



How In-house Counsel Safeguard Organizational Values

Employment and Labor

Technology, Privacy, and eCommerce



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Great organizations lead with their values. And those values can go beyond short-term shareholder value to create an abiding culture for long-term success (and, not coincidentally, long-lived and predictable shareholder value).

But when laws and regulations conflict with an organization's values, it is skilled, practical in-house counsel who can help lead an organization to live by its values alongside the values enshrined in law.

A COVID case study

When the US federal government instituted vaccine mandates (in an [executive order](#) for federal government contractors and for large private employers with a testing alternative under the [Occupational Safety and Health Administration \(OSHA\)](#)), those mandates clashed with many organizations' value of staying out of employees' decisions when it comes to their health.

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While this conflict played out in the courts, organizations had to deal with the conflict internally. And in-house counsel's role was to mediate the legal risk (breach of contract for federal contractors and OSHA violations for companies in general) alongside the stalemate caused by employees refusing to get vaccinated.

This meant working across various areas of the law, from employment law (to understand competing legal requirements for accommodating employees' religious beliefs and disabilities) to litigation (to understand the scope and effect of various injunctions on the mandates). For federal contractors, this

also meant exploring federal contract law to determine when implementing clauses would require individual contracts to be staffed only with fully vaccinated employees.

Ultimately, for many organizations, this meant making compromises between the values of medical autonomy and following legal requirements by requiring employees to become fully vaccinated (subject to reasonable accommodations and medical exceptions) to keep their jobs, all in an environment where retaining talent was already difficult.

In-house counsel's role in mediating this conflict was invaluable: Explaining to senior management (and through guidance and interactions with human resources, to employees in general) why the law required vaccination, the continued respect organizations have for employees making their own health decisions, and the ways that the law itself provided for accommodations and exceptions to the mandates.

A mirror-image case study

In reaction to the federal vaccine mandates, several [states restricted any mandate](#). This set up another conflict, one between state law and some organization's value of keeping their employees safe (not to mention [conflicts](#) between the federal mandates and state law).

Many employees had just as vehement a reaction to the idea that vaccines would not be required as the previous reaction from employees who disagreed with vaccine mandates. Some employees have health conditions making them vulnerable to serious complications from COVID (or have vulnerable family members). When vulnerable employees (or caregivers for vulnerable family) chose to become fully vaccinated, some of them understandably disagreed with state laws prohibiting vaccine mandates — and wanted their coworkers to be vaccinated too.

Organizations now had to deal with clashes between:

- Federal vaccine mandates and state anti-mandates;
- Employees who agreed with mandates and wanted their coworkers to be vaccinated (often for other health reasons); and
- Employees being asked to do something related to their personal health that they disagreed with (often for other understandable reasons).

And this was not just a conflict between laws or between employee viewpoints. It was also a direct conflict between two values commonly held by many organizations: Respecting employees' decisions about their health versus keeping employees safe based on accepted, authoritative medical guidance.

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The value of in-house counsel

In the end, the US Supreme Court struck down the OSHA vaccine mandate. And (as of mid-2022), [injunctions](#) and a decision by the US federal government to abstain from enforcement prevent the immediate effect of the federal contractor mandate.

But many organizations have not been able to wait because they faced the possibility of OSHA violations or breaches of their government contracts. This was especially true with COVID vaccine mandates because of the science: If the law requires your employees to be fully vaccinated once it's in effect and it takes at least two weeks to become fully vaccinated, it's unworkable for an organization to wait in reliance on an injunction and enforcement abstention that could disappear immediately.

So, like with the increasingly frequent instances in which laws are being challenged in court, organizations did not have the luxury to delay action until the courts sort out what the law is. And, of course, organizations could not depend on the courts to sort out the elemental conflict between their own competing values.

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Instead, it was up to in-house counsel to help lead organizations through these conflicts, conflicts that were (and remain) difficult. But those same conflicts illustrate how in-house counsel can provide value like no one else in an organization.

For example, some organizations relied on the federal government's own questionnaire about religious beliefs to address the thorny issue of how to evaluate requests for religious accommodations. And one such accommodation was to require those who did not get vaccinated based on an accommodation to wear a mask while at work to protect vulnerable coworkers.

As in-house counsel, we do our most valuable work when we help navigate an organization's conflicting values by providing clear, practical advice, not only about the complex legal landscape but, more importantly, practical business advice about what an organization's leadership really wants to know: What should we do?

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