

# In the Push for Vaccine Mandates, Don't Neglect These Considerations

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Enterprise Risk Management Research Team

Initiatives: [Risk Response Strategies](#); [Coronavirus \(COVID-19\) Resource Center](#)

Figuring out how to implement a vaccine mandate is fraught with missteps. Heads of ERM and other executives can use this list of considerations, including emerging practices, to inform leaders and company policy.

**Update:** On 9 September, U.S. President Biden announced that the Occupational Safety and Health Administration (OSHA) of the Department of Labor would formulate a rule that would require all companies with more than 100 employees to mandate vaccines or require weekly testing. The details of such a rule are still forthcoming. This article has been amended to address this development.

A vaccine mandate for employees must account for a variety of strategic, legal and technical challenges or companies risk lawsuits, privacy violations, staffing shortages or even an ineffective program. To inform leaders at your company on what you need to evaluate before implementing a mandate, including emerging practices, use this cheat sheet of considerations.

The rise of the delta variant and full approval from the U.S. Food and Drug Administration (FDA) for the Pfizer-BioNTech vaccine has increased employer willingness to require a shot. The percentage of companies requiring vaccinations jumped from 7% in January of this year to 16% in August, according to around 200 executives attending a Gartner webinar – another 34% say that the FDA approval will increase the likelihood of mandating vaccines.

The U.S. public experienced the same shift in sentiment. In June, less than half of consumers said that participating in activities like working in an office or in a role that involves direct contact with consumers should necessitate a vaccine. <sup>1</sup> Now 62% of Americans support employers mandating the vaccine, according to an August survey by USA TODAY and Ipsos. <sup>2</sup>

A number of companies have already put a mandate in place, some details on how they have done that below, while others are still deciding on next steps. Get smart fast on the implications of a mandate policy by reading through this essential list of considerations.

## Strategic Considerations

From who decides on the policy to how to justify it, there are a number of strategic choices to make upfront.

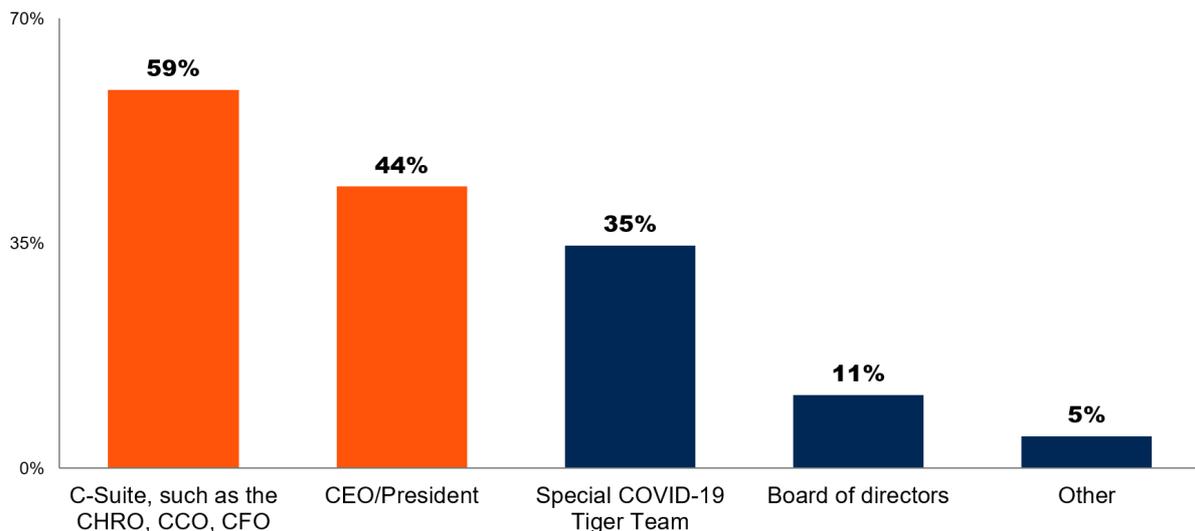
### Who is making the decisions?

Companies report that a variety of leaders are responsible for establishing a vaccine policy, including C-suite executives (CHRO, COO, CFO...), the CEO or a special pandemic tiger team (see Figure 1).

**Figure 1: Decision Maker for Vaccine Mandate for In-Office Employees**

#### Decision Maker for Vaccine Mandate for In-Office Employees

Percentage of executives selecting (multiple responses allowed)



n = 219

Q: Who is involved with determining whether or not to mandate vaccination for in-office employees? (Select all that apply)

Source: Gartner COVID-19 Variants, Vaccinations and Implications on Reopening the Workplace Webinar (24 August)

**Gartner.**

Establish responsibilities early on because vaccine mandates require cross-functional collaboration. The table below outlines assessments and decisions different functions might undertake, in addition to the ones outlined in this article. This includes stakeholders external to the organization, such as public health experts and authorities.

**Table 1: Roles in Vaccine Management Policy for Different Stakeholder Groups**

(Enlarged table in Appendix)

Stakeholder Group	Role
Executive Leadership Team/Board of Directors	Give final approval of vaccine strategy and related return-to-the-workplace implications.
Finance	Determine the ROI of mandating employee vaccines to accelerate return to the workplace.
Real Estate	Advise on return-to-the-workplace safety measures.
Communications	Craft and coordinate messaging to promote awareness of the mandate and the impact of vaccination.
IT Leaders (CIOs, EAs and D&A)	Advise on data management, storage and use. Develop requirements and solutions for capturing employee data.
Procurement	Source and evaluate vendors for vaccine reporting and storage solutions.
HRBPs/Local HR	Act as source of employee voice related to vaccine experience/concerns. Provide local information on vaccination rates and community spread.
Total Rewards	Assist in cost/workforce modeling.
Business Unit Leaders	Advise on priority roles for segmentation of vaccine delivery; act as communication source to build employee willingness to accept vaccines.
Local Public Health Officials	Provide local information on vaccination rates and community spread. Can inform on local reasons for vaccine hesitancy and relevant messaging.
Legal/Risk/Compliance	Advise on legal implications, and data management and privacy risks.
Health and Safety	Assist in facilitating the execution of the policy across the organization.

Source: Gartner

**How will you justify the policy?**

While the forthcoming OSHA rule outlined in Biden’s 9 September address will require large companies to implement a vaccine mandate or require weekly testing, employers should emphasize reasoning that goes beyond compliance. Establishing a clear and transparent rationale for a vaccine mandate can help win support for it.

Most companies requiring vaccines justify their policy as a way to keep employees safe and reduce potential spread in the workplace. Your company may have already had to do this in other jurisdictions, like the U.K., where employers are legally required to provide a “clear and necessary reason” before implementing certain restrictions or collecting data. <sup>3</sup> However, some have gone further emphasizing their company’s commitment to social responsibility by helping to bring the pandemic to an end.

The stated goals of a vaccine mandate should match the policy. For instance, healthcare company Ascension expressed the desire to “put this pandemic behind us” when justifying its mandate for not just on-site employees, but even those working remotely. <sup>4</sup>

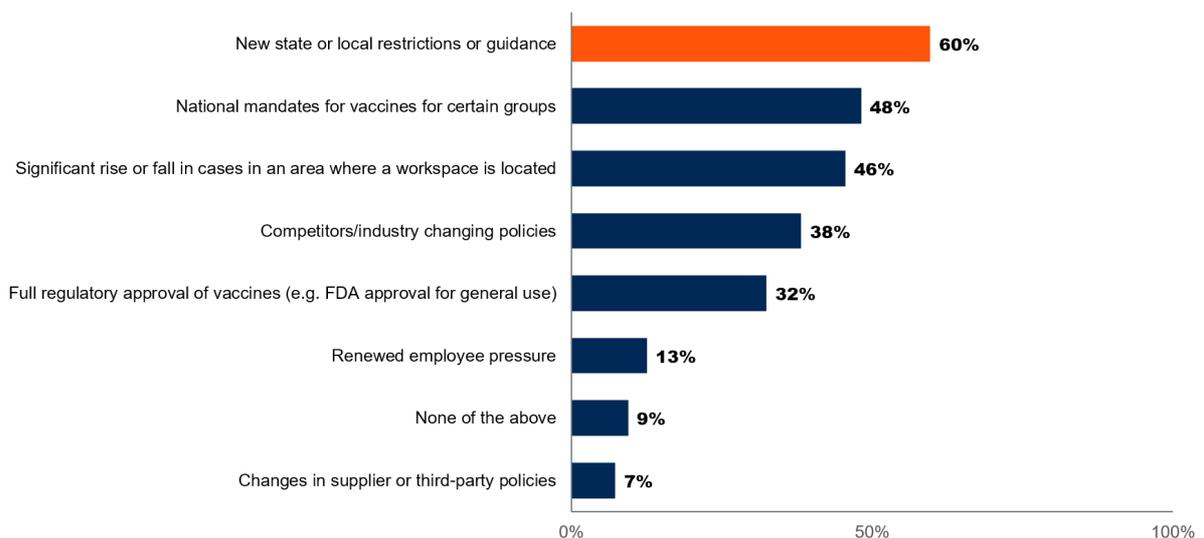
### How will you incorporate flexibility into the policy?

Build vaccine requirements with the assumption that the policy will need to change. How best to cope with the pandemic is a moving target. In the U.S. the federal government allows employer vaccine mandates, yet at least one state government has outlawed them and others have proposed similar legislation. <sup>5,6</sup> Six in 10 companies say that new state and local guidance would cause them to change their current vaccine and return to work policies (see Figure 2). Other triggering events include a significant change in local COVID-19 cases and shifts in competitor or industry policies.

**Figure 2: Factors Impacting Vaccine Requirements and Return to Office Guidelines**

#### Factors Impacting Vaccine Requirements and Return to Office Guidelines

Percentage of executives selecting (multiple responses allowed)



n = 191 (August)  
 Q: Which of the following would change your current policy around vaccine requirements and return to office guidelines? (Select all that apply)  
 Source: Gartner COVID-19 Variants, Vaccinations and Implications on Reopening the Workplace Webinar (24 August)

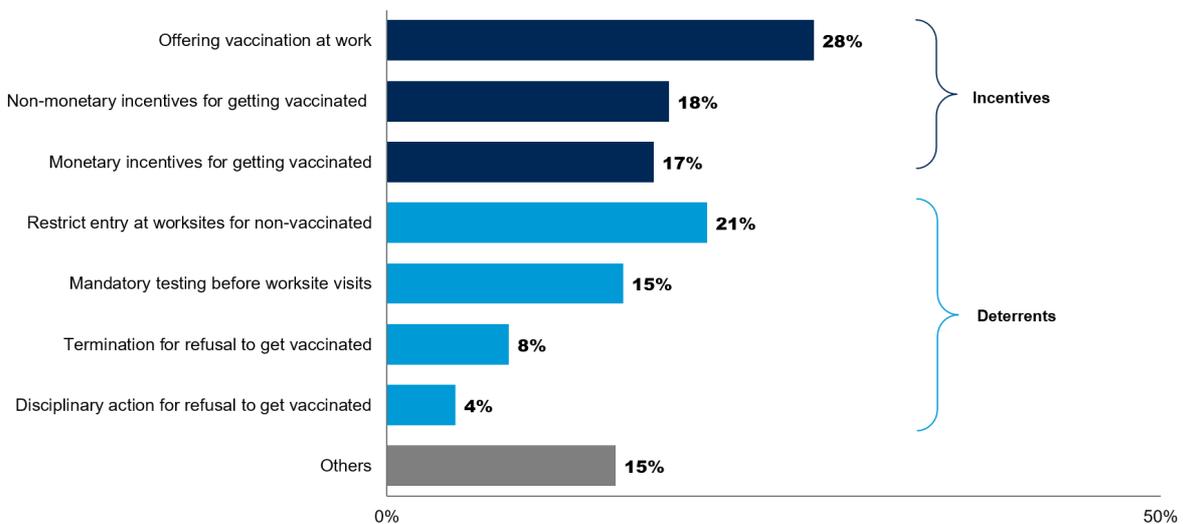
## How will you enforce the policy?

While encouraging vaccinations involves the use of incentives like compensation or paid leave, requiring them will need the use of deterrents. The most common one reported by organizations is restricting access to facilities for the unvaccinated. With companies already facing talent shortages, few (only 8%) say that unvaccinated employees face termination. In the U.S., companies are required to provide alternative accommodations where possible.

**Figure 3: Ways to Encourage Vaccination Efforts**

### Ways to Encourage Vaccination Efforts

Percentage of executives selecting (multiple responses allowed)



n = 203 (August)

Q: What is your organization doing to support vaccination efforts? (Select all that apply)

Source: Gartner COVID-19 Variants, Vaccinations and Implications on Reopening the Workplace Webinar (24 August)

## Legal Considerations

Requiring employees to vaccinate is not legal in all jurisdictions. In the U.K. and EU, employers are only allowed to encourage vaccinations and may not be able to store data on vaccination status under GDPR. Companies located or operating where mandates are legal, should ask the following questions.

### What exemptions do you need to make?

Under U.S. law, employers are required to make exemptions for religious and medical reasons. Both reasons generally require some corroboration, like a note from a doctor or religious leader. This may seem straightforward, but uncertainties exist:

- For religious exemptions: The National Law Review notes that the U.S. Supreme Court currently favors religious liberty arguments and may be more sympathetic to recent lawsuits. <sup>7,8</sup>
- For medical exemptions: Several employees have filed lawsuits claiming that their natural immunity from a previous COVID-19 infection constitutes a medical exemption. <sup>9,10</sup> While research is still evolving, current studies show that natural immunity provides at least similar levels of protection against infections as a vaccine and that people recovered from the virus may experience worse side effects from a vaccine. <sup>11,12,13</sup>

## **What are the legal risks of requiring vaccinations?**

A vaccine policy should also address other issues employees or regulatory agencies could raise. These include, but are not limited to, lawsuits arising from an employee experiencing an adverse reaction to the vaccine and employee compensation for work missed because of vaccination.

## **What are the legal risks of retaining employee vaccine data?**

Some employees in the U.S. have raised concerns that their employer asking for vaccine status violates the Health Insurance Portability and Accountability Act (HIPAA). This is incorrect. While these rules prevent organizations subject to HIPAA <sup>14</sup> from releasing such information, they do not prevent a company from asking employees their status or requiring them to prove it. However, a company may not seek out an employee's status from their medical provider without the worker's consent. <sup>15</sup> Companies also face risks if they attempt to discover why a staff member chooses not to be vaccinated.

Companies will also need to scrutinize how employee vaccine information is stored. These laws differ from state to state in the U.S. and from country to country in Europe. A policy and storage system that does not account for these jurisdictional differences risks fines from noncompliance or potential employee lawsuits.

## **Technical Considerations**

### **How are you collecting the data?**

First, determine what data you are collecting. Is it a simple affirmation of vaccination or are you asking for more details? While employers can reduce risk by limiting what they ask for, some information, like the date of vaccination, might be important later as evidence of waning immunity emerges. <sup>16</sup>

Most companies (67%) are already collecting the vaccine status of their employees and there are a number of vendors selling tracking solutions. <sup>17</sup> These vendors include IBM, CLEAR, Qualtrics, ReturnSafe and ServiceNow, among others. The CEO, HR and internal communication teams should coordinate on a way to tell employees how to submit vaccine information or requests for exemptions.

## **How are you storing the data?**

The Equal Employment Opportunity Commission (EEOC), in its updated guidance in May, stated that employee vaccine information must be kept confidential. <sup>5</sup> This means that employee data should be kept separate from their personnel file. And because staff may have to comply with the vaccine policies of vendors and contractors that your organization works with, storage decisions should also account for the transfer of credentials to these stakeholders.

Companies may also want to look at privacy technologies that help protect data from the start, like using zero-knowledge proof systems where personal information is not exchanged for verification.

## **Are you verifying the data?**

More companies are requiring proof of vaccination (28%) rather than simply having employees self-report with a declaration of truth (21%). <sup>17</sup> This verification can be as simple as employees sending in a photo of the vaccination record. But with increasing reports of forged and fake cards, that might not be enough. Explore whether it's possible to link to a standardized database of digital certificates in certain regions.

But note that any efforts for verification using vaccine certificates would require employee consent.

## **How are you using the data?**

Most companies use the data to restrict access to offices, factories or other locations where people gather in close proximity. That means real estate and facilities operations teams need to establish new protocols for entry, including the development of health passes.

Taken in aggregate, employers can use this information to determine when to reopen certain locations. When a certain percentage of the workforce reports they have been vaccinated, for instance, it could act as a trigger to return to that office. Knowing the vaccination status of the workforce may further help inform whether a mandate is even necessary.

But organizations should tread lightly. Vaccines and vaccine certificates are already controversial topics. While there are strong arguments for putting mandates in place, in the name of public health, for starters, companies risk reputation and activist campaigns if employees or the public perceive that they're using personal data unnecessarily. It could also decrease compliance with a mandate at a time when nearly a quarter of workers (23%) would already consider leaving a job if ordered to get the shot. <sup>18</sup>

Disclaimer: While Gartner research may include reference to related legal issues, we do not provide legal advice or services, and our research or guidance should not be construed or used as a specific guide to action. We encourage you to consult with your legal counsel in considering and applying the advice and recommendations contained in our research.

*By Steve Shapiro*

*The HR and data and analytics research teams contributed to this post.*

Contact [Steve](#) with any questions or comments.

## Recommended by the Authors

[COVID-19 Vaccines: Employment Lawyers on Shot Mandates, Liability Risks and On-Site Work Concerns](#)

[Vaccine Management Resource Center](#)

[Global Business Implications for Vaccine Certificates and Passes — Presentation Materials](#)

[3 Imperatives for Designing an Effective COVID-19 Vaccine Campaign](#)

## Endnotes

<sup>1</sup> Gartner Consumer Community Survey (17-24 June 2021).

<sup>2</sup> [No Vaccination? Americans Back Tough Rules and Mask Mandates to Protect the Common Good](#), USA TODAY.

<sup>3</sup> [COVID-19: Processing of Vaccination Data by Employers in Europe](#), Inside Privacy.

<sup>4</sup> [For Safety of Communities, Ascension to Require COVID-19 Vaccination for Associates](#), Ascension.

<sup>5</sup> [EEOC Issues Updated COVID-19 Technical Assistance](#), U.S. Equal Employment Opportunity Commission.

<sup>6</sup> [State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports](#), National Academy for State Health Policy.

<sup>7</sup> [Employer Considerations on Vaccine Mandates and Employee Incentives](#), The National Law Review.

<sup>8</sup> [Religious Objections Stand in Path of Mask, Vaccine Mandates](#), Bloomberg Law.

<sup>9</sup> [MSU Employee Files Lawsuit Over University's Vaccine Mandate, Claims She Has Natural Immunity](#), Detroit Metro Times.

<sup>10</sup> [Why I'm Suing Over My Employer's Vaccine Mandate](#), Wall Street Journal.

<sup>11</sup> [Having SARS-CoV-2 Once Confers Much Greater Immunity Than a Vaccine—but Vaccination Remains Vital](#), Science.org.

<sup>12</sup> [COVID-19 Survivors May Possess Wide-Ranging Resistance to the Disease](#), Emory University.

<sup>13</sup> [Robust Spike Antibody Responses and Increased Reactogenicity in Seropositive Individuals After a Single Dose of SARS-CoV-2 mRNA Vaccine](#), medRxiv.

<sup>14</sup> [Covered Entities and Business Associates](#), HHS.gov. HIPAA rules only apply to covered entities that are defined by the U.S. Department of Health & Human Services as “health care providers, health plans or a health care clearinghouse.”

<sup>15</sup> [Is It a HIPAA Violation to Ask for Proof of Vaccine Status?](#) HIPAA Journal.

<sup>16</sup> [Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 \(Delta\) Variant Predominance – Eight U.S. Locations, December 2020–August 2021](#), CDC.

<sup>17</sup> Gartner COVID-19 Variants, Vaccinations and Implications on Reopening the Workplace Webinar Poll (24 August 2021).

<sup>18</sup> [New Research: Vaccine Policies May Determine Whether Employees Stay or Go](#), Qualtrics.

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