

## Corporate Boards' Role In Workplace Vaccine Mandates

By **Jen Rubin** (October 12, 2021, 4:08 PM EDT)

Mandatory workplace COVID-19 vaccination is becoming an accepted and necessary measure to protect employee health and safety. Given the importance of the employee stakeholder to the corporate mission, and the board's obligation to manage corporate risks associated with employee health and welfare, corporate boards may have a role in workplace vaccination mandates.



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### Background

Mandatory workplace vaccination is not only widely viewed as a key to ending the coronavirus pandemic, it is also a meaningful tool to manage employee health and safety risks.

While the initial acceptance of mandatory COVID-19 vaccination was somewhat muted, in light of recent data supporting the safety and efficacy of the vaccines, employers are now turning to mandatory vaccination to manage the risk the pandemic poses to the workforce.

In fact, a recent survey from research and consulting company Gartner Inc.[1] indicates that nearly 50% of all employers are considering vaccine mandates, a significant departure from earlier anecdotes that suggested a much lower rate of workplace vaccine mandate adoption.

As indicated by the U.S. District Court for the Eastern District of Kentucky's Sept. 24 decision in *Beckerich v. St. Elizabeth Medical Center*, vaccine mandates already appear to be withstanding legal challenges.[2] As a result, mandatory COVID-19 vaccination may soon become industry standard.

In addition to the firm legal ground supporting mandatory vaccination, the Centers

for Disease Control and Prevention[3] recently published data demonstrating that individuals who are fully vaccinated are five times less likely to become infected with COVID-19, and, significantly, 10 times less likely to be hospitalized or die from this illness.

This data is a stark reminder that vaccination remains a vital public health measure to prevent serious illness and death from COVID-19.

Wider adoption of vaccination is an important step in ending the pandemic. Toward this end, President Joe Biden recently announced, as part of his "Path Out of the Pandemic" action plan, his direction to the Occupational Safety and Health Administration to develop an emergency temporary standard for employers of 100 or more that includes vaccine mandates and weekly testing for those employees who cannot take a vaccine.

Mandatory workplace vaccination programs are therefore no longer untested theories; these programs have arrived and are an important feature in the American workplace.

### **The Board's Role in Health and Safety Measures**

The pandemic has placed employee health and welfare at the forefront of corporate priorities.

Employers, of course, have always had to provide a safe workplace for employees. This obligation arises from federal and state occupational health and safety laws, and other laws impacting worker safety.

While these laws pre-date the pandemic, the current crisis has highlighted the paramount importance of health and safety workplace planning, implementation, administration and enforcement. These obligations are a primary function of a corporation's management.

But they are also important indicia of corporate risk.

It is here that the board's oversight role becomes significant. The rise of environmental, social and governance requirements, or ESG, has focused investors on employees as crucial stakeholders in carrying out the corporate mission to create shareholder value and effectuate other corporate goals. ESG is now sometimes referred to as EESG, reflecting an additional E for the employee stakeholder.

This investor focus requires attention to the primacy of employee welfare, and not just welfare based on the vital importance of equal employment opportunities, diversity, equity and inclusion.

The EESG focus arguably requires a board to consider the overall impact of corporate welfare policies — which includes employee health and safety — on the identification and management of corporate risk and employee well-being.

These matters also implicate employee retention, a challenging feature of today's workplace.

Corporate boards already have the long-standing obligation to discharge the Caremark standard of corporate oversight and risk management, established by the Delaware Chancery Court's 1996 ruling in *In re: Caremark International Inc. Derivative Litigation*.<sup>[4]</sup>

This obligation is particularly acute when a board becomes aware, or should be aware, of a known risk — in this case, the risk that the worldwide coronavirus pandemic poses to employee health and welfare.

So how does a board discharge its obligation to identify and manage that risk?

Caremark has already been applied in a case arising in the health and safety context.

The case of *Marchand v. Barnhill*<sup>[5]</sup> arose from the 2015 outbreak of *Listeria*, a bacteria that causes food poisoning, at Blue Bell Creameries USA Inc., one of the nation's largest ice cream manufacturers.

Applying the Caremark standard to claims in that case that the board breached its obligations, the Delaware Supreme Court in 2019 warned directors that "to satisfy their duty of loyalty, [they] must make a good faith effort to implement an oversight system and then monitor it." In this instance, "the Blue Bell board failed to implement any system to monitor Blue Bell's food safety performance or compliance."

### **Mitigating the Risk the Pandemic Poses to Employee Health**

While the risk obligations for Blue Bell's board may have been heightened because the company's business was manufacturing, marketing and selling food to the

public — making food poisoning prevention a substantial risk factor — the message from Caremark and Marchand is clear. A board's primary obligation is to identify and understand the risks posed to the organization the board oversees.

And once those risks are understood, the board must take reasonable steps to mitigate those risks.

Taking that oversight observation to its natural conclusion, the obligation to manage and oversee risks would include understanding and mitigating the risks the coronavirus pandemic poses to the organization.

The risks the pandemic poses to an organization's workforce range from the obvious risks posed to employee health — including not only the employees who produce the organization's goods and services, but also to the health of the executive team tasked with ensuring business continuity — to supply chain disruption. Significant legal risk arises from compliance issues associated with a swiftly changing workplace regulatory scheme.

This regulatory scheme presents unique compliance challenges not just because of the speed with which COVID-19-related health and safety measures are passed and implemented, but also because of the intensely local nature of public health regulation.

This decentralized approach to public health means, for example, that it is possible that a safety scheme in one corporate facility might be entirely unacceptable for another location, even if those facilities are located within the same state.

As boards continue to address this crisis, they should prepare for the risks posed by Caremark claims, and build their compliance and oversight programs to ensure that they are well positioned to provide effective corporate oversight.

### **Managing Corporate Risk Through Vaccine Mandates**

Even though a board's obligations to provide strategic oversight and manage risk mitigation are irrefutable, a board's obligation to demand that management implement a mandatory vaccination program should be part of a well-considered employee health and safety risk management program.

Mandatory vaccination programs require adept and informed administrative management. A mandatory vaccination program will not succeed if it is implemented without the support of trained human resources professionals who are

capable of processing religious and medical exemptions, as well as employees who can adeptly manage the organization's facilities, including client, customer, vendor and landlord-tenant issues.

A poorly contrived program can, in fact, create more risk to the organization.

In addition, the implementation of a mandatory vaccination program does not absolve the board of the requirement to identify other known risks. Similarly, it remains important to communicate with employees about health and safety issues and the proactive steps the employer has taken to address those issues.

In other words, a board direction to management to implement a mandatory vaccination program without a consideration of the broader safety program and other risks is inadvisable.

With that said, however, a board's duty of care inarguably requires it to oversee management's discharge of its obligation to implement worker safety in a pandemic when the threat to human life is real. A fully vaccinated workplace is undeniably a key safety measure, especially if combined with frequent, readily available testing.

As a result, it is prudent for a board to require that management regularly report to the board's corporate risk committee, including about the measures management has taken to protect worker safety and why those measures are appropriate for the particular business, together with requiring management's attention to training, policymaking and attention to implementation.

Any workplace safety scheme must comply with the federal, state and local regulations applicable to the particular organization.

Consideration and attention should also be made to voluntary incentives for vaccination, frequent testing, the continuation of remote work and other accommodations that could promote workplace safety.

### **Board-Focused Tasks — For Now**

Boards should note the growing acceptance and adoption of vaccine mandates and the increasing focus on EESG accountability.

The employee-stakeholder focus also requires corporate self-examination of employers' role in advancing social and other societal progress — including a role

in ending the pandemic.

Mandatory vaccination as a public health measure could play a part in that process. However, it is far from clear that a mandatory vaccination program is also a board mandate — at least for boards that actively engage in employee safety and welfare risk identification and mitigation.

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[1] <https://www.gartner.com/en/newsroom/press-releases/2021-09-24-gartner-survey-reveals-nearly-half-of-organizations-will-institute-vaccine-mandates>.

[2] <https://storage.courtlistener.com/recap/gov.uscourts.kyed.96595/gov.uscourts.kyed.96595.34.0.pdf>.

[3] [https://www.cdc.gov/mmwr/volumes/70/wr/mm7037e1.htm?s\\_cid=mm7037e1\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7037e1.htm?s_cid=mm7037e1_w).

[4] *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

[5] *Marchand v. Barnhill*, 212 A.3d 805 (2019).