



Recent Trends in COVID Vaccine and Mask Mandates for Employers

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Nichole Atallah counsels clients in a broad range of employment matters, including compliance with Title VII, ADA, ADEA, FLSA/wage and hour, FMLA, wrongful termination, and reduction in force. She advises clients in general business matters, including interpreting and drafting employee compensation and benefit arrangements, confidentiality, non-compete and non-solicitation agreements, as well as separation agreements.

Ms. Atallah has substantial experience assisting government contractors with FAR Part 22 compliance, including the Davis Bacon Act, the Service Contract Act, and Equal Employment Opportunity requirements specific to government contractors. Additionally, she has advised tribally-owned entities on unique labor and employment issues, including Native American preferences, sovereign immunity questions, and Title VII jurisdiction.

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Sarah Nash advises clients on a wide variety of labor and employment issues including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, anti-discrimination law, and whistleblower law. She provides employers counsel regarding terminations, non-disclosure agreements, personnel issues, wage and hour issues, and employment practices and policies. Ms. Nash has also advised tribally-owned entities on unique labor and employment issues, including Native American preferences, sovereign immunity questions, and Title VII jurisdiction.

Ms. Nash has litigated cases before federal and state courts, including representing clients at arbitration, administrative proceedings, and mediation. She has participated in litigation in a number of practice areas, including labor and employment, administrative procedure, constitutional law, trademark law, and appellate practice.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

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- Audits & Investigations
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- Business & Transactions
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- Corporate and Organizational Governance
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- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Labor & Employment for Government Contractors
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital



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Introduction

- Approximately $\frac{3}{4}$ of the vaccine-eligible population in the United States have received at least one dose of a vaccine to combat the novel coronavirus (COVID-19)
 - Many businesses and employers are looking forward to a “return to normal”
 - Impact of Delta variant
 - CDC: Fully vaccinated individuals can resume activities but must continue wearing masks in areas with “high” or “substantial” transmission (nearly every county in U.S.)
- However, many Americans are still hesitant to get a COVID-19 vaccine
- Should employers implement a mandatory vaccination requirement as part of their return-to-work policies?
 - Multifaceted decision with legal and practical considerations
 - On 9/9/2021, Biden Administration announced vaccines will be mandated for certain employers and all government contractors

Biden Administration Actions

- On 7/29/2021, President Biden introduced vaccine/testing mandate for onsite federal employees and contractors.
 - Established the Safer Federal Workforce Task Force to oversee the development and implementation of agency COVID-19 workplace safety plans across the federal government
 - Issued Agency Model Safety Principles, which were to be adopted by federal agencies and addressed with onsite contractor personnel
 - Fully vaccinated employees and onsite contractors:
 - must sign an attestation confirming vaccination status;
 - must wear a mask indoors if working in a locality with high or substantial transmission rates in accordance with the CDC guidance; and
 - not subject to any government-wide restrictions on official travel

Biden Administration Actions

- On 7/29/2021, President Biden introduced vaccine mandate for onsite federal employees and contractors.
 - Employees and onsite contractors who are not fully vaccinated and / or unwilling to attest to their vaccination status :
 - must submit to weekly or bi-weekly COVID-19 tests, which may be provided by the agency, though these details are yet to be determined;
 - must wear a mask and socially distance; and
 - subject to government-wide restrictions on official travel.
 - The policy requires that federal agencies conduct frequent health checks and symptom monitoring, among other things

Biden Administration Actions

- On 9/9/2021, President Biden expanded on the previously issued mandate and announced sweeping updates to his national strategy to combat COVID-19.
 - **Employers with 100+ Employees Will Be Required to Ensure Vaccination or Weekly Testing** - OSHA will be issuing an emergency rule that requires public and private employers with at least 100 employees to ensure workers are vaccinated or else require weekly testing for unvaccinated workers.
 - **Employers with 100+ Employees Must Provide Paid Leave for Employee Vaccination** - the Families First Coronavirus Response Act currently provides covered employers with the option to provide this leave and receive a tax credit for time; however, this benefit is scheduled to expire on September 30, 2021.
 - **Requiring Vaccinations for Healthcare Workers at Medicare and Medicaid Hospitals and in Healthcare Settings** - CMS will require vaccinations for workers in most healthcare settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.

Biden Administration Actions

- **Federal Contractors Will Be Required to Get Vaccinated**
- Executive Order 14042 called for new guidance on implementation of vaccine mandate and explanation of protocols required of contractors and subcontractors. Guidance issued 9/24/2021.
 - As of 10/14/2021, agencies will be required to incorporate FAR 52.223-99 in new, renewed, and extended contracts.
 - Applies requirement to employees working “on or in connection with” a covered contract (including remote employees) and to employees working at the same worksite as said employees.
 - Contractors must verify employees’ vaccination status.
 - Flow down obligations.
 - Masking and social distancing requirements as well as designation of workplace safety coordinator and obligation to monitor community transmission rates.
 - Initial deadline for compliance is **12/8/2021** for covered contracts.

Biden Administration Actions

- Missing pieces:
 - How employers are to respond to employee requests for medical and religious accommodations
 - Which employees are considered to be working “on or in connection with” a covered contract
 - How/when will agencies decide to incorporate the new FAR clause
 - How companies subject to the testing alternative will be expected to pay for employee testing (increased free testing access)
 - How mandate will be enforced and what the penalties and repercussions are for noncompliance

Regulations Covering COVID Vaccination Policies

- Prior to the pandemic, it was not uncommon for employers to require their workforce to receive inoculations against certain viruses that posed a threat to public health
 - E.g., seasonal influenza
- Federal regulatory authority
 - Equal Employment Opportunity Commission (EEOC)
 - COVID-19 poses a “direct threat” to health in the workplace
 - Employers permitted to implement enhanced safety measures
 - Occupational Safety and Health Administration (OSHA)
 - General Duty Clause: furnish employees with workplace free of workplace hazards, which may include encouraging vaccines

Federal Regulatory Updates

- EEOC
 - December 12, 2020
 - In FAQs, EEOC implicitly endorsed vaccine requirements for onsite work
 - May 28, 2021
 - Under federal EEO law, employers are permitted to adopt mandatory COVID vaccination policies
 - Subject to accommodations as required under the Americans with Disabilities Act and Title VII
- OSHA
 - January 29, 2021
 - Focuses on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces)
 - Contains recommendations, as well as descriptions, of mandatory safety and health standards
 - Updated June 10, 2021 – encouraging COVID vaccination
 - June 10, 2021
 - Protect healthcare and healthcare support service workers from occupational exposure to COVID in settings where people with COVID-19 are reasonably expected to be present
 - Requires non-exempt healthcare facilities to develop and implement a plan to identify and control COVID in the workplace
 - Expect issuance of ETS in the coming weeks pursuant to Biden's 9/9/2021 Plan

Accommodating Exemptions to Mandatory Vaccination Policies

- In general, employees who refuse to receive one of the available COVID vaccinations are subject to termination
- **EEOC warning**: Employers must permit exemptions to their vaccination requirements as an accommodation under the ADA and Title VII
 - Legally protected reasons for not getting vaccinated (e.g., allergic reaction to a vaccine's ingredients)
 - Requesting proof of COVID-19 vaccination is not a disability-related inquiry under ADA
- Be aware: Asking why an employee has chosen not to be vaccinated could elicit information about a disability or genetic information

Accommodations for ADA Disabilities

- If an employee requests an exemption on the basis of a qualifying disability, an employer is required to determine whether the request can be accommodated
 - Subject to an undue burden (i.e., significant difficulty or expense)
 - Case-by-case analysis
- Engage in an interactive process
 - Required under the ADA to find a possible accommodation
- Possible accommodations include providing personal protective equipment (PPE), altering work times or assignments, and telework arrangements
 - An employer need not necessarily grant an employee their requested accommodation

Accommodations for Sincerely Held Religious Beliefs

- Title VII requires employers to reasonably accommodate an employees sincerely held religious beliefs
 - Similar to the ADA, only if no undue burden is imposed
 - Again, case-by-case analysis
- Can be difficult to determine whether an employee's religious beliefs are "sincerely held"
 - Not unusual for an employee to present a set of nontheistic beliefs
- What is a "sincerely held religious belief"?
 - Generally, sincerely held religious beliefs are "moral or ethical beliefs as to what is right and wrong" that are held by the employee with the same sincerity as that of traditional religions
- Engage in an interactive process

State Laws

- Employers must be aware of their respective state laws and pending legislation concerning mandatory vaccination policies
 - May impose additional obligations
 - May prohibit mandatory employee vaccinations
- That said, the newly-issued mandate from the Biden administration may pose a conflict with certain state laws
- May see litigation surrounding Biden's mandate
 - Montana: Prohibits employers from denying employment or discriminating against employees based on vaccination status
 - Florida: prohibits any business from requiring customers to provide documentation certifying COVID vaccination
 - Texas: (NEW) requires accommodation where individual objects to vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19
 - Santa Clara, California: Employers are required to obtain a record of workforce's COVID vaccination status or face a \$5k per day fine

Conclusion

- Doing your best with imperfect information. Little to no guidance as of yet and expect lots of questions, lack of clarity, and issues to arise with new guidance and protocols
- For small businesses, deciding whether to require employees to be vaccinated and navigating the accommodation process can be difficult
- Critical that employees understand how to initiate the accommodation process
- Critical that any health information obtained from employees is handled with care and kept confidential
- Restoring employee confidence in returning to work is important

Questions?



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