

# As Breakthrough Cases Rise, So Do Vaccination Mandates

By Allen Smith, J.D.

August 30, 2021

**B**reakthrough cases—coronavirus infections in those who have been fully vaccinated—are increasing some employees' skepticism about COVID-19 vaccinations but also strengthening some employers' resolve to mandate them.

Many employers are not giving in to employee dissension when deciding whether to implement or maintain COVID-19 vaccination policies, according to Alex Leiva, an attorney with Greenspoon Marder in Miami. "On the contrary," he said, "the uptick in breakthrough cases seems to prompt employers, especially those with operations in substantial or high-transmission areas, into significantly increasing their encouragement efforts ... or mandating COVID-19 vaccinations altogether."

Employers are relying on data demonstrating that the greatest risk of transmission is still among unvaccinated individuals and that vaccines are effective at preventing severe illness, he said.

The delta variant "threw us a curveball," said Dorit Rubinstein Reiss, a professor at the University of California Hastings College of the Law in San Francisco. "We are not where we thought we would be. ... Employers need to proactively act to make the workplace as safe as they can to avoid outbreaks and closures, and mandates are one of the tools they should consider."

She added that so long as the evidence supports that vaccines reduce transmission, even if they don't completely prevent transmission, employers are on solid ground mandating them.

Before the recent increase in breakthrough cases, employers leaned toward incentivizing or strongly encouraging vaccinations, said Brooke Iley, an attorney with Blank Rome in Washington, D.C.

Some companies said vaccines were mandatory for entry into the office but used an honor system to monitor compliance. "There has definitely been a marked increase in employers that have moved to mandate vaccines and require proof," she stated.

After refusing vaccination up to this point, some people will be prompted to finally get the vaccine based on news about the variants, said James Paul, an attorney with Ogletree Deakins in St. Louis. But he said others will use the breakthrough infections "as a justification to remain unvaccinated because they believe it doesn't work."

Nonetheless, Denise Keyser, an attorney with Ballard Spahr in Mount Laurel, N.J., said, "The recent surge in transmission rates, breakthrough infections and government action seem to have underscored the very real danger posed by the virus and have spurred more employers to take action."

Government action has included President Joe Biden's announcement ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/worker-vaccination-and-testing.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/worker-vaccination-and-testing.aspx)) that federal employees will be required to confirm that they are vaccinated against the coronavirus or submit to frequent testing for COVID-19. Additionally, the Pentagon announced that it will send

## FEATURED RESOURCE HUB PAGE



### COVID-19 Vaccination Resources

([www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx](http://www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx))

Feedback

guidelines to active-duty service members, who will be required to get vaccinated.

### Vaccination Mandates Generally Permitted

"Other than in Montana, private employers can mandate vaccination of any or all of their workers," Paul said. Employers must grant valid disability and religious-belief exemption requests and determine how those who are exempted should be accommodated.

While vaccination mandates are a viable option for some employers, Paul said, other employers can't implement vaccination mandates "due to practical hurdles." These include "the inability to enforce the mandate against unvaccinated workers because the employer can't afford to remove those workers from their jobs or can't replace them quickly enough to continue its operations effectively."

He added, "There could be negative morale repercussions as well if a large enough percentage of workers have strong anti-vaccine views and protest and refuse to get vaccinated."

Some employers are imposing "soft mandates," such as permitting only fully vaccinated employees to return to the workplace or requiring employees who are not fully vaccinated to submit to regular COVID-19 testing, said Joshua Keith Sekoski, an attorney with Akin Gump in Washington, D.C.

The nation is in the early stages of mandatory vaccinations, he said, "and it remains to be seen how employer action impacts vaccination rates and case counts." Sekoski added that full U.S. Food and Drug Administration approval, recently granted to the Pfizer vaccine ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/pfizer-vaccine-full-approval-impact-on-employer-covid-19-policies.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/pfizer-vaccine-full-approval-impact-on-employer-covid-19-policies.aspx)), and the implementation of booster shots ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-rollout-of-booster-shots.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-rollout-of-booster-shots.aspx)) expected soon likely will influence employers' vaccination policies.

*[Want to learn more? Join us at the SHRM Annual Conference & Expo 2021 (<https://annual.shrm.org/>), taking place Sept. 9-12 in Las Vegas and virtually.]*

### Do's and Don'ts of Mandating Vaccines

Reiss said employers that are mandating vaccinations should consider:

- What kind of mandate they're implementing: a "hard mandate"—that is, employees get vaccinated or, if they don't have an exemption, are fired—or a soft mandate.
- Whether they will offer an open-ended exemption to vaccine opponents as an alternative.
- Whether, if they don't offer an open-ended exemption, they need to offer a religious exemption. The standard is that the employer has to accommodate those with sincere religious objections unless doing so creates an undue burden on the employer. For religious accommodations, unlike disability-related accommodations, undue burden is no more than minimal costs; for disability-related accommodations, undue hardship is a higher standard and much more difficult to prove.
- What accommodations employees will offer in the rare cases where people cannot get vaccinated for medical reasons, and how those accommodations will be implemented.
- What effect the mandate will have on the workforce.

"The more [COVID-19] infections across the country, the higher the number of breakthrough cases, although that number is still very low compared to unvaccinated case counts," Iley said. At this point, "breakthrough infections are generally not resulting in serious illness" in most cases. "The vaccine is working, and workplaces that have high vaccination rates will experience less business disruption in the coming months."

## HR DAILY NEWSLETTER

News, trends and analysis, as well as breaking news alerts, to help HR professionals do their jobs better each business day.

**CONTACT US ([WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX](http://WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX)) | 800.283.SHRM  
(7476)**

© 2021 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

[Disclaimer \(www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer\)](http://www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer)

Feedback