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# A Jury Of Your Vaccinated Peers: Attys Wary Of Mandates - Law360

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By [Chris Villani](#)

Law360 (August 13, 2021, 3:26 PM EDT) -- COVID-19 vaccination disparities across racial and political lines could skew jury pools if judges begin requiring panel members to get shots, adding a new wrinkle for trial attorneys as the highly contagious delta variant prompts stricter courtroom health measures.

Vaccine mandates have become more common for employers in both the public and private sector. Some federal judges, fearing the spread of COVID-19 inside their courtrooms, have openly considered requiring vaccination for jurors who must sometimes sit close to one another during a trial or deliberation.

But experts told Law360 that unequal access or interest in getting vaccinated could skew jury pools, potentially putting corporate defendants in civil trials or criminal defendants at a disadvantage.

"Right now the number one determinant of vaccine resistance is politics," said Robert Field, professor of law, health management and policy at [Drexel University](#). "In areas that are deeply conservative, you would be more likely to exclude people with that

political orientation."

According to a recent Politico/Morning Consult poll, more than 80% of Democrats and half of independent voters are in favor of mandatory vaccines, while only about a third of Republicans back such measures. Polls also show that Republicans make up the largest demographic that is hesitant or refusing to get vaccinated.

That skew could have real-world implications for juries if people have to be vaccinated in order to serve, Field said.

"It might affect the propensity of jurors to trust police accounts, to evaluate the severity of punishment for a crime, or the seriousness of criminal violations," he said. "There could be different views about the relative culpability of corporate defendants versus consumers or environmentalists or other kinds of plaintiffs."

Field said he could envision a corporate defendant in a civil case challenging a juror vaccine mandate. That's what played out in Ohio in June, when U.S. District Judge Dan Aaron Polster granted a bid from various pharmacy defendants, including [Walgreens](#), CVS and [Rite Aid](#), to reconsider his order making vaccination a requirement for all prospective jurors in multidistrict opioid litigation.

After initially saying he would require vaccines for jurors, Judge Polster reconsidered and said he agreed with the pharmacies' argument that vaccine disparities "could make the jury 'less likely to reflect a fair cross-section of the community,'" quoting a bedrock constitutional principle.

U.S. District Judge Douglas P. Woodlock in Boston also floated the idea of a juror vaccine mandate for an upcoming corruption trial, though he has yet to make a final determination and said he wants

to hear from the parties first.

A representative for prosecutors in that case declined to comment on the issue. One of the defendants' lawyers, Martin G. Weinberg of Martin Weinberg Law, told Law360, "I can express my views as a citizen but must reserve my views as ... defense counsel unless and until Judge Woodlock invites counsel to articulate their position on whether a procedure that excludes those who refuse to be vaccinated is in conflict with a client's right to a cross-section of impartial jurors."

Nick Carter, a litigator and partner at [Todd & Weld LLP](#) in Boston, said he is in favor of vaccines generally and supports mask mandates for jurors and anyone in the courtroom who isn't speaking. Still, he was skeptical of the idea of a juror vaccine mandate.

"We need a representative jury pool, and I'm concerned a vaccine mandate will skew the juror pools so that certain segments of the community don't get to participate in the jury process," Carter said. "That would be bad for the process and bad for civic engagement."

Though Massachusetts is among the most vaccinated states in the country, Carter pointed to statistics that show that people of color are less likely to have been vaccinated than white people.

"I don't think I would challenge it," he said of a mandate. "I just think as a policy matter it's not a good idea."

Joel Rosen of Rosen & Goyal PC, a member of the [Massachusetts Bar Association](#)'s Health Law Section Council, said that despite the Ohio judge's reversal, a challenge to a vaccine mandate for jurors is likely an uphill battle.

"I think you'd really have to make a strong case that this vaccine mandate is a stand-in for the exclusion of people of a certain race," Rosen said. "The mere statistical fact that nationally African Americans are said to have lower vaccination rates than white Americans would not win the day in most appeals."

An unvaccinated juror who really wanted to serve would have little hope of mounting a successful challenge to a mandate, Rosen added, noting that jury service is not a right.

"Certain people can't serve on a jury and people can be struck for no reason. It's not a privilege, it's a duty," he said. "So you can't worry about the impact on the rights of the jurors. What you need to think about is the impact on the parties trying the case."

Where the challenge is raised could have an effect, as well. Barely half of Ohio's population has received at least a single dose of a COVID-19 vaccine, compared to nearly three-fourths of people in Massachusetts. Henna Budhwani, an assistant professor of public health at the [University of Alabama at Birmingham](#), said vaccination rates are a moving target, making the issue more complicated.

"In some communities, there is close to parity in rates, while in others there are notable disparities. We don't know how rates will look a year from now," Budhwani said. "Also, in communities with large employers that have mandated vaccination, such as academic medical centers, you may see higher rates among these employees."

Budhwani said she recognizes the pro-public health rationale of mandating vaccines for jurors but added, "I think it could lead to unintended consequences affecting the profile of eligible jurors."

The Boston federal court has been empaneling juries on Tuesdays. During a conference for an upcoming trial in the "Varsity Blues" college admissions case, U.S. District Judge Indira Talwani told the attorneys that potential jurors who have health concerns, child care needs, or other difficulties brought on by the pandemic are having their issues addressed on Monday, so they are weeded out before getting to the individual session where they might serve.

"It doesn't seem to have, in effect, made any change in the demographics that we can observe," Judge Talwani said.

If anything, it has sped up the jury selection process, because people who are itching to get out of jury duty and have numerous arguments ready to go are eliminated the day before empanelment, she added.

"It has been surprisingly smooth," Judge Talwani said.

Tangible evidence of a vaccine mandate affecting a jury pool's makeup may take a while to emerge, said Lawrence Friedman, a professor of law at New England Law, Boston.

"The U.S. district court could enact some sort of 'must be vaccinated' rule on its own, then you have to look to see whether the jury pools they are able to assemble are as diverse as before the rule was put in place," Friedman said. "It might be that certain segments, or ZIP codes were reduced because of the mandate and that were then connected to a person's race."

Friedman said defense lawyers in a criminal case might be the most likely to challenge juror vaccination issues. He could envision anything from not liking the makeup of the panel to worrying about a jury wanting to deliberate more quickly because one person isn't vaccinated and the others don't want to be around them.

How any of those challenges might hold up on appeal is an open question, he said.

"As with everything else in COVID, this is uncharted territory," Friedman said. "But don't doubt the ability of defense attorneys in criminal cases to make hay out of almost anything."

--Editing by Nicole Bleier.

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