

Whether Employers Keep Vaccine Mandates or End Them, There Are No Easy Answers

HR Brew | Susanna Vogel | April 19, 2022

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COVID-19 Vaccination Record Card
Please keep this record card, which includes medical information about the vaccines you have received.

Last Name: John First Name: Smith
Date of Birth: 10/21/1952 Part: 1457 05

Vaccine	Name/Manuf Lot Number	Date
1st DOSE COVID-19	<u>SAR-COV-2 659-889</u>	<u>10, 21, 2021</u>
2nd DOSE COVID-19	<u>SAR-COV-2 659-880</u>	<u>08, 31, 2021</u>

A forthcoming study from WTW says some employers are split about continuing vaccine mandates; here's what they need to know when making the decision.

As workers return to their offices, Covid may start to look to some as if it's in the rearview mirror, particularly in the wake of a federal judge in Tampa, Florida, striking down the mask mandate on planes and other public transportation on April 18.

Tampa's EEOC field office, however, recently warned employers that the virus in the mirror is closer than it appears. In a public webinar on April 11, the agency shared guidance with employers on continuing to lead through unprecedented times, including how to handle vaccine mandates. Here are the top takeaways.

Mandates are (still) messy. During the webinar, the Tampa field office said the agency has fielded 2,700 charges involving a vaccine-related dispute from employees nationwide as of December 2021.

Reports from around the country show that while the vast majority of US workers support vaccine mandates, some employees continue to resist them, in some cases, resulting in terminations.

But the future is unpredictable, and just because an employer has a vaccine mandate today, does not mean it will tomorrow. Some of the workers who were fired for remaining unvaccinated without a medical or religious exemption when the mandates were in place could come asking for their jobs back. In March, hundreds of NYC municipal workers held a rally demanding to be rehired and receive back pay. United Airlines (a company that made headlines for terminating workers who did not comply with its mandate) began to allow employees with approved Covid vaccine exemptions to return to customer-facing roles, and companies including JP Morgan Chase & Co. are hiring unvaccinated workers again. A soon-to-be-released study suggests others may follow suit.

Consultancy WTW surveyed employers and found more than one in three US employers currently require vaccines (38%). Five percent of those companies plan to drop the requirement by the end of the year, and 10% of all companies surveyed have already done away with their vaccination requirement.

If mandates are lifted, people disagree on what, if anything, is owed to employees who were terminated for refusing to get vaccinated. In March, New York City Mayor Eric Adams provided a vaccine exemption for professional athletes and performers who work for city-based companies while leaving the mandates for city and private-sector employees in place. A former server at a Yankee Stadium restaurant, who claims she was fired for refusing to get vaccinated, has since sued Adams, accusing him of a double standard.

At a media briefing last month, Adams said that "at this time" he is uninterested in rehiring the 1,400 city workers who were fired for failing to get vaccinated.

Looking for less of a headache? During the April webinar, the EEOC reiterated previous guidelines for employers around mandates. Specifically, the agency recommended using crisp, precise language and being mindful of employees' civil rights. Their recommendations:

Yes, you can ask workers if they're vaccinated. As employees RTO or gather in person for company events, HR may want to know who is and isn't fully vaccinated. The EEOC affirmed asking employees about their vaccination status "does not violate the laws the EEOC enforces," but the reason for the inquiry must be "job-related and consistent with business necessity," and documentation or vaccination confirmation must be kept confidential.

Resist the urge to overly ask "why not?" If an employee requests a religious exemption, the EEOC advised employers that, generally, under Title VII, they should assume the request is based on a sincerely held belief, but if there is an objective basis for questioning the "religious nature or sincerity of a particular belief," employers can seek additional information through limited factual inquiry.

Accommodations need to work for all parties. The EEOC stressed that if an employee requests accommodation because of a disability, the ADA requires employers to provide an available accommodation, but employers also have a say in the process. The agency listed remote work, face-masking in the office, or frequent Covid-19 tests as possible accommodations.