

# Pfizer Vaccine Gets Final FDA Approval – Now What for Employers?

By Jessica Summers

On Monday August 23, 2021, the Food and Drug Administration (FDA) announced final approval of the Pfizer-BioNTech coronavirus vaccine for individuals 16 and older. Of course this is a big step for the vaccine which first received emergency use authorization last December. It is also likely to raise significant questions for employers.

With the Delta variant continuing its aggressive spread, significant focus (including from the Biden Administration) has turned to encouraging private employers to implement vaccine mandates as a means of increasing the country's overall vaccination rates. Many employers had been hesitant to implement a vaccine mandate while all of the COVID vaccines remained in emergency use status. However, with the Pfizer announcement, time will be ripe for many employers to make the decision about whether they will require vaccines for their workforces.

## **So what are some of the big issues for an employer considering a vaccine mandate to keep in mind?**

- State and Local Laws and Unions – Under federal law, it is clear that (subject to accommodation requirements discussed below) employers can require employees to be vaccinated against COVID-19 (even under the emergency use vaccines). However, as of August 2021, nine states have placed laws on the books limiting or prohibiting employers' from mandating vaccines. For local readers in the DMV – Maryland, DC and Virginia have placed no restrictions on vaccine mandates at this time. Before implementing a vaccine mandate, employers, particularly those with employees in multiple jurisdictions, should confirm that such a mandate will not run afoul of any state or local laws. Additionally, employers that have unionized workforces may also be limited in their ability to implement a vaccine mandate without the cooperation of the union.
- Accommodation Obligations – Employers that choose to mandate the vaccine will have an obligation to reasonably accommodate an employee who cannot receive the vaccine because of a disability or who won't receive the vaccine because of a sincerely held religious belief. When rolling out a vaccine mandate, it is important that employers have a clear policy and procedure for handling requests for accommodations. The appropriate accommodation will vary depending on the circumstances and might include allowing an unvaccinated employee to work from home or allowing the employee to undergo regular testing in lieu of being vaccinated.
- Vaccine Related Injuries or Illnesses – While significant injuries or illnesses arising from the COVID vaccines are very rare, to the extent that an employer mandates the vaccine and an employee suffers an injury or illness from the vaccine, such injury or illness may result in a workers' compensation claim. However, whether workers' compensation would provide coverage under such circumstances is still a developing question. For its part, OSHA has confirmed that employers will not be required to report any side effects from mandatory COVID-19 vaccines as workplace injuries at least through May 2022.
- Rollout Timeline – From a practical perspective, employers that are implementing a vaccine mandate will need to decide what to do about employees before they are fully vaccinated. One approach is to implement a policy that identifies a future date by which employees will be required to be fully vaccinated which provides an adequate window for employees who act promptly to become fully vaccinated. Alternatively, an employer can implement an immediate vaccine requirement and require employees who are not fully vaccinated to work from home or take leave for the period until they become fully vaccinated.
- Incentives – The EEOC has confirmed that employers are permitted to offer limited incentives to employees in exchange for them becoming vaccinated. Accordingly, employers that decide to implement a vaccine mandate have the option to offer rewards (beyond simply the retention of their position) to employees who comply. Additionally, an employer that elects to provide employees with paid leave to obtain or recover from the COVID-19 vaccine will be eligible to claim the Families First Coronavirus Response Act (FFCRA) credit any such leave that is provided through September 30, 2021. The FFCRA credit will expire after that date.

- **Refusals** – While the hope will be that all employees will comply or be eligible for an accommodation, an employer that implements a vaccine mandate needs to be prepared to handle employees that refuse to get vaccinated for any reason other than a protected disability or religious belief. With the tight labor market, in many industries the prospect of terminating an otherwise performing employee can be daunting. However, allowing an employee to remain employed after adopting a policy requiring all employees to get vaccinated (and after others have taken steps to comply) could raise a host of legal and employee relations issues for the employer. An employer that adopts a vaccine mandate needs to be prepared to terminate non-compliant employees. As such, in preparation for implementing a vaccine mandate, many employers have taken the position of simply encouraging vaccinations and requesting employees provide proof of vaccinations, to allow them to get a better sense of the nature and extent of their unvaccinated workforce before deciding to implement a mandate. Employers with large workforces are also going to have to consider how to process and evaluate what could amount to hundreds or thousands of requests for disability or religious accommodations, to prepare forms for processing such requests and to train persons evaluating such requests. There are several organizations with websites that provide employees with “canned” templates, accommodation request forms and other tools to support religious accommodation requests.
- **Customer Mandates** – Employers are also going to have to consider how customer mandates may impact their workforce. If a customer mandates that an employer’s employee be vaccinated before meeting with the customer’s employees or going to the customer’s site, will the employer mandate the vaccine for its customer-facing employees? Should an employer mandate that all of its sales and business development employees who have in-person customer interactions be vaccinated but not require others to get vaccinated? It is certainly a viable option as it is not unlawful to require some but not all of a company’s workers to get vaccinated for legitimate, non-discriminatory business reasons. Even then, however, a company may still have to navigate between customer preferences and accommodation issues if an employee seeks a disability or religious accommodation.
- **Alternatives** – Short of implementing a vaccine mandate, there are other policies that employers can implement to encourage vaccinations among their employees. After the federal government announced at the end of July that it will require federal employees to be vaccinated or submit to regular COVID-19 testing, many employers have been eyeing this approach as an alternative to a full-out mandate. However, as is often the case, the more nuanced the approach the more legal issues arise. Employers considering a vaccine or test policy will need to address additional issues related to the testing requirement – including if or when the employer will be required to cover the cost of the test or to pay employees for the time it takes for them to get tested.

Ultimately, to the extent that it is allowed by state and local law, the decision to implement a vaccine mandate will be a business decision based on practical and social considerations and employee, customer or public demands that will vary by employer, region and industry.

Having a clear written policies and procedures to implement any employer rules or positions regarding COVID-19 vaccinations will be critical – regardless of the approach that the employer elects to take. Our team at Paley Rothman is working to assist our clients in navigating these difficult issues and crafting an approach that is right for them.