

The Covid-19 Vaccine: Current Developments and Best Practices

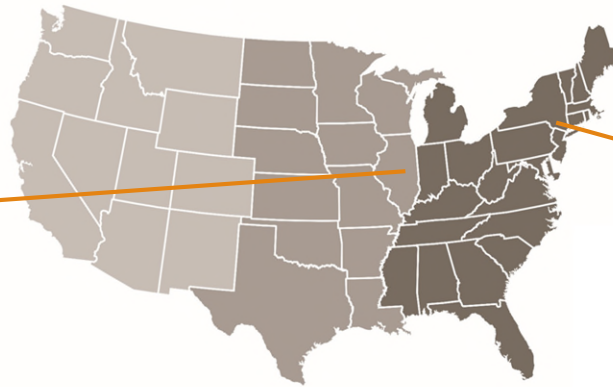
WBC – October 14, 2021

JEREMY GLENN AND MICHAEL SCHMIDT, COZEN O'CONNOR



Speakers

Chicago
Jeremy Glenn



New York
Michael Schmidt



How Did We Get Here?

Delta Variant

Updated Mask Mandates Due to Surge

- CDC – revised guidance – July 27, 2021: recommend that all individuals wear masks in indoor public spaces whenever they are in an area of substantial or high transmission.
- OSHA – adopted CDC’s guidance – August 13, 2021: **recommending** that everyone wear a mask in indoor public settings in areas of substantial and high transmission regardless of vaccination status.
- Guidance also states, “OSHA suggests that employers consider adopting policies that require workers to get vaccinated” (more on that later)

Mask Mandates

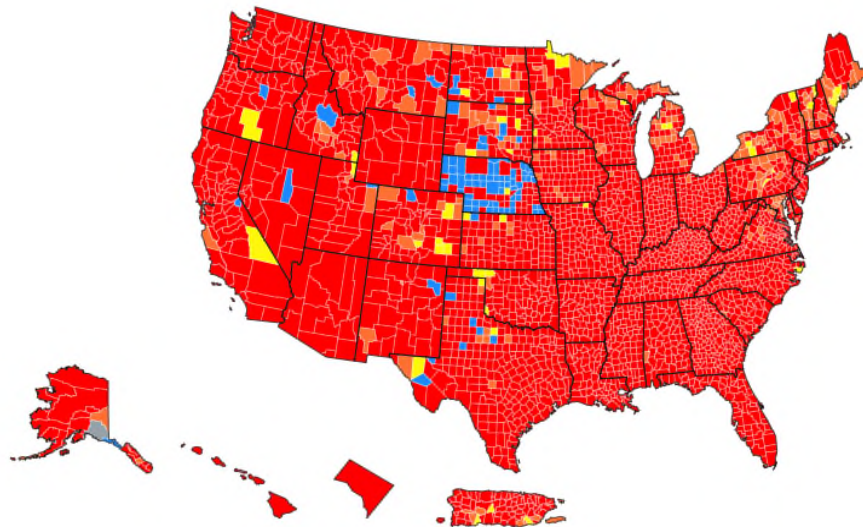
What is Substantial or High Transmission?

Map Data:

Level of Community Transmission

Level of Community Transmission Time Period: Sat Aug 14 2021 - Fri Aug 20 2021

All Counties



Indicator - If the two indicators suggest different transmission levels, the higher level is selected	Low Transmission Blue	Moderate Transmission Yellow	Substantial Transmission Orange	High Transmission Red
Total new cases per 100,000 persons in the past 7 days	0-9.99	10-49.99	50-99.99	≥100
Percentage of NAATs ¹ that are positive during the past 7 days	0-4.99%	5-7.99%	8-9.99%	≥10.0%

Source: <https://covid.cdc.gov/covid-data-tracker/#county-view>

Reinstating the Mask Mandate

- Several jurisdictions have reinstated the mask mandate to require all individuals, regardless of vaccination status, to wear masks in indoor public settings.
 - **Chicago, IL** (8/20/2021); **Cook County** (8/23/2021)
 - **Charlotte, NC** (8/18/2021)
 - **Louisiana** (08/04/2021)
 - **California Bay Area Counties** (08/02/2021)
 - **Washington, DC** (07/31/2021)
 - **Nevada (substantial or high transmission counties)** (7/30/2021)
 - **Atlanta, GA** (07/28/2021)
- Many states, including New York, Illinois, Colorado, Connecticut, Massachusetts, and Washington, continue to require masks in certain settings, such as K-12 schools, healthcare and long-term care facilities, emergency shelters, prisons and on public transportation.

Ignoring Mask Mandates What Risk?

- Run afoul of Local indoor mask mandate
- Employers run a potential risk of violating OSHA's "general duty clause" if they do not follow OSHA's new guidance
- Serious illness or death leads to lawsuit for negligence

Are OSHA Inspections Likely?

- Yes, if included in OSHA's National Emphasis Program (7/7/21) and subject to programmed inspections by OSHA (i.e., health care, meat processing and restaurants).
 - https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-03_CPL_03.pdf
- Yes, if employees complain that workplace is unsafe. Example: Denver insurance agency did not safely distance employees, failed to implement a health and safety plan and allowed symptomatic workers to remain on site. The company faces \$23,406 in proposed penalties.

Mandatory Vaccine Policies: We are Seeing a Trend

Healthcare & Pharmaceuticals

As Delta surges, U.S. military braces for mandatory COVID-19 vaccines

Phil Stewart, Idrees Ali

New Vaccine Mandates Are Coming For Government Employees And Health Care Workers

Updated July 27, 2021 - 8:27 PM ET

National

Disney and Walmart mandate that employees be vaccinated as covid-19 cases spike nationwide

What Does “Mandate” Mean?

- Many states have no requirement: Arizona, Florida, Texas, Georgia
- Some states incentivize vaccines: Wisconsin (1st dose between 8/20 and 9/19 for \$100)
- Some states have mandatory requirements for healthcare workers and/or state employees: Illinois, Pennsylvania
- Others have “Soft Mandate” option which allows employees to mask and undergo regular COVID testing in lieu of vaccination: California, New York
- Some employers are not terminating unvaccinated employees but instead requiring vaccination to:
 - Return to the office
 - Travel
 - Meet with customers



Can Employers Mandate Vaccines?

- According to the EEOC, yes, but...

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19?

(5/28/21)

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the [reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below](#). These principles apply if an employee gets the vaccine in the community or from the employer.

Explaining The Trend

- Methodist Hospital decision (Texas federal court) – Case dismissed June 12, 2021
- Dept. of Justice Opinion on Application of Emergency Use Authorization to Employers – July 6, 2021
- Indiana University decision (Indiana federal court) – Case dismissed July 20, 2021 – Affirmed by Seventh Circuit Court of Appeals, August 1, 2021

(Slip Opinion)

Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization

Section 564(e)(1)(A)(ii)(III) of the Food, Drug, and Cosmetic Act concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.

July 6, 2021

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

Explaining The Trend

- On August 23, 2021, the U.S. Food and Drug Administration (FDA) granted full approval to Pfizer's COVID-19 vaccine.
- In response, many employers have or are considering establishing mandatory employee COVID-19 vaccination policies.
 - Under most mandatory vaccination policies, employees are required to submit proof of vaccination by a specified date as a condition of employment, absent an approved medical or religious accommodation.



Federal Contractor Mandate

- Executive Order from President (Sept. 9, 2021):
- Both federal employees and contractors and subcontractors working in connection with federal contracts to receive a vaccine against COVID-19.
- New EO eliminates the testing option and expands the vaccine requirement to **all** federal contractors regardless of whether they have employees working on federal property.
- This new clause will then be effective for all new contracts, solicitations, renewals/extensions, or options entered on or after **October 15, 2021**, with limited exceptions.
- Any new contract or new contract-like instrument:
 - a procurement contract for services, construction, or a leasehold in real property;
 - a contract covered by the Service Contract Act (SCA);
 - a contract for concessions, including concessions excluded generally under the SCA; or
 - a contract in connection with federal property or lands offering services for federal employees, dependents, or the general public.
- Not products contracts (interpreted to mean supplies or goods).

Federal Contractor Mandate

- On September 24, 2021, the Safer Federal Workforce Task Force issued its anticipated guidance for federal contractors and subcontractors pursuant to President Biden’s Executive Order 14042.
 - By **December 8, 2021** all “covered employees” of federal contractors must be fully vaccinated.
- A “covered contractor” is “a prime contractor or subcontractor at any tier who is party to a covered contract.”
- A “covered contractor employee” means “any full-time or part-time employee of a covered contractor working on **or** in connection with a covered contract or working at a covered contractor working place.”
- A “covered contractor workplace” is a “location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.” (not a residence)

Federal Contractor Mandate

Three (3) new categories of requirements for covered contractors, including:

- 1) Vaccination of all covered contractor employees (absent limited exceptions for medical or religious reasons) by December 8, 2021, or thereafter on the first date of the period of performance under a newly awarded contract or exercised option.
- 2) Compliance with CDC masking and physical distancing requirements by covered contractor employees and visitors at covered contractor workplaces.
- 3) Designating a person(s) to coordinate COVID-19 safety efforts at covered contractor workplaces.

Not Without Some Caveats Still

- Mandatory vaccination is a mandatory condition of employment and will need to be negotiated with a union before implementation. Many unions have pushed back on such policies.

Coronavirus - COVID-19 August 3, 2021

Teamsters' Pension Lawsuit Could Thwart Vaccine Mandates

The union says its pension fund's mandatory vaccine policy violates collective bargaining agreements.

VACCINE RESISTANT | JUNE 3, 2021

Required Vaccinations? The Doormen's Union Says No

By Daniel Clemens

Duty to Bargain Arises When ...

- The proposed change has an impact on bargaining unit employees in terms of wages, hours, discipline, discharge and working conditions. (i.e., a mandatory subject)
- Two Types:
 - Decisional Bargaining
 - Effects Bargaining



Duty to Bargain Arises When ...

- Decisional Bargaining
 - Can Management unilaterally make the decision/change?
 - First question – is it covered by the collective bargaining agreement?
 - *M.V. Transportation, Inc.*, 368 NLRB No. 66 (2019):
 - Is Company's action within the scope of a contractual provision permitting it to act unilaterally?
 - Did Company have a sound arguable basis for its interpretation of the contract and not motivated by animus or bad faith?
 - NLRB Chair Lauren McFerran's dissenting opinion in that case criticized the majority's decision to abandon the longstanding "clear and unmistakable waiver" doctrine.

Duty to Bargain – Effects Bargaining

- Tales from the Table - Effects Bargaining Over Mandatory Vaccine Policies
 - Lead time before effective date
 - Exceptions beyond ADA, Title VII for the “personal choice”
 - Testing Option in lieu of vaccine or as accommodation
 - On-site or off-site
 - Paid testing
 - Paid time
 - Testing days is not working
 - False Positives

Tales from the Table - Effects Bargaining Over Mandatory Vaccine Policies

- Paid time-off for positive test
- Job switching
- Severance pay
- Recall rights if circumstances change

Not Without Some Caveats Still

- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K, Vaccinations.
 - Reasonable accommodations for those who do not get a vaccine may be available because of a disability or a sincerely held religious belief, unless providing an accommodation would pose an **undue hardship** on the operation of the employer’s business or pose a **direct threat** to any employee.
 - **Examples of reasonable accommodations** for employees who do not get a vaccination include requiring “unvaccinated employee entering the workplace [to] wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given opportunity to telework, or finally, accept a reassignment.”

Steps To Handle An ADA Accommodation Request

1. Determine whether the employee has made a request for an accommodation.
2. Recognize who is seeking an accommodation under the ADA.
3. Determine whether the employee has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
4. If the impairment and/or need for accommodation is not obvious, ask for reasonable documentation to establish the employee's right to receive accommodation under the ADA.
5. Determine what accommodation the employee is seeking, and discuss possible reasonable accommodations with employees.
6. Prepare a response to requests for accommodation based upon essential functions.

Best Practices for ADA Accommodations

- Ensure that a policy and procedure exist for handling accommodation requests.
- Ask that the request be in writing; supported by doctor's certification.
- Engage fully in the interactive process on an individual basis for each request.
- Consider and evaluate all possible alternatives if the employee's request is unreasonable. Remember that employees are only entitled to a "reasonable" accommodation; not the accommodation of their own choosing.
- Maintain all copies of accommodation requests, supporting information and documentation, including denials, in a file separate from the employee personnel file.
- Ensure that managers and supervisors direct ADA accommodation requests to HR.

What is a Sincerely Held Religious Belief?

- According to the EEOC, “[t]he law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.”
- Whether a practice is religious depends on the employee’s motivation. A practice might be engaged in by one person for religious reasons and by another person for purely secular reasons.
- Religious observances or practices include refraining from certain activities.

What is a Sincerely Held Religious Belief?

- What is a sincerely held religious belief?
 - In assessing whether beliefs are religious, courts consider factors such as whether the beliefs:
 - address fundamental and ultimate questions having to do with deep and imponderable matters;
 - are comprehensive in nature; and
 - are accompanied by certain formal and external signs.
 - Someone who holds a sincere opposition to vaccination or subscribes to an “anti-vax” philosophy that is not rooted in a sincerely held religious belief is not covered by Title VII.

Steps To Handle A Religious Exemption Accommodation Request

1. Evaluate Request to Ensure It Falls under Title VII
 - Employees do not have to use any special words or language when requesting an accommodation. Managers and supervisors should understand how to recognize a request for accommodation and who to relay the information to within the company.
 - A request for exemption due to a personal preference not to receive a vaccine is not protected by law, and the employer should reiterate the company policy and the consequences for not complying with the vaccination mandate.
2. Initiate the Interactive Dialogue Process
 - Involves a good-faith effort by the employer and the employee to discuss the employee's specific circumstances.
 - Goal is to obtain information about the nature of the religious belief and the limitations on receiving a mandatory vaccination.

Steps To Handle A Religious Exemption Accommodation Request

3. Determine if additional information is reasonably needed to evaluate the request
 - Where there is an objective basis for questioning the employee's stated religious belief, ask the employee to provide appropriate documentation regarding the religious belief and how it conflicts with the vaccination requirement.
 - The EEOC has identified four factors that can create doubt in an employer's mind as to the sincerity of the employee's belief:
 1. Whether the employee has acted in a way that is inconsistent with the claimed belief;
 2. Whether the employee is seeking a benefit or an exception that is likely to be sought for nonreligious reasons;
 3. Whether the timing of the request is questionable; and
 4. Whether the employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

Steps To Handle A Religious Exemption Accommodation Request

4. Determine if the accommodation request creates an undue hardship.
5. If the request cannot be reasonably accommodated, determine if there are any available alternative accommodations.
6. If no reasonable accommodation exists and there are no other obligations under state and local law, notify employee in writing of decision to deny request.
7. Ensure appropriate documentation.

Summary:

What Are Risks of Mandating Vaccination?

- Accommodations for religious and medical needs are areas of risk and disputes could lead to litigation.
- Employee morale and turnover.
- Unions: Bargaining obligations and concerted activity in opposition to a vaccine policy could be legally protected.
- Un-level playing field: States may pass laws prohibiting mandatory employer vaccination policies. Bills have been introduced in South Carolina, Florida, Kentucky, Missouri, Tennessee and Washington. Montana was the first state to pass such a law.

Where Are We Likely Going Now?

President Biden's Covid-19 Action Plan

September 9, 2021



What Will Be Required?

- Require employers to provide **paid time off** to employees to get vaccinated and recover from ill effects of vaccine
- Employers **must mandate** that employees either:
 - Get fully vaccinated; or
 - Obtain and produce a negative test result at least weekly before going into work

What is the Process and Timeline?

- The ETS is expected within “weeks but not months”
- We anticipate it will be effective immediately.
- OSHA wants all employers to start implementing mandatory vaccination policies as soon as possible
- Employers in State Plan States should anticipate that those State Plans will adopt their own ETS within 30 days of issuance but those State OSH plans will have to comply with the various state laws and regulations

What is the Process and Timeline?

- Very little detail as to how the ETS will operate
- Given OSHA's rulemaking history with prior ETS, expect at least 2 months for the rule to be released to OMB, several more weeks for OMB to release the rule and the ETS published toward the end of 2021
- It is anticipated that OSHA will give a "grace period" of 4 to 6 weeks for employers to get vaccinated once the ETS is published

Likely Legal Challenges . . .

- There is no “grave danger”. There was no “grave danger” to **all workplaces** in June.
- It is not “necessary”. Why didn’t the prior ETS require a vaccination mandate?
- This is a public health issue and not a workplace issue and is beyond OSHA’s authority.
- It is arbitrary to limit the ETS to the number of employees instead of the nature or type of work those employees perform. The ETS has no relationship to actual risk.
- Certain businesses may be destroyed due to employee flight for employers with less than 100 employees.

What Should Employers Do Now?

- Try to arrange for vaccination and testing centers or in-house capabilities.
- Update leave policies for vaccinations and ill effects from same.
- Assess how many of your employees are already vaccinated and how many will opt for weekly testing if you choose to offer that option.
- Update policies governing disability and religious objections.
- Review and revise your COVID-19 plan.
- Review state laws regarding compensability for time spent by employees for testing and payment for the tests.

Thank You

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