

Should Boards of Cooperatives and Condominiums Implement a Vaccination Policy?

Boards of cooperatives (coops) and condominiums (condos) should start thinking about whether to implement a vaccination policy for their buildings now that vaccines are becoming more available. Boards not only have a fiduciary duty to protect the health and safety of their residents and occupants, but also a responsibility to provide a safe workplace for employees of the building.

Can boards require employees hired directly by the coop or condo to get a COVID-19 vaccine in order to maintain employment? The answer is yes, as of now, however, there are some important exceptions and potential areas of risk. Employment in the United States is mostly “at will,” which means that an employer can establish working conditions, including requiring certain vaccinations. That said, the Federal Drug Administration (FDA) approved the COVID-19 vaccine on an emergency use authorization (EUA), which is different from prior vaccines in that recipients of an EUA vaccine must be told that they may refuse the vaccine. It is not yet settled whether this distinction matters from a legal or public policy perspective, and some states have proposed legislation prohibiting employer mandates. Moreover, if an employee has an underlying medical condition, he or she may be exempt from such mandate under the Americans with Disabilities Act (ADA). Also, employees with “sincerely held” religious beliefs may also be exempt under Title VII of the Civil Rights Act of 1964.

Additionally, for coops and condos with unionized employees, boards will need to carefully review their collective bargaining agreements before enacting a vaccination policy. The collective bargaining agreement may already provide a board with the unilateral right to implement a vaccination policy. If not, a board will more than likely need to bargain such implementation with the union to comply with the requirements of the National Labor Relations Act.

Whether boards **should** mandate vaccinations is a different matter. Issues related to availability and access to the COVID-19 vaccine will limit the pool of employees available to work. Boards are also opening themselves up to potential ADA or Equal Employment Opportunity Commission claims by such a mandate, not to mention worker’s compensation claims if an employee suffers a complication from the vaccine. Such risks, nonetheless, may be worth taking when it comes to building employees, especially superintendents, resident managers, and doormen who frequently interact with residents, occupants, vendors, and other third-parties entering the building.

Can boards require contractors hired directly by the coop or condo or unit owners/shareholders to get a COVID-19 vaccine before entering the building? Yes — as long as it is not prohibited by the contract or governing documents of the coop or condo. Once the vaccine becomes increasingly available to the general population and approved by the FDA on a non-EUA basis, boards may also want to consider requiring all contractors and their employees and subcontractors to be vaccinated as a condition attendant to construction contracts and alteration agreements with unit owners/shareholders. For previously existing contracts and alteration agreements, boards should contemplate incorporating amendments or making proof of vaccination a prerequisite to continuing or resuming alteration or construction work. From a practical perspective, however, it may be difficult for contractors to comply with such vaccination mandates because it will reduce the availability of eligible vendors. Contractors will likely be met with the same employment risks outlined above preventing them from requiring their own employees and subcontractors to vaccinate. Nevertheless, despite push back from shareholders and unit owners, the business judgment rule will afford a board protection from such claims in connection with vaccination mandates when it comes to alteration agreements. Additionally, requiring such a mandate would provide comfort to building staff who frequently interact with such construction personnel and who are most at risk of contracting COVID-19.



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Can boards require unit owners or tenants to get a COVID-19 vaccine? It is too early to say at this point. Since the inception of the COVID-19 pandemic, boards have had tremendous leeway to implement COVID-specific policies. However, most of those policies mirrored the guidelines already promulgated by Governor Cuomo in his executive orders and those of the Centers for Disease Control and Prevention (CDC) and New York State Department of Health (NYDOH). Without a formal mandate from New York State requiring all residents to be vaccinated, any efforts by boards to require unit owners or tenants to vaccinate will most likely be met with significant opposition.

Regardless of a board's decision to implement a vaccination policy, it is imperative that boards continue to follow the COVID-19 guidelines of the CDC and the NYDOH including, but not limited to, requiring social distancing, face coverings, and frequent sanitization of the common areas of the building.
