



# Monthly Strategies

HR Strategies, LLC

Volume 18, Issue 8  
August 1, 2021

As a result of recent developments regarding COVID-19 in addition to local organizations such as ChristianaCare, Trinity Health and Epsilon and many others that are mandating new requirements for their staff and business partners, we thought we would provide the following timely information that may assist your organization in accommodating new mandates.

## **Federal Government, Large Companies Roll Out Stricter Vaccination Policies**

*By Lisa Nagele-Piazza, J.D., SHRM-SCP*

President Joe Biden announced on July 29 that federal employees will be required to confirm that they are vaccinated against the coronavirus or submit to frequent testing for COVID-19. Additionally, some large employers - such as Facebook and Google - will require workers to get vaccinated before returning to the office due to the surge in coronavirus cases.

"We are now faced with a much more transmissible strain of this virus - the Delta variant," the White House said. "The good news is that we are prepared for this. We know how to stop it: Get more people vaccinated."

Biden announced that employers covered by the American Rescue Plan will be reimbursed for providing employees paid time off to take their family members to get vaccinated. He also urged state and local governments to [give \\$100 incentive payments](#) to anyone who gets vaccinated.

We've rounded up articles and resources from *SHRM Online* and other trusted media outlets on the news.

**New Policy for Federal Employees** - Biden held a press conference to outline "the next steps in our effort to get more Americans vaccinated and combat the spread of the Delta variant." Federal employees and onsite contractors will be required to attest that they are vaccinated or complete other steps, such as getting tested once or twice a week for COVID-19, wearing a mask while working (regardless of geographic location), and keeping physically distant from other employees and visitors. The federal government employs more than 4 million workers - half of whom work in the federal civilian workforce.

White House officials said the policy will closely align with recent state, local and private employer policies

aimed at creating safer workplaces and combating the surge in COVID-19 cases fueled by the Delta variant.

The Biden administration said it "will encourage employers across the private sector to follow this strong model." ([The White House](#))

**Google and Facebook Revamp Policies** - Google announced that the company will move its return-to-office date from September to October in light of the uptick in COVID-19 cases. The tech giant will also soon require workers at its U.S. worksites to get vaccinated before working onsite and plans to later extend that requirement to locations in other countries. Chief Executive Officer Sundar Pichai hopes the policy will give workers "greater peace of mind as offices open."

Facebook also said it will require vaccination for in-person work at U.S. campuses, and the company will incorporate local requirements into its plans for each location. Facebook's head of HR, Lori Goler, said the company has a process for working with employees who need a medical accommodation. ([The Wall Street Journal](#))

**Netflix to Require Vaccination for Actors and Some Crew** - Netflix is the first major Hollywood studio to roll out a vaccination mandate for all U.S. productions. The policy will apply to all actors and any crew that has contact with them. The company will make limited exceptions for workers who refuse a vaccine based on age, religion or medical conditions. ([CNBC](#))

**Restaurants to Ask Workers and Customers for Proof** - A number of New York City restaurants plan to require staff and indoor diners to show proof of vaccination status. Union Square Hospitality Group CEO Danny Meyer [told CNBC](#) that the company's full-service restaurants will implement the requirement on Sept. 7. "We know right now that the vaccine works, and it's time to make sure that this economy continues to move forward," he said. "There's just no going back." ([Eater](#))

**More Local Mandates and Pleas from Industry Groups** - Several state and local governments, including California, New York State and New York City, announced mandates earlier this week for some health care and public employees to either show proof of vaccination or submit to weekly COVID-19 testing. "As the state's largest employer, we are leading by example and requiring all state and health care workers to show

proof of vaccination or be tested regularly, and we are encouraging local governments and businesses to do the same," California Gov. Gavin Newsom said.

Additionally, health care and restaurant associations are urging their members to mandate vaccination.

"Vaccination is the primary way to put the pandemic behind us and avoid the return of stringent public health measures," according to a joint letter signed by more than 50 health care associations, including the American Medical Association. ([SHRM Online](#))

**Return to Mask-Wearing as the COVID-19 Delta Variant Spreads?** - Workplace safety guidelines from federal, state and local authorities are rapidly changing, and employers may want to update their policies accordingly. Earlier this week, the U.S. Centers for Disease Control and Prevention (CDC) urged vaccinated people in counties with high rates of COVID-19 transmission to resume wearing masks indoors. "We still largely are in a pandemic of the unvaccinated," said CDC Director Rochelle Walensky during a press conference on July 27. But she cautioned that, in rare cases, fully vaccinated people may experience breakthrough infections and could be contagious.

In mid-June, the CDC [reported an average](#) of about 12,000 new COVID-19 cases each day, but the rate recently surpassed 40,000 a day on average. "An increase in the number of cases will put more strain on health care resources, lead to more hospitalizations and potentially more deaths," according to the CDC. The agency said that vaccines are the best protection against variants. ([SHRM Online](#))

**How to Develop a COVID-19 Employee Vaccination Policy** - Employers grappling with whether to require their workers to be vaccinated against COVID-19 as well as other infectious diseases may benefit from the process that Houston Methodist, an academic medical center comprising eight hospitals in Houston, used to make that decision. On March 31, the organization mandated that their 26,000 employees, with some exceptions, be vaccinated, making it [the first U.S. hospital system to do so](#). On June 12, a judge dismissed a lawsuit filed by 117 workers who challenged the mandate. "With our policy having stood this legal test, we believe that other employers can use our process for developing a vaccination policy of their own," according to Houston Methodist leaders. They said [this 7-step process](#) can help employers decide whether to mandate vaccinations.

## Can Employers Require Vaccines for Those Who Have Gotten COVID-19?

*By Allen Smith, J.D.*

Federal law allows employers to mandate COVID-19 vaccines for employees who've been infected with COVID-19 and those who haven't, legal experts say.

"Although COVID-19 vaccination continues to be a polarizing issue in the United States as a whole, private employers who wish to require employees to be vaccinated for COVID-19 can do so with little legal risk, provided they comply with [accommodation](#), confidentiality and any other legal obligations," said Christopher Durham, an attorney with Duane Morris in Philadelphia.

Currently, there aren't valid legal arguments forbidding private employers from requiring vaccinations against COVID-19, except that legally required accommodations must be provided, he added. The vaccine mandates can include employees who have been infected with and recovered from COVID-19, Durham said.

Kevin Troutman, an attorney with Fisher Phillips in Houston, explained, "Employers have the legal right to require employees to be vaccinated, but each employer must decide whether a requirement - rather than encouragement - is the right choice for them. The more people who are vaccinated, the sooner life and work can return to normal."

But employers should monitor state and local developments, cautioned Jo Bennett, an attorney with Schnader in Philadelphia. [Equal Employment Opportunity Commission \(EEOC\) guidance](#) and the [Houston Methodist Hospital decision](#) in favor of mandatory vaccinations did not address state and local law, she said.

Donna Glover, an attorney with Baker Donelson in Baltimore, said the court held in the Houston Methodist Hospital decision that the federal Food, Drug and Cosmetic Act (FDCA) does not grant an employee subject to an employer's vaccine mandate the right to sue that business, despite the vaccines having received only emergency use authorization. She said once full Food and Drug Administration approval is conferred on the vaccines, "we may see less frivolous litigation."

In addition, the U.S. Justice Department stated in a July 6 opinion that the FDCA doesn't bar public or private entities from imposing vaccination requirements, even

when the only vaccines available are those authorized under emergency use.

**CDC's Stance** - The Centers for Disease Control and Prevention (CDC) states that people should be vaccinated regardless of whether they have already had COVID-19.

"That is because it's not certain how long someone is protected from getting sick again after recovering from COVID-19," said Emily Harbison, an attorney with Baker McKenzie in Houston. So if an employer has a mandatory vaccine policy, it should require vaccines for all employees and not create an exception for those who have already had COVID-19, she said.

Nonetheless, Troutman said, people who were treated with monoclonal antibodies or convalescent plasma should wait 90 days to get a vaccination.

"According to the CDC, studies have shown that vaccination provides a strong boost in protection in people who have recovered from COVID-19," Harbison said. "It may be that if employees are challenging the policy and asking for an exception because they have previously had COVID, the company should provide information to educate employees and raise awareness about the benefits of vaccination even to those who have already had COVID."

**Mandate's Purpose** - For employers in safety-sensitive industries, such as hospitals, a vaccine mandate can serve to communicate the employer's mission, Bennett noted.

"As the judge in the recent Houston Methodist Hospital case succinctly stated, the hospital is in the business of saving lives without infecting patients with the virus," she said. "An employer that mandates vaccines, regardless of whether it is in a safety-sensitive industry, may intend to demonstrate that it cares for all of its employees and wants to ensure a safe workplace."

**Reasonable Accommodation Process** - "Based on the current EEOC and CDC guidance, employers can require vaccinations as long as certain legal steps are taken, and based on the CDC's guidance, this should include individuals who already had COVID-19," said Andrew Maunz, an attorney with Jackson Lewis in Pittsburgh.

Objections based on a previous COVID-19 infection would have to be made through the reasonable accommodation request process, he noted, and the employer should then follow its normal accommodation procedures to determine if the following applies:

- The employee has a disability under the Americans with Disabilities Act (ADA) that conflicts with the employment policy. While COVID-19 that lasted a short time and didn't substantially limit a major life activity would not be an ADA disability, a "[COVID-19 long-hauler](#)" may have an ADA disability that must be reasonably accommodated.
- A reasonable accommodation can be provided without an undue hardship on the employer.

**Difficulty Identifying Who Has Been Infected** - In some cases, it would be difficult to know whether an employee had COVID-19, particularly if that person's infection occurred before testing was available and was identified solely based on the presence of antibodies or self-reported symptoms, said Martha Boyd, an attorney with Baker Donelson in Nashville, Tenn. "Accordingly, we advise employers who require employees to be vaccinated not to distinguish between those who were previously infected and those who were not with regard to the vaccination protocol," she said.

From an employee relations perspective, letting employees who have previously been infected opt out of a COVID-19 vaccine mandate seems like a recipe for employee conflict, Boyd said. "Proving that an employee was previously infected may be difficult in many instances, and the level of immunity may depend to some extent on the severity of the prior infection and the time since the prior infection," she noted.

An employer that lets an employee bypass a vaccine mandate by claiming prior infection may be in the uncomfortable position of having to determine on a case-by-case basis whether the employee's account of the previous illness substantiates the worker's claim, Boyd said.

**Contact HR Strategies staff at 302.376.8595 or [info@hrstrategies.org](mailto:info@hrstrategies.org) if you would like support or would like to learn more about the items in this newsletter. Please contact us if you would like to be removed from our Monthly Strategies mailing list or if you would like for us to add someone to our mailing list.**