

# Vaccine Mandates Aren't the Only - or Easiest - Way for Employers to Compel Workers to Get Their Shots

Can companies legally require workers to get vaccinated? Employers have gotten so good at finding ways to get employees to comply with their policies that it may not matter.

A workplace showdown may be brewing over mandating vaccinations.

Employers would love the sense of certainty that comes with a vaccinated workforce. Workers can be brought back sooner than later, there's no need for physical distancing in the office and there will be less worry about employees falling ill from COVID-19.

And polls suggest many workers would love this too. One recent survey found that over 60% of workers want their companies to require everyone to get vaccinated before returning to the office.

But not everyone is convinced about the value of getting vaccinated. Surveys suggest that 17% of American adults are taking a "wait and see" approach to the vaccine, and 20% say either they "definitely" won't get the vaccine or would do so only if required. Some states, such as Florida and North Dakota, have even introduced legislation that would prevent companies and other businesses from requiring workers to get vaccinated.

While I agree with other employment law experts that companies are well within their legal rights to mandate a vaccine - provided they offer disability and religious accommodations - I don't expect them to lower the hammer, at least not right away.

As I explain in an ongoing book project, employers have already gotten so good at nudging workers to do what they want, they may not need to resort to a mandate.

**The illusion of control**

Employers have such a strong influence on their employees' daily behavior – and bodies – that it becomes part of the rhythm of their lives.

Most people can remember a time when they skipped breakfast to avoid being late for work. Nurses regularly report missing breaks and meals to tend to patients' needs. Even remote workers who are physically removed from direct control may find themselves hovering over a laptop late at night, at the expense of their family, mental health, and eyesight.

Or to use an extreme example, warehouse workers and poultry workers have reportedly avoided trips to the bathroom just to keep up with an impossible pace of work.

Most of the time, employers influence worker choices without a direct mandate. Instead, they use more subtle methods – like imposing rules and expectations, tinkering with pay, monitoring behaviors, controlling time, and passing judgment on performance.

Undoubtedly some organizations, such as airlines and nursing homes, will impose a vaccine mandate as a business necessity.

And while many corporate CEOs say they are mulling the idea of a mandate, most seem to have settled on more subtle methods at their disposal.

### **Making it easier to get vaccinated**

A simple way to alter worker choices is to make it easier for workers to engage in behavior the employer wants to encourage.

At the law firm where I used to work, they offered dinner for people who worked past 6:30 p.m. Were they just being nice? Of course not! They wanted us to stay at work, rather than calling it quits when we got hungry.

Companies have already started doing the same for vaccines. Some employers – including my university – are offering on-site vaccinations.

Others are making it easier for workers to make it to their vaccine appointments off-site. Target is offering its workers free Lyft rides to vaccination sites.

For workers worried about using scarce vacation or sick time, Trader Joe's,

Chobani, and Dollar General are offering time off to get vaccinated.

Even a gesture as simple as instructing managers to find coverage for a worker's shift could help relieve the logistical burden for workers who want to get vaccinated but haven't gotten around to it.

### **Information and education**

Companies are already accustomed to pushing out educational information to workers - particularly during the pandemic when they have had to roll out and update social distancing protocols in a short time frame.

Although the human resources department often handles routine communications about legal requirements and mandatory training sessions, companies can also draw upon the expertise of their marketing departments to craft internal messaging to employees.

They seem to already be doing so with vaccine messaging. Some large companies, like Walmart and Microsoft, are assisting with the vaccine rollout and publicizing that role in their internal and external messaging. Meatpacking plants, which have been plagued by extensive COVID-19 outbreaks, are promoting the vaccine through videos, posters, and presentations.

And when the stakes are high enough, companies can be brutally effective at persuasion - as when Amazon convinced its Alabama warehouse workers to reject a union in a recent vote. The retailer apparently went so far as to barrage workers with near-daily text messages, targeted social media ads, and even marketing materials in warehouse bathroom stalls.

As the U.S. finds itself in a race to vaccinate enough of the population to keep fast-spreading COVID-19 variants at bay, the stakes are deadly serious for companies hoping to reopen without workplace outbreaks in the months ahead.

### **Making it a hassle to avoid getting vaccinated**

Short of threatening to fire unvaccinated workers who do not qualify for a disability or religious exemption, companies certainly could make things inconvenient for workers who avoid the vaccine as a matter of personal preference.


I expect that companies may start to resort to more punitive measures over time, to help push remaining stragglers over the finish line.

What might that look like?

It could be a “reward” that is primarily intended to foment a fear of missing out among the vaccine-reluctant; monthly raffle drawings available to the recently vaccinated; tickets to the company’s outdoor barbecue for those fully vaccinated by a specified date; or preference in vacation scheduling or shift selection for those who are vaccinated or qualify for an exemption.

Employers can also introduce annoying hassles for vaccine avoiders, not unlike the way they prod workers who are slow to complete the company’s mandatory harassment training, as I know from personal experience. That could mean automated reminders, followed by personalized reminders from human resources, and eventually a phone call. At some point, it becomes more of a hassle to avoid the vaccine than to get it.

Companies that don’t want to fire workers who refuse to get a shot may ultimately have them sign a document acknowledging the health risks of continued exposure – like the form employers are required to provide health care workers who refuse a hepatitis B vaccine. While such a document should not include an unlawful waiver of workers’ compensation claims, it could explicitly warn workers of the health risks they’re taking.

Are companies meddling in workers’ choice and behavior? Of course they are. You might even say it’s their core competency. 

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