

## Vaccine rollout raises legal questions for employers

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Some employers are offering their workers incentives to get inoculated against Covid-19. Others are considering whether to mandate the shots. But both approaches come with legal risks that are making some companies hesitant to play a role in getting their workforces vaccinated.

Unknowns about how long the vaccines are effective and whether the vaccinated can still spread Covid-19 could leave employers at risk of liability if workers nonetheless get sick, employment attorneys warn. With the vaccine rollout still in its early stages, employers could also face liability if they mandate a particular vaccine that turns out to have more serious side effects than others.

Economists warn that how many workers get shots, and how rapidly, will determine how quickly the U.S. economy can recover, especially in industries that require employees to work together on site in close proximity. But the legal uncertainties could slow the pace of vaccinations.

Nearly half of employers, HR professionals and business attorneys say they have already decided against a vaccine mandate, according to a new survey of 1,800 executives conducted by Littler, an employment and labor law practice that represents employers.

Most of the companies surveyed by Littler are also worried that employees may push back on a mandate and how a vaccine mandate could affect company culture. Instead, most employers said they planned to provide vaccine information to their workers, and nearly a third said they would offer paid time off for workers to get the shot.

"In general, the better approach at this point is to encourage rather than mandate," said Dan Altchek, an attorney at Saul Ewing Arnstein & Lehr, a Baltimore law firm that represents employers with unionized workforces. "I think that's where most employers are going to land."

Amtrak announced earlier this month that it would give workers two hours pay for getting the Covid-19 vaccine. Grocery-store chain Aldi announced last month that it will cover all costs associated with getting the vaccine administered and will provide two hours of pay for each dose. Ryder System, a supply chain transportation company, said last week it would offer its employees up to six hours of paid time off to get the COVID-19 vaccine.

Still, businesses are concerned that incentives like those carry some legal risk of running afoul of federal disability and other laws.

"Legal uncertainty about providing such incentives, however, has many employers concerned over liability and has made them hesitant to act," more than 40 trade associations — including the National Retail Federation, the National Association of Manufacturers and the National Restaurant Association — wrote in a letter to the Equal Employment Opportunity Commission.

The business groups asked the agency to release more guidance and to "define what qualifies as a permissible incentive as broadly as possible."

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Mandates are technically allowable, according to the EEOC — the federal agency charged with policing federal anti-discrimination laws.

But a vaccine mandate "is not as simple a question as most CEOs and general counsel may think it is," Rob Duston, a management-side attorney at Saul Ewing Arnstein & Lehr, said. "There are a lot of legal issues, there are risk issues — it's a risk assessment."

The EEOC cautioned that businesses must provide accommodations for workers who say they can't get the shot because of their religious beliefs or a disability. Businesses can tell workers to stay home if they can't be vaccinated for one of those reasons, and workers could be fired if their employer is unable to accommodate remote work, attorneys say.

But those actions could be difficult to defend.

Federal, state and local laws require employers to work with employees on accommodations before the worker is fired, said Jason Habinsky, chair of Haynes and Boone's Labor and Employment Practice Group.

"And under most circumstances an employer is required to accommodate that employee unless there's ... an undue hardship," he said.

Proving that is "a difficult threshold to meet," Habinsky said, "so an employer does have to think very carefully about whether it will claim that something is an undue hardship."

Widespread hesitancy about the vaccine could lead large numbers of workers to seek exemptions, undermining the effectiveness of a mandate if not enough workers are vaccinated to create widespread immunity. Employers could also be exposed to additional liability if unvaccinated workers contaminate others.

"If we have so many exceptions, how effective can mandatory vaccination programs be when all these other people can basically be exempt from it?" said Barry Hartstein, an attorney at Littler Mendelson in Chicago.

"At least for right now, what you're getting from a mandate or a required vaccine to return to work isn't a silver bullet that says that person will never get sick and can never contaminate anybody," Duston said.