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Vaccine Mandates: Latest Considerations for
US Employers

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Topics to Cover

- The Legal Landscape
- State Vaccine Mandates Applicable to Private Employers
- Types of Employer Vaccine Mandates
- Vaccine and Testing Requirement Considerations
- Collecting Vaccination Information
- Reasonable Accommodations
- Labor Issues
- Resources

Legal Landscape

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Federal Law Permitting Mandates

- Federal law permits employers to mandate COVID-19 vaccination for employees physically entering a workspace.
- Federal antidiscrimination laws permit vaccine mandates so long as employers abide by reasonable accommodation requirements in Title VII and ADA for persons with sincere religious beliefs and disabilities.
- Emergency Use Authorization (EUA) status of vaccines **does not** prevent an employer from mandating vaccination.
 - Full authorization for the Pfizer vaccine is expected in September.

Courts and DOJ Have Upheld Vaccine Mandates

- Challenges by plaintiff groups that vaccines only have EUA authorizations and, thus, cannot be required have uniformly failed.
- Opinions from Department of Justice (DOJ) and three federal courts, including a circuit court, uphold the ability of an employer/state entity to mandate vaccine for individuals using their services.
 - All authorities rejected the argument that EUA authorization prohibited mandates
 - *Houston Methodist* and DOJ decisions held employers are free to establish terms and conditions of employment, including that employees be vaccinated.

Federal Mandates for Government and Federal Contractors

- On July 26, US Department of Veterans Affairs became the first federal agency to mandate that its employees be vaccinated for COVID-19.
- On July 29, President Biden announced that every federal government employee and **onsite contractor** must attest to being fully vaccinated. Anyone who does not provide such an attestation must:
 - Wear a mask on the job no matter their geographic location;
 - Physically distance from all other employees and visitors;
 - Comply with a weekly or twice-weekly screening/testing requirement; and
 - Be subject to restrictions on official travel.
- Biden administration is considering similar rules for all federal contractors.

State Vaccine Mandates Applicable to Private Employers

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States' Positions on Mandates by Private Employers

- Numerous states have issued written guidance advising or at least directly implying that private employers have discretion to implement vaccine mandates – *e.g.*, CA, CO, IL, IN, MD, MA, NV, NJ, NC, OR, PA, VA, WA, and DC.
- Governors in a number of states issued orders requiring all healthcare workers to be vaccinated – *e.g.*, CA, NJ, NY, OR, and WA.
 - CA and NJ orders extend to non-employees who work in healthcare facilities.
- Only one state, Montana, has passed legislation prohibiting discrimination on the basis of vaccine status by private employers.
 - Similar legislation has been introduced in other states, such as Texas, but there are no indications that passage in any of those states is likely.
- Vaccine passport laws not implicated.

States With Testing Alternatives

- **States Requiring Public Employees To Be Vaccinated Or Get Regular Testing:** CA, CO, DE, DC, HI, MD, MN, NV, NM, NY*, NC, PR, VA
 - There is no testing option for patient-facing healthcare workers at NY state-run hospitals.
- **States Requiring Workers in Health Care, Long-Term Care and/or High-Risk Congregate Settings To Be Vaccinated:** CA, CT, DE, DC, NY, MA, MD, MN, NJ, OR, PA, PR, RI, VT, WA
 - Some also allow employees to “test out” (*e.g.*, New Jersey, Delaware, Oregon)
 - Some states’ requirements apply only to state employees in state health care facilities or high-risk congregate care facilities (*e.g.*, PA, RI, VT).
- KY “strongly encourage[s]” all contractors and state employees working in state-run health care facilities to get vaccinated. If any of the staff in these facilities is unvaccinated, they will be tested at least 2x per week.
- CA Dep’t of Public Health requires all workers in K-12 schools to get vaccinated or be tested at least 1x per week.
- PR requires employees in dining and entertainment venues to get vaccinated, get tested weekly, or provide a positive COVID-19 test result from within the last three months and proof of recovery.

Types of Employer Vaccine Mandates

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Employer Vaccine Mandates – Varieties

- An increasing number of employers are requiring that employees be fully vaccinated against COVID-19 in order to enter employer facilities.
- Varieties of vaccine mandates:
 - Hard: All employees entering facilities must be fully vaccinated or qualify for an exemption due to disability or sincere religious belief, and everyone must return to working onsite
 - Limited/Targeted: Vaccination mandatory for certain classes of employees (*e.g.*, those interacting with public, those working onsite) or new hires
 - Soft: Employees have option of receiving a vaccine or submitting to weekly testing requirements

Vaccine and Testing Requirement Considerations

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Who Pays for Vaccines or Tests?

- Federal government has said that it will pay for the cost of the vaccine itself.
 - Any costs associated with administration of vaccine will likely be reimbursable through Medicare, Medicaid, private insurance, or Provider Relief Fund, administered by Health Resources and Services Administration (HRSA).
- While federal law requires insurers to fully cover COVID tests ordered by a healthcare provider, routine workplace tests are exempt from federal requirement.
- Some states (*e.g.*, California, Virginia) require employers to pay for COVID-19 tests if employer requires employee to obtain the test or if employee obtains the test because it is effectively required for the job.

Who Pays for Time Spent Getting Vaccinated or Tested?

Issue of compensation for time spent receiving a COVID-19 vaccine or COVID-19 test is unsettled.

- **CDC:** Guidance from the CDC regarding Workplace Vaccination Programs encourages employers (who are not hosting a vaccination clinic at their workplace) to provide paid leave to employees to seek COVID-19 vaccinations.
- **Title VII/ADA:** If testing is done in accordance with an ADA or Title VII accommodation, employer **must** pay for testing.
- **FLSA:** U.S. Department of Labor issued informal guidance saying employers must pay for time spent obtaining mandatory COVID-19 tests, and would likely take similar view for mandatory COVID-19 vaccine.
- **State Law:** Some states (*e.g.*, California, Virginia) require employers to pay for time spent taking a mandatory COVID-19 test.

Additional Considerations Around Whether to Mandate Testing or Offer Testing as an Alternative to Vaccination

- Popular option as a result of government guidance, avoids some of the issues relating to accommodations, and reduces employee backlash
- But creates other issues:
 - Administrative burden
 - Wage and hour/cost concerns
 - Enforcement issues
 - Employee morale and new accommodation requests from vaccinated employees
 - Privacy and logistical issues
- Also may create a disincentive to getting vaccinated
- Some employers considering mandatory testing for all employees

Are Employers Required to Provide Paid Sick Leave for COVID-19 Vaccine Side Effects?

- Some individuals may experience mild or moderate side effects following a COVID-19 vaccination.
- Whether employees are entitled to paid sick leave to recover from such side effects depends on an employer's sick leave policies and state and local laws.
 - *E.g.*, Philadelphia passed an ordinance expanding the permitted uses of its public health emergency leave to allow employees to use this benefit when obtaining or recovering from a COVID-19 vaccine.
 - *E.g.*, Los Angeles city and county adopted ordinances requiring employers to provide paid sick leave for vaccine-related time off.

Collecting Vaccination Information

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Methods of Collecting Vaccination Information

- Options for Verifying Vaccination Status:
 - Ask employees to upload to HRIS system or email to a designated email box a digital copy of CDC's COVID-19 Vaccination Record Card;
 - Use managers or HR to verify employees' COVID-19 Vaccination Card and record their vaccination status, without collecting the Cards themselves;
 - Ask employees to complete a form, either physically or electronically, providing vaccination information (*e.g.*, name, date of vaccination(s), manufacturer);
 - Use a third party (*e.g.*, a wellness program administrator or an on-site healthcare provider) to collect vaccination information from employees; or
 - Ask employees to self-report and/or attest to their vaccination status.
- An employer's decision on which system to use will depend on the nature of its workforce and the resources available, along with any state or local requirements.

Collecting Vaccine Information

- EEOC: Asking about vaccination status is not a disability-related inquiry.
- EEOC: Treat “documentation or other confirmation of vaccination” as if it were a confidential medical record under the ADA and applicable state law.
- Some state privacy and medical information laws (*e.g.*, California) require that vaccination status information be maintained as confidential.
- Information contained in vaccine card (*e.g.*, vaccine manufacturer, date of vaccination, location of vaccination, vaccine batch number) should be kept separate from an employee’s personnel file.
- In general, vaccination status should only be shared on a need-to-know basis.

Medical Accommodations and COVID-19 Vaccine Mandates

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Verifying Need for Accommodation

- Under the ADA, an employer can request documentation from a healthcare professional showing that:
 - The person has a medical condition, and
 - The person needs the requested accommodation as a result of functional limitations stemming from that condition

Verifying Need for Accommodation

- Common issues with requests for exemption from COVID-19 vaccination:
 - Vagueness: Documentation doesn't clearly explain need for exemption based on limitations
 - Conclusory: Documentation merely says exemption is required due to medical need with no further information
- If initial documentation is insufficient, an employer can request additional information from the employee or the employee's healthcare provider.
 - This will most often involve information explaining the *need* for an exemption as opposed to the presence of an underlying disability or condition.

Verifying Need for Accommodation

- In **rare cases** where an employer has objective information from reliable sources indicating that the employee or healthcare provider is providing false information, you may request an independent medical examination.
- Employer must pay for examination in those cases.

Do You Have to Provide It?

- Employers only need to provide accommodations that do not impose an **undue hardship** on the finances or operations of the employer.
- Undue hardship is defined as “significant difficulty or expense.” Factors relevant to an undue hardship determination related to a vaccine exemption include:
 - Inability to maintain social distancing given the nature of the job
 - Diminished capacity at certain facility due to need to implement social distancing
 - Diminished productivity at same facilities due to need to implement social distancing
 - Increased costs associated with cleaning and testing protocols
- Unlikely to meet ADA standard in most cases

Direct Threat

- It's also an undue hardship if an employee poses a direct threat to the health and safety of themselves or others.
- COVID-19 infection and the unmitigated risk of COVID-19 is a direct threat, according to EEOC.
- The key question is whether there are measures that can sufficiently mitigate that threat, such as:
 - Masks
 - Social distancing
 - Testing
- Public health guidance is constantly fluctuating, and that affects this calculation.

Religious Accommodations and COVID-19 Vaccine Mandates

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Verifying Need for Accommodation

- Employees must show that a sincere religious belief, practice, or tenet conflicts with a work requirement.
- An employer **can** request documentation to verify this, examples include:
 - Letter from a pastor
 - Employee statement/explanation of religious beliefs

Verifying Need for Accommodation – Sincerity

- Title VII protects *sincerely* held religious beliefs.
- The concept of religion is broad, but it does **not** include:
 - Political, economic, or social beliefs; or
 - Mere personal preference
- Employers usually will not have reason to question sincerity of an employee's belief, but the following can undermine sincerity:
 1. Actions inconsistent with beliefs
 2. Desirability of accommodation for secular reasons
 3. Questionable timing of request/moving target

Verifying Need for Accommodation

- Common issues with requests for exemptions to vaccine mandates include:
 - Requests tied to “Accommodation-Mill” churches or websites
 - Vague requests
 - Requests combining religious and political beliefs
 - Requests contrary to announced church positions on receiving the COVID-19 vaccine
- Employers can ask for follow-up information in these instances, such as whether an employee has received vaccines in the past, etc.

Do You Have to Provide It?

- Employers only need to provide accommodations that do not impose an undue hardship on the finances or operations of the employer.
 - Undue hardship is defined under federal law as more than "*de minimis*" costs
 - This is **LOWER** than the ADA standard
 - Caveat that state law tests may differ/impose a higher threshold (*e.g.*, California)
- Employers can also require that employees not pose a safety risk, which is the same as direct threat.

Do You Have to Provide It? Undue Hardship

- Factors relevant to undue hardship under Title VII are the same as under ADA.
- The difference is these can easily add up to more than *de minimis* costs for religious requests.

Labor Issues

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Labor Law Considerations Under NLRA

- Under National Labor Relations Act (NLRA), absent a legal mandate that employees be vaccinated, a vaccine requirement likely would be considered a mandatory subject of bargaining for most employers.
 - Vaccine mandate is likely a mandatory subject of bargaining because of the consequence of termination or suspension if an employee fails to comply.
 - Vaccine/frequent testing alternative is likely a mandatory subject of bargaining because of implicit threat of adverse consequences if employee refuses to comply with either alternative.
- As a result, employers should consider:
 - (1) giving the union notice and an opportunity to bargain over the issue; or
 - (2) relying on language in an existing collective bargaining agreement (CBA) or other agreement with the union that arguably gives the company the right to impose the requirement unilaterally.

Labor Law Considerations Under NLRA

- We recommend that employers provide unions with notice and opportunity to bargain over mandatory vaccination policies and vaccine/frequent testing alternatives before they are implemented or announced as final decisions.
 - No prejudice to any management rights or other arguments under terms of a CBA
 - Likely expected by current NLRB

Labor Law Considerations Under NLRA

- Due to exigent circumstances of pandemic, employers can push bargaining to impasse fairly quickly and then implement policy if no agreement is reached.
- Employers can do this mid-term unless CBA restricts their right to implement such policies or health and safety measures unilaterally.
 - Union may still grieve the policy and seek to arbitrate.
 - Unless there is contract language that fairly clearly restricts the company's right to implement such a policy, bargaining to impasse and implementing is lawful from an NLRB perspective even if mid-term.
 - NLRB should defer the issue to arbitration if the union goes that route.

Labor Law Considerations Under NLRA

- Even in a non-unionized setting, concerted activity by employees (such as organizing, discussing, or communicating) concerning a mandatory vaccination policy is likely protected activity under Section 7 of the NLRA.

Resources

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Morgan Lewis COVID-19 Vaccine Issue Resources

- State and Local Tracker Weekly Tracker
 - Monitors state and local orders issued by hundreds of jurisdictions around the country; available with weekly updates on a monthly basis
- Vaccine Mandate Toolkit
 - Memo on Key Legal Issues Regarding Mandatory COVID-19 Policies
 - Template COVID-19 Mandatory Vaccination Policy (no test-out alternative)
 - Template COVID-19 Mandatory Vaccination Policy (with test-out alternative)
 - Template Communication to Employees Announcing Vaccination Requirement
 - Sample Attestation Form Regarding Vaccination Status
 - Guidance on assessing requests for exemptions based on sincerely held religious beliefs, including template request form
 - Guidance on assessing requests for exemptions based on disability, medical condition, and/or pregnancy, including template request form

Additional Morgan Lewis Coronavirus COVID-19 Resources

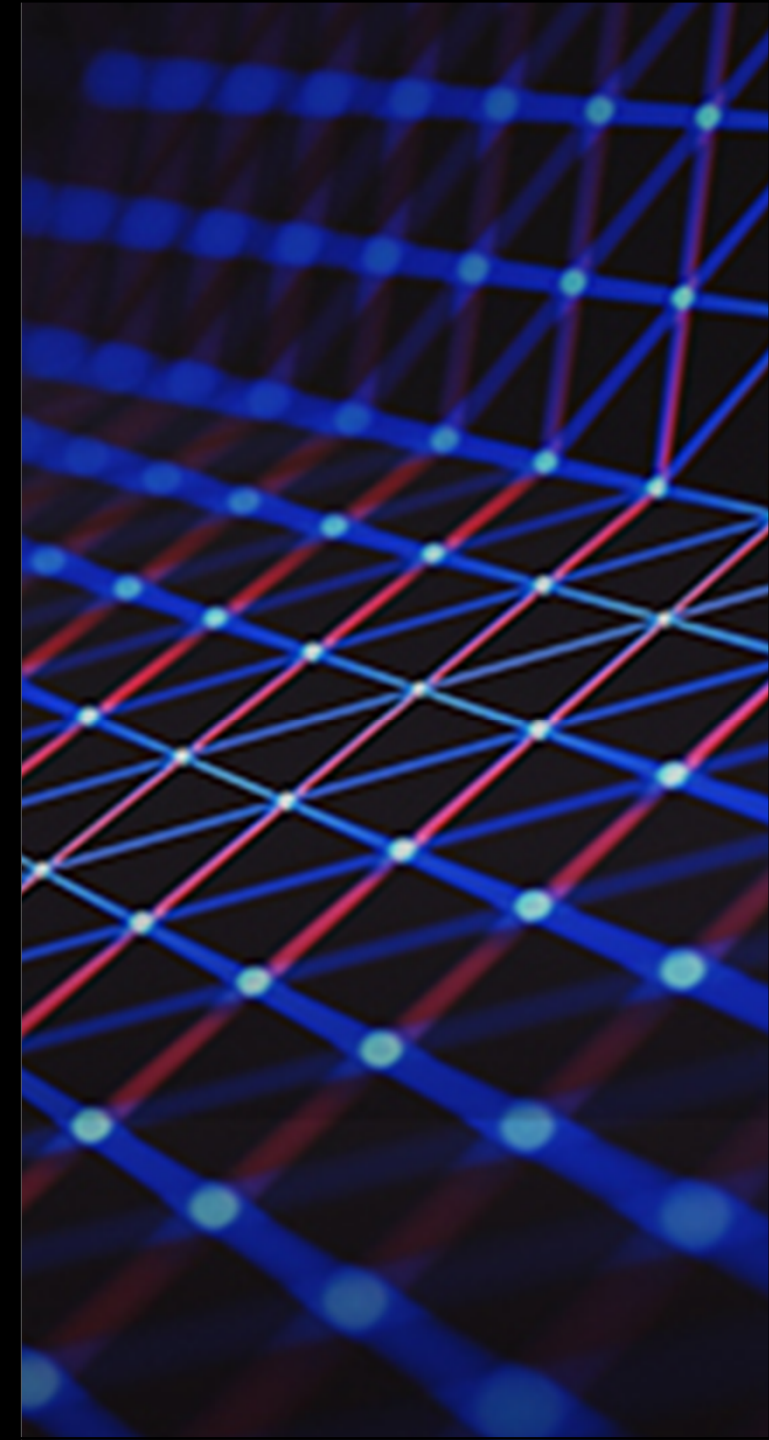
We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



Questions?

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