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THE GREAT DIVIDE

Philadelphia-area employers weigh the benefits and risks of vaccine mandates

Hatboro-based Manncorp has tried to avoid mandating Covid-19 vaccines for its 30 employees.

“We don’t have a lot of policies in the office, other than asking people to work hard and do a good job,” Manncorp Vice President Kyle Mann said. “Some people wear shorts to work. This is a family business that respects the private lives of our employees. And we certainly didn’t want to make a policy we couldn’t back up.”

Like most employers, Mann and his father, company founder and President Henry Mann, had implemented a policy that strongly encourages vaccinations with a variety of incentives. One of those is continuing to pay vaccinated employees if they contract the virus and use all of their paid time off, while not offering the same benefit to unvaccinated workers.

But roughly 15% to 20% of employees at the manufacturer and seller of commercial lighting and surface-mount technology equipment remained unvaccinated. So on Aug. 9, Manncorp unveiled a new policy. All employees are now required to submit their vaccination cards, and any unvaccinated employees must have a clean Covid-19 test every week to report to work on Mondays.

Covid cases and hospitalizations have risen sharply across the country in recent weeks as the Delta variant of the virus surges, increasing pressure on employers like Manncorp to mandate the vaccine or impose stricter rules on the unvaccinated to ensure the safety of employees and those with whom they come in contact.

According to a survey conducted by the U.S. Census Bureau between July 12 and July 18, just 5.5% of all small businesses nationwide are requiring employees to have proof of Covid-19 vaccination before returning to the workplace. That number has slowly ticked up this year, increasing from 2.5% in late April and 4.4% in early June.

In Pennsylvania, just 3.8% of businesses said they are requiring vaccinations, while 7.9% of New Jersey business owners answered in the affirmative. But there has been a seismic shift since that data was collected, with dozens of major U.S. employers introducing employee vaccine mandates in August, including Walmart, Facebook, BlackRock, United Airlines, Uber and Tyson Foods.

Out of 42 responses to a Philadelphia Business Journal survey of 100 of the region’s largest employers, 15 companies said they are enforcing a vaccine mandate for their employees. Of those 15 companies, 11 are either health care providers or universities, three are law firms and one is a health insurer.

CAREER & WORKPLACE

Which Philadelphia employers are requiring Covid-19 vaccination? More than 40 companies detail their policies.

Mann has watched in recent weeks as more private and public sector employers announced vaccine mandates.

“That all makes it a little easier in my mind,” Mann said. “We don’t want to wind up getting sued for mandating it. It’s a fluid situation with guidance from the CDC and the government being constantly updated. So now the question is whether it will work for us.”

Risks, incentives and ‘scarlet letters’

For many business owners, some hesitancy could stem from the fact that vaccines have become a political football. Manncorp, for instance, has many longtime employees, including a few sets of parents and children both working for the company. By instituting a vaccine mandate, it could risk losing some valued performers.

Perhaps some of the company’s customers – Manncorp has a client roster that includes Primo Hoagies, Iron Stone Real Estate Partners, Tyson Foods and Nissan – could take their business elsewhere if they have strong opinions on the topic.

Despite those possibilities, Mann said he began seriously considering a mandate for employees as case numbers rose this month.

“This is not a political issue for me,” he said. “There are some different beliefs on the management team, but I think over time I have started to lean toward mandating it. I think my dad would say he would rather just do the right thing and risk any consequences.”

While the more stringent policy recently adopted by Manncorp falls short of a full mandate, the requirement that unvaccinated employees be tested weekly has had the desired effect, even with the company footing the bill for the tests. Mann said three of Manncorp’s eight unvaccinated employees chose to get the vaccine after the policy was announced and many vaccinated employees expressed support for the harder line taken by management.

For months now, employers have offered paid time off, gift cards and other incentives to encourage vaccination. Some, like Manncorp, require unvaccinated employees to wear a mask or physically distance from their vaccinated co-workers. That could be perceived as a “scarlet letter” of sorts that might further incentivize employees to get vaccinated.

Though early legal challenges to employer vaccine mandates have been flatly rejected by the courts, some employers are waiting for the additional legal cover of full Food and Drug Administration approval for the Moderna, Pfizer and Johnson & Johnson vaccines, which are all still operating under emergency use approval. Others dread the potential political fallout or are concerned about the impact a mandate might have on morale.

No job, no job

One employer who does not seem to have any of those fears is Shanin Specter, co-founder of Center City plaintiffs personal injury law firm Kline & Specter, which required that employees get vaccinated before coming back to the office. That was important because the firm also mandated that all employees return to the office full-time in July, saying the move was necessary for collaboration on cases.

“We are a trial firm, so we have to work together,” Specter said. “There is no feasible way to work remotely and discharge our duties to our clients to the best of our ability. And if you allow people to work remotely, they don’t have a reason to get vaccinated.”

Only seven of Kline & Specter’s 150 employees did not get vaccinated. Each one of those seven qualified for a medical or religious exemption. So Specter said the firm dedicated one of its 10 floors at 1525 Locust St. to those employees. Unvaccinated employees must be masked when outside of their individual offices and are not permitted to interact face-to-face with colleagues on the other nine floors. Instead, they are limited to communicating by phone, email or video conference.

Specter said those with medical issues provided documentation as such. Religious exemptions can be trickier for both employees and employers, as Specter discovered when one longtime employee expressed an objection to getting vaccinated.

“She was told that would not be sufficient and that it would need to fit into either the medical or religious categories,” Specter said. “And she wound up submitting a religious objection. [Co-founder Tom Kline] and I are not getting into questioning the sincerity of a request made by an employee who has been with us for years.”

Specter was clear about what would have happened if that employee did not recalibrate her objection.

“Anyone who refused to get vaccinated and did not have a legitimate exemption would have been discharged,” Specter said. “But no one fell into that category.”

Kline & Specter is not alone among law firms requiring the Covid jab. David Pudlin, CEO of Hangley Aronchick Segal Pudlin & Schiller, said his firm issued a mandate for employees to get vaccinated before returning to the office in September — a start date which was recently delayed indefinitely due to concerns over the Delta variant.

The midsize law firm has 90 employees, 50 of which are lawyers. That includes two positions that are permanent off-site roles. Of the 88 on-site employees, Pudlin said just one did not get vaccinated due to a medical exemption. That employee works in a closed office and has to be masked. The remaining 87 were required to show proof of vaccination.

Pudlin said he and the firm’s director of administration, Janet Walker, spent a great deal of time reading up on guidance and policy on the federal, state and local levels and leaned on an outside employment law counsel since Hangley Aronchick itself does not have employment lawyers.

“Our overwhelming concern was the safety of our employees,” Pudlin said. “That’s why we mandated vaccination.”

Regulators, courts back mandates

While terminating someone who refuses vaccination is tricky, especially if that employee is a key contributor, an employer would be well within their rights to do so, according to guidance issued May 28 by the U.S. Equal Employment Opportunity Commission. The EEOC guidance states that federal employment laws permit employers to require their workforce be vaccinated for Covid-19 as long as employers comply with the Americans with Disabilities Act and Title VII of the Civil Rights Act.

That means employers must take into account the exceptions for employees who cannot get the vaccine due to disabilities and sincerely held religious beliefs. And those employees must be provided with reasonable accommodations, which could be requiring them to wear a face mask or be physically distanced from other employees or customers.

If an employee does not have one of those two exemptions, an employer can ask for proof of vaccination and require workers to get vaccinated at the risk of termination.

All employee health information must be kept confidential and employers cannot inquire if an employee's family members are vaccinated, which would violate the Genetic Information Nondiscrimination Act.

And the EEOC says employers can offer incentives to employees to get vaccinated as long as they are not deemed coercive.

On June 12, a federal judge in Texas sided with Houston Methodist Hospital's vaccine mandate for their employees and tossed out a lawsuit filed by 117 employees who were against getting the shot. In a powerful opinion, U.S. District Judge Lynn Hughes dismissed the lawsuit saying, "This is not coercion ... The public's interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences."

The number of organizations mandating vaccinations began to increase after a federal judge blocked a challenge to Indiana University's requirement that students get a Covid-19 vaccination before returning to campus this fall. A group of students had sued the school in June, stating it went against their rights under the 14th Amendment.

A lot of 'I don't know's' and 'I'm not sure's'

Amy G. McAndrew, director of legal and compliance services for the MidAtlantic Employers' Association, said despite having legal cover, most employers still do not want to mandate vaccinations if they can avoid it. One concern is how it might affect recruitment and retention of potential and existing employees, and many do not want to be viewed as dictating the medical decisions of their employees. Most companies feel comfortable with a 70% vaccination rate, McAndrew said.

But employers do have a duty to provide a safe work environment. While Kline & Specter can effectively isolate unvaccinated employees on one floor, most employers cannot.

McAndrew said it has also become harder to enforce wearing masks in the workplace since Pennsylvania lifted its indoor mask mandate in June.

Still, she has yet to see a local employer fire someone for refusing to get vaccinated.

“What we all learned last year is that employees need to be flexible,” McAndrew said. “What happens if one of these variants spreads? Do we all go back home? One thing that’s for sure is you don’t want to be the test case. Let a hospital in Houston spend the money to fight that lawsuit. Right now, I am getting a lot of ‘I don’t knows’ and ‘I’m not sures’ when I ask employers what they are doing.”

Most companies are targeting fall returns to the office — largely with hybrid working arrangements. A minority are either requiring employees to be in the office full-time or allowing them to work remotely on a permanent basis. Regardless of which route they choose, return-to-office plans are intertwined with decisions on vaccine mandates, as both could be impacted by the rise of the Delta variant.

Weighing the costs

Brian Pedrow, a labor and employment partner at Ballard Spahr and a board member and former president of the southeastern Pennsylvania chapter of the Society for Human Resource Management, said employers are pondering a variety of issues surrounding vaccinations. What should they do if there are resurgences of Covid-19 or new variants begin to spread? Should supervisors be required to be on site? How do you mix vaccinated and unvaccinated employees?

“If we think for one minute that politics will be left out of this, that would be mistaken,” Pedrow said. “Politics continues to drive the debate and that extends to workplaces, where people have a variety of views. The EEOC says you are free to do it, but you need to weigh the costs. Each employer is unique. There are no one-size-fits-all policies.”

The direction of the pandemic will play a major role in what the future holds for vaccine mandates. Eric Meyer, an employment lawyer at FisherBroyles, said if the CDC decreed that, vaccinated or not, people no longer need to wear a mask indoors, that would change the thinking of employers. Conversely, he said if the Delta variant finds a way to break through the existing vaccines, everyone could be wearing masks in offices or even returning to remote work.

Meyer said if he was asked by a client, he would recommend not having a mask mandate. It’s not so much a legal issue, he said, but it’s bad for morale. He would suggest going with the honor system.

In a late July blog post, Meyer told existing and prospective clients that the degree of latitude they provide to their employees on Covid-19 vaccinations is up to them.

“But, whatever your decision, incentives, encouragement, mandate, it should involve some push towards vaccinations,” Meyer said. “Silence is not a reasonable option. Because if your business suffers an outbreak, you may not be able to afford it.”