



The Duty of Oversight in the Face of COVID Mandates

BY DOUG RAYMOND

In the United States, vaccination of the population is not only a medical issue, but also a political and workplace issue. This has challenged boards seeking to navigate a host of competing issues, including workplace and customer safety, significant resistance to vaccination against COVID-19 — particularly in certain regions of the country. A tight employment market in

many sectors also raises the dilemma of alienating either those employees who insist upon a vaccinated workplace or those who decry it. Meanwhile, permitting a continued “work-from-home” or entirely virtual work environment raises its own concerns for data integrity and security, as well as employee training and the inculcation of the corporation’s core values

throughout the workforce.

As boards consider these issues and their responses to the current resurgence of the pandemic, they must do so in the exercise of due care, which in general means that they should adequately and thoughtfully consider the issues that are implicated, including those mentioned above, as well as potential investor and community reactions to whatever

program they adopt. The directors may also want to consider how others in their industry and community are addressing these issues and consult with medical, workplace safety and other experts.

These deliberations have been complicated by the recently announced federal mandates to vaccinate the employees of many corporations. These new mandates

raise new and challenging questions for directors of the companies affected, who now have to consider whether their fiduciary duty of oversight interplays with these federal mandates and, if so, how.

The board's obligation to oversee corporate compliance, particularly of regulatory matters, has gained increasing attention in recent years and has become a key aspect of the director's duties. Recent Delaware cases have reemphasized this duty of oversight, originally outlined by the 1996 case, *In re Caremark International Inc. Derivative Litigation*. One of the remarkable aspects of this duty of oversight is that, under the *Caremark* line of cases, directors can be held liable not only for what the board has done — but also for what the board has failed to do. In part for this reason, the Delaware courts initially expressed reluctance to find that boards had failed to adequately exercise this oversight obligation. However, this reluctance may be eroding as courts have been more receptive to a series of more recent cases where plaintiffs have brought cases alleging a failure of the duty of oversight.

The *Caremark* case and those following it have established a new and heightened standard for board oversight of a company's

legal and regulatory compliance programs. Under these cases, the board should carefully consider what company activities could fairly be considered “essential and mission critical.” Having identified the mission critical activities, the board should evaluate (and periodically revisit) the regulatory and compliance risks associated with these mission critical activities and ensure that there are appropriate reporting systems in place to enable the board to adequately monitor those activities and the associated risks. Examples of the regulatory regimes that have triggered *Caremark* oversight duties include aircraft and food safety regulations, and FDA and other pharmaceutical regulations.

On Sept. 9, President Joe Biden announced his six-pronged [COVID-19 Action Plan](#), which will have a significant impact on employers across the country by mandating vaccinations for many employees and requiring regular testing of certain others. Although key details are unknown at the time of this writing, the plan will have a significant impact on many private sector employers, particularly companies that contract with the federal government, those that receive Medicare or Medicaid

reimbursement and, most sweepingly, companies with 100 or more employees. The rule applicable to employers of more than 100 individuals is being developed by OSHA now and, once issued via temporary standard, will require these companies to ensure that their staff is fully vaccinated against or tested weekly for the COVID virus. Employees who are not vaccinated will have to show proof of a negative virus test before reporting to work. The White House estimates this requirement will impact over 80 million workers.

OSHA is seeking to issue its new rule initially pursuant to rarely used emergency authority that it may exercise only where there is evidence of “grave danger from exposure to ... agents determined to be toxic or physically harmful or from new hazards.” This basis for the regulation will almost certainly be challenged in court, but in the meantime, it sets forth an unambiguous statement of the importance of a vaccine requirement for employee safety.

Although the COVID-19 Action Plan includes frequent testing as an alternative to vaccination, boards may justifiably be concerned that if the company fails to comply with the regulations, this response could be second-guessed

in lawsuits brought alleging that the board's response reflected inadequate oversight of the “grave danger” to employee (and possibly customer) safety posed by COVID-19. Even if the board requires compliance but relies primarily on testing and not by mandating employee vaccinations, this could possibly still be alleged to be an inadequate response to the risk.

Even if the proposed regulations when promulgated are less severe, or if they are delayed or invalidated because of court challenges, it will be difficult for boards to argue in the current environment that properly addressing the risk to employee safety presented by COVID-19 is not an essential and mission critical function that triggers the board's active duty to oversee the corporation's response. Boards should consider carefully how they respond to COVID-19 generally, and not just to the COVID-19 Action Plan. It is also important for boards to document that they have done so. ■

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