee’s recourse is to simply find a job elsewhere, Averbuch says.

That is consistent with EEOC guidance. The EEOC noted if employers choose to enact mandatory vaccination policies, they should inform all employees that requests for reasonable accommodation based on disability, pregnancy, or religion will be considered on an individual basis.

Considering the risk for discrimination lawsuits, employers should take requests for reasonable accommodations relating to mandatory vaccination policies seriously and should engage with employees to find a solution that works for all involved, such as telework or reassignment to a different role.

“Given the fraught political climate surrounding mandatory vaccinations, many employers are opting to encourage or incentivize employee inoculation instead,” Averbuch says. “The EEOC’s latest press release says that federal discrimination laws

also do not prevent employer incentives for vaccination or providing its employees with educational materials related to the COVID-19 vaccine. When designing employee incentives, however, the EEOC warns that incentives should not be so substantial as to be coercive.”

Employers should look hard for accommodation options, says **A. Kevin Troutman**, JD, partner with Fisher Phillips in Houston. The hospital might require the employee to mask and distance, assign the employee to a work area with no exposure to others, or allow remote work.

“If nothing else works, you might choose to allow the employee to go on leave, and that does not necessarily have to be with pay,” he says. “You wouldn’t want to go right to termination even if you can’t find something for the employee to do in the workplace. It makes sense to give the employee some time to evaluate their situation and see if the situation with COVID changes in the meantime.”

States Will Look to Texas

When implementing COVID-19 vaccine policies, employers should ensure uniform enforcement to mitigate the risk of discrimination claims, Averbuch says. In deciding to mandate vaccines, employers must balance the risk of losing workers with the need to operate a safe workplace.

“In the case of Houston Methodist, the hospital decided that the health and safety of its patients necessitated the vaccine mandate for its staff, and the court agreed that the hospital was entitled to do so. Houston Methodist told employees

they had to be vaccinated by June 7, 2021, or face suspension,” she says. “The hospital ultimately suspended almost 200 employees for failing to meet the vaccination deadline. [A hospital spokesperson] noted that of those almost 200 employees, 153 resigned during the suspension period or were terminated on June 22, 2021. The spokesperson also said that if suspended employees complied with the vaccination policy during their suspension, they were permitted to return to work.”

While the Houston Methodist Hospital case is not binding on other courts, it is likely to be instructive in subsequent lawsuits in other states, says **Monique Ngo-Bonnici**, JD, partner with Winston & Strawn in Los Angeles. Courts weighing such cases would have to balance the public’s right to be protected against possible COVID-19 infection and the hospital’s ethical obligation to keep its patients safe with an employee’s individual right to decline the vaccine.

“In most cases, I think that the public and hospital’s interests would outweigh the employee’s individual right to choose not to be vaccinated since employees have a choice to accept alternative employment somewhere that does not mandate the vaccination, whereas patients do not always have a choice in which hospital they end up in.”

A more conservative approach than requiring the vaccine for every hospital employee would be to only require employees who have direct access to patients to take the vaccine, Ngo-Bonnici says. This will make it easier for hospitals to argue — and for courts to rule in their favor — the reason for the mandatory vaccination is for patient safety and not for any other potentially improper or less legitimate reason.

“In addition, to the extent there has been any spread of COVID-19 in the hospital by healthcare workers, I would recommend tracking and keeping that data as it may be helpful, if ultimately needed, in defending its position as to why it is now requiring its employees to be vaccinated,” she says. “Of course, any hospital employer that wishes to mandate vaccines must reasonably accommodate employees who cannot be vaccinated due to medical or religious reasons.”

Legislation is pending in many states to address the issue of mandatory employee vaccination programs, says **Abbye Alexander**, JD, partner with Kaufman Dolowich & Voluck in Orlando. The state-based pending legislation varies considerably, but most would prohibit mandatory vaccinations as a condition of employment where the employee maintains a religious-based or health-based objection to receiving the vaccination.

“These exceptions track with the current EEOC guidance on mandatory vaccinations in the workplace,” Alexander says. “Only two states — Arkansas and Oregon — have passed legislation pertaining to mandatory employee vaccination.”

Arkansas Act 977 applies specifically to state entities, agencies, and organizations. It prohibits any of these entities from conditioning employment on the receipt of a COVID-19 vaccination. The act specifically permits state-owned or state-operated healthcare facilities to offer positive incentives to employees based on their receipt of a vaccination, but these entities cannot mandate vaccinations unless they first receive approval from the Arkansas Legislative Council.³

Oregon Revised Statute § 433.416 prohibits healthcare employers from

conditioning employment on the receipt of a vaccine unless it is otherwise mandated by law.⁴ The Oregon statute is the most specific state law dealing with the issue of mandatory vaccinations of healthcare workers, Alexander says.

Not all healthcare employers are requiring vaccines, notes **Lisa Gingeleskie**, JD, an attorney with Lindabury, McCormick, Estabrook & Cooper in Westfield, NJ. Some are taking a softer stance and offering incentives for employees to take the vaccine. That could be useful with a workforce that is resistant.

“While there appears to be no case law directly on point concerning the mandate of the COVID-19 vaccine for employees subject to a collective bargaining agreement, the National Labor Relations Board provides sufficient guidance to conclude that such a mandate would be subject to mandatory bargaining,” she says.

Gingeleskie says that while the Texas lawsuit resolution seemed authoritative, other challenges to mandatory vaccinations will arise.

“I certainly don’t think it’s going to be the last lawsuit,” she says. “But the argument against mandatory vaccinations is, in my opinion, not strong. The CDC has said the vaccines are safe, the EEOC has said they may be mandated provided accommodations are made, and I don’t think there is a strong legal argument for those to bring suit against mandatory vaccinations.”

Some attorneys see reason for caution when interpreting the legal outlook. Any hospital seeking to impose vaccination mandates must appreciate the present uncertainty of the underlying law and separately consider the legal risk of enforcing such a policy, says **Michelle L. Greenberg**, JD, partner with Frier Levitt in Pine Brook, NJ.

The recently released guidance from the EEOC and the recent Texas federal court ruling strongly suggest private employers like hospitals may legally require their employees to take a COVID vaccine as a condition of continued employment, subject to certain disability and religious-related conditions. But that is not the whole story, she says.

“However, the state of the law is far from settled, and similar challenges are making their way through courts around the country, which may have different outcomes,” Greenberg says. “Hospitals must consider their state’s employment laws. We would then advise our client of the litigation risk associated with such a policy. To illustrate, even if Houston Methodist Hospital was legally ‘in the right,’ it nevertheless had to defend a costly lawsuit against its striking employees.”

Greenberg says she also would suggest the client evaluate those considerations against the medical and legal risk of non-vaccinated employees infecting patients. Many national associations, including the American Medical Association and American Nurses Association, are in favor of medical professionals taking the vaccine for their own health as well as the health of the public with whom they interact.

“This is all to say, the current advice for hospitals that want to require vaccinations is speak with your attorney and make sure that attorney is familiar with both healthcare and employment law,” she says. “There is no one-size-fits-all advice because your situation is unique.”

Also, remember full vaccination brings some benefits and partial vaccination bring obligations, says **Jennifer L. Curry**, JD, shareholder with Baker Donelson in Baltimore.

“Employers who have employees who are unvaccinated, whether they choose not to be vaccinated or cannot be vaccinated due to a medical condition or a sincerely held religious belief, or have employees who are vaccinated but still at risk if exposed to COVID-19, they still should take whatever precautions necessary to protect those individuals, which would likely include continued mask-wearing for all unvaccinated or at-risk employees,” she says.

Curry also notes the new OSHA COVID-19 ETS is the first federal law that specifically mandates employers to pay employees for the time to get vaccinated, albeit only for employees in covered healthcare settings. This standard does not include home health settings and ambulatory settings with fully vaccinated workforces, or pharmacists dispensing drugs in retail settings, and others.

“Covered healthcare employers are also now required to create and maintain a COVID-19 log that records every single instance of an employee confirmed to have COVID-19, regardless of whether the employee was exposed at work or elsewhere,” Curry says. “This is different from the standard OSHA 300 log that requires employers to record work-related COVID-19 illnesses and deaths.”

More Willing to Mandate Now

Healthcare employers are more willing to enforce their legal right to require vaccinations, says **Tory I. Summey**, JD, an attorney with Parker Poe Adams & Bernstein in Charlotte, NC. Many wanted to require vaccinations in January when the vaccines first became available, but they were unwilling to confront

reluctant employees. The EUA made the legal position tenuous.

“The Houston Methodist case is going to give a lot of momentum to those hospitals that already wanted to require vaccines,” he says. “The judge in that case dug into the EUA and suggested that it does not actually prohibit a private employer from requiring the vaccine. With the EEOC guidance, employers can be confident that they can require this as a condition of employment.”

Summey notes the vaccines might soon receive full approval from FDA, which would negate the EUA issue and provide even more support for hospitals wishing to establish mandates. Nonetheless, Summey says lawsuits still can be expected.

“Any time you adopt a policy in the employment space, especially with something like vaccines where feelings are so hot, you have to be prepared for a potential legal challenge,” he says.

Some hospitals are mandating vaccines only for a portion of the workforce, such as those working most closely with patients, notes **James W. Boyan III**, JD, partner with Pashman Stein Walder Hayden in Hackensack, NJ. Many hospital leaders probably are waiting to see what their peers decide to do, and how mandatory vaccination policies work for them.

“If you go with mandatory vaccinations, the messaging is important. Give people as much time as possible to plan accordingly,” he says. “Now that the vaccine is more readily available, the problem might not be so much finding access to the vaccine, but it’s still a good idea to give them time to consider it and obtain the vaccine they prefer. If they ultimately decide they don’t want to get the vaccine, it might be helpful to give them time to find another job.” ■

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