

Considerations for Employers Contemplating a Voluntary or Mandatory COVID-19 Vaccine Policy (February 2022 Update)

Authors



Amy A. Robinson
Partner
amy.robinson@millernash.com
360.619.7024 | Vancouver Office



Iván Resendiz Gutierrez
Partner
ivan.resendiz@millernash.com
503.205.2377 | Portland Office



Rebecca R. Schach
Associate
rebecca.schach@millernash.com
206.777.7483 | Seattle Office

February 1, 2022 Update | Previous update published September 16, 2021 | Originally published December 31, 2020 (see below)

Although litigation is still ongoing for some vaccine-related mandates, we have new guidance and key developments in vaccine mandate litigation and regulations since our September 2021 update:

- Following the Supreme Court’s [decision blocking the vaccine mandate](#) for large employers, [OSHA recently announced](#) that it was withdrawing the vaccination and testing emergency temporary standard issued on Nov. 5, 2021, to protect unvaccinated employees of large employers from workplace exposure to coronavirus. The withdrawal was effective January 26, 2022. This essentially ends the litigation related to the ETS.
OSHA further announced that although it was withdrawing the ETS as an emergency rule, it does not intend to withdraw it as a proposed rule, and reiterated its “strong encouragement” for work vaccination.
- For health care workers, the Court allowed the Centers for Medicare and Medicaid Services’ final rule (CMS Healthcare Vaccine Mandate) to go forward and become effective. See our MN COVID-19 Resource Center [January 13 article](#).
- As for federal contractors, since President Biden signed [Executive Order 14042](#) on September 9, 2021, lawsuits have been filed in several federal courts. With litigation pending and stays in place, no enforcement action will be taken at this time. See [Safer Federal Workforce](#) for updated [guidance](#) as released.
- In November, Washington’s Governor Inslee [amended the state vaccine mandate](#) to allow 24/7 facilities (e.g., corrections, acute care, rehabilitation) to use contractors whose vaccination status has not been verified in certain narrow and limited circumstances.
- California has also imposed mandatory vaccination for all state and certain private sector employees including:
 - » All [state workers](#),
 - » [Workers](#) in health care and high-risk congregate settings (and boosters),
 - » [Workers](#) in facilities providing other health care services and their visitors,

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps businesses or employers must take under applicable laws.

- » [Workers](#) in adult and senior care facilities,
- » [Workers](#) who provide health care in state and local correctional facilities,
- » [School staff](#) at K-12 schools, and
- » [Students](#) following FDA approval for their grade span (7-12 and K-6).
- » California mandates recognize exemptions for covered workers in certain circumstances.

September 2021 Update | Originally published on December 31, 2020 (see below)

While the considerations for voluntary adoption of a COVID-19 vaccination mandate for the workforce have not changed significantly since this alert was published at the turn of the new year, we wanted to supplement it with some of the key developments and mandate-related guidance issued since then:

- On May 28, 2021, the EEOC supplemented that guidance stating even more unequivocally that “[t]he 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 These principles apply if an employee gets the vaccine in the community or from the employer.” See, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#).
- As anticipated, challenges to vaccine mandates have begun making their way through the court system, and are not getting much traction so far. See, [New Federal Court Decisions Pave the Way for COVID-19 Vaccine Mandates for Employers and Education Institutions](#).
- In August, Washington State’s Governor Jay Inslee issued a state-wide vaccine mandate that applies to those who work for or at state agencies, health care providers, and educational settings. See, [Proclamation by the Governor](#).
 - » Personnel and contractors covered by the mandate must be fully vaccinated by October 18, 2021, and proof of vaccination does not include an employee attestation in this context.
 - » The mandate recognizes, but does not require, exemptions when a covered worker is unable to be vaccinated due to a medical condition or bona fide religious belief, but explicitly prohibits covered employers from simply “rubberstamping” requests.
 - » Under applicable discrimination laws, these exemptions are still constrained to only where there are reasonable accommodations available (in some instances, for example, the ability to work from home, or additional safety precautions like an N95 mask with a face shield) that don’t pose either a direct threat to others or an undue hardship to the employer.
 - » There is also an FAQ to address vaccine mandate related issues. See, [Vaccine Mandate Frequently Asked Questions | Governor Jay Inslee](#).
- Likewise, Oregon now has vaccine mandates in effect for [Executive Branch employees](#) of the state government, [health care workers](#), and [teachers, educators, support staff, and volunteers in K-12 schools](#).
 - » Personnel and contractors covered by the mandate must be vaccinated by October 18, 2021.

- » The mandate recognizes, but does not require, exemptions when a covered worker is unable to be vaccinated due to a medical condition or “sincerely held” religious belief, provided there are reasonable accommodations available (in some instances, for example, the ability to work from home, or additional safety precautions like an N95 mask with a face shield) that don’t pose either a direct threat to others or an undue hardship to the employer.
- » The Oregon Health Authority (OHA) also developed specific forms to be used for requesting exemptions, and an FAQ for evaluating requests available online here: [Instructions for filling out the COVID-19 Medical Exception](#). OHA has also developed [an FAQ](#) for the Healthcare Provider and Healthcare Staff Vaccine Rule and the COVID-19 Requirements for Teachers and School Staff.
- On September 9, 2021, President Biden issued a vaccine mandate for [federal government employees](#) and [federal government contractors](#), and announced that OSHA has been instructed to adopt mandatory vaccine rules that are anticipated to apply to employers throughout the US with 100 or more employees. See, [Federal Government Issues New Vaccination Mandates, With More to Come](#).

While this additional guidance and new government vaccine mandates does not cloak mandatory vaccination policies with immunity from legal challenges, it does provide some peace of mind, as well as legal arguments, to employers considering COVID-19 vaccine mandates. It is still important for employers considering implementing mandatory vaccine policies to remember that any mandate must comply with applicable state and local laws, regulations, and rules.

The following was originally published on December 31, 2020.

Now that vaccines for coronavirus disease 2019 (“COVID-19”) are available and have received full FDA approval, and various politicians and dignitaries are being vaccinated publicly, everyone seems to be asking the same question: can employers require their employees to be vaccinated against COVID-19 as a condition of employment? On December 16, 2020, The U.S. Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Guide, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), to include some vaccine-related content. While it does not definitively answer the question for every employer (or employee), the EEOC suggests that federal discrimination laws do not prohibit a vaccine mandate.

Given a myriad of unknowns and competing considerations at play, many of which we have listed in the section to follow, many employers may opt to not require vaccination. Instead, they may find it preferable to strongly encourage, and perhaps even incentivize, employees to get the COVID-19 vaccine, at least until further guidance and information is available. If that is the desired approach, here are a few specific actions employers can take to do so:

- Develop and distribute accurate, reputable COVID-19 vaccine education materials, demonstrate good knowledge about the data, and clearly communicate how vaccination will make the workplace safer;
- Help make the COVID-19 vaccine accessible to employees, including offering free on-site COVID-19 vaccinations;¹

- Explore and promote “perks” that may be available to vaccinated employees through bonuses or voluntary and carefully designed wellness programs (for example, with the promise of gift cards or discounts on health insurance premiums);
- Provide *paid* time off for employees to get the vaccine and recover from any potential side effects; and/or
- Lead by example and ensure that management is vaccinated first, including public vaccinations by an organization’s leaders.

If, however, an employer decides to require some or all of its employees to get a COVID-19 vaccine, then it should develop a clear, nondiscriminatory, and legally compliant written policy or program, factoring in these important considerations along with any others that are applicable to their particular operations:

- **Employment Discrimination and Disability Protections.** As previously noted, the EEOC recently updated its COVID 19 Technical Assistance Guide and suggests that employers can generally require employees to receive a COVID-19 vaccine, at least without running afoul of federal discriminations law, provided that employers recognize the exceptions and additional protections that may need to be made in doing so. This includes:
 - » Providing reasonable accommodations for those with disabilities or sincerely held religious beliefs that may conflict with a vaccine requirement, where doing so is not an undue hardship. See [*Questions and Answers: Religious Discrimination in the Workplace*](#).
 - » Ensuring that any prescreening vaccination questions are appropriately constrained to only what is “job-related and consistent with business necessity.” See U.S. EEOC, [*Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*](#), July 26, 2000.
 - » If asking for proof of vaccination, reminding employees not to provide any medical information when doing so, and adopting appropriate screening protections to ensure that any personal medical information volunteered or inadvertently provided is properly protected from disclosure and maintained separately from the employee’s personnel file. See *id.*
- **Balancing Occupational Safety and Health Obligations.** We know airborne transmission of COVID-19 is a deadly or serious hazard. The federal Occupational Safety and Health Administration (OSHA) places a duty on employers to protect employees from workplace infections and has issued guidance related to personal protective equipment and other preventative efforts.

The federal Occupational Safety and Health Act of 1970 may also afford whistleblower protections to employees who refuse a vaccine based on good-faith concerns that the vaccine may pose a real danger to their health, based on a medical condition and based on prior guidance related to vaccination generally. See, [*OSHA Standard Interpretations*](#). It may well be that subsequent guidance from OSHA will offer additional clarity here, but for now this tension continues to require careful, thoughtful deliberation before proceeding.
- **Labor-Related Limitations.** Employers with union-represented work forces should review their collective bargaining agreements to determine whether there are any terms that may directly or indirectly address a vaccine requirement. If a contract term were to restrict an employer from imposing a vaccine requirement, then that employer would need agreement from the union to require a vaccine.

More likely, however, a collective bargaining agreement will not address the subject of a vaccine requirement. In that event, we would expect that a vaccine requirement is a mandatory subject of bargaining or will have impacts that are mandatory for bargaining. In either case, an employer should give notice to the union (not just employees) that the employer is considering a vaccine requirement, and be prepared to bargain upon demand to bargain from the union. Before implementing a vaccine requirement, the employer must generally bargain to agreement or impasse.

If no agreement is reached, limited exceptions of business necessity or emergency might apply, but those are narrow and should not be invoked without a full legal and practical analysis. Finally, because labor laws protect certain concerted activities of employees, and if employees take joint action concerning employment-vaccination policies, employers must be careful before taking action because of potential unfair labor practice claims.

- ❑ **Additional State and Local Laws Constraints.** Most states have equivalents of the federal discrimination laws, occupational health and safety laws, and wage and hour laws discussed generally above, and often with different or heightened protections that must be considered before proceeding with a mandate.
- ❑ **Wage and Hour Compliance.** If the vaccine is not administered on site during regular working hours, employers need to consider whether they are obligated to compensate employees for: (a) the employees' time spent getting the vaccine (which can include a post-vaccination observation period), and (b) the costs associated with the COVID-19 vaccine, if any (if not fully health-insurance funded). Given that wage and hour considerations center primarily on whether the task at issue was "work related" and not voluntary, it would be equally important to ensure that any workplace policy related to vaccination is abundantly clear as to whether the expectation is mandatory and therefore compensable, or merely encouraged and entirely voluntary, to help ensure compliance and avoid disputes.
- ❑ **Workers' Compensation/Insurance Coverage.** Employers should review their workers' compensation and other applicable insurance policies to confirm coverage and identify any relevant limitations. For example, would adverse reactions to vaccines be covered? If so, would the vaccine need be administered at the employment site, during work hours, or satisfy any other requirements in order to preserve coverage?
- ❑ **Reputational and Employee-Relations Concerns.** Certainly, customer preference and community perceptions may weigh heavily on the side of ensuring that the entire workforce is vaccinated as soon as possible. However, adverse reaction(s) to a mandatory COVID-19 vaccine or employee opposition to such a mandate, even in the absence of any adverse reactions, can easily spread outside the organization's walls, onto social media, and into the court of public opinion.² Moreover, if a significant portion of a workforce refuses to comply with the mandatory vaccine policy, then an employer may find itself between the proverbial "rock and a hard place"—sticking to its stated policy and excluding employees who refuse to be vaccinated for non-legally-protected reasons or deviating from the policy for certain employees who object, which can both undermine the legitimacy of the policy itself and open the door to possible claims. Perhaps worse yet, the business may find itself unable to operate without significant additional recruitment and onboarding efforts.

At the same time, an employer with a successful and safe mandatory COVID-19 vaccine program could receive positive feedback and praise from its workforce and (potentially) the public for its efforts to eradicate the virus and end the COVID-19 pandemic. Employers should carefully weigh potential impacts and employee-relations considerations applicable to their operations, and be prepared with messaging accordingly.

Of course, regardless of which approach is taken now, it is important that all employers stay informed and remain equipped to quickly adjust, based on continuing and evolving guidance and data on this issue.

We hope that this snapshot of the key considerations and potential takeaways that we have outlined above is helpful to employers as they navigate these challenging issues. As always, employers should call on us if they have questions or need assistance with evaluating their approach to vaccination and implementing related policies and practices.

The content of this alert is provided for general information purposes only. It should not be considered legal advice or used as a substitute for consulting an attorney for legal advice. Readers are encouraged to check out the Miller Nash LLP [COVID-19 landing page](#) in particular for additional resources.

¹ See Centers for Disease Control and Prevention, *Promoting Vaccination in the Workplace*, <https://www.cdc.gov/flu/business/promoting-vaccines-workplace.htm>.

² See Jacqueline Howard, *2 Alaska health care workers suffer reactions to Covid-19 vaccine*, CNN Health (Dec. 17, 2020), <https://edition.cnn.com/2020/12/16/health/alaska-allergic-reaction-coronavirus-pfizer-vaccine/index.html> (“Two workers at an Alaska hospital suffered allergic reactions after receiving Pfizer’s Covid-19 vaccine this week, and one was kept for observation for at least two nights, hospital representatives said.”).

About the Authors

Amy Robinson represents public and private employers throughout Washington, Oregon, and Alaska in a broad range of workplace-related issues. She skillfully handles matters for clients regarding wage-and-hour, leave laws, disability and accommodation, and complaints related to discrimination, retaliation, and harassment. Amy is adept at guiding employers through policy and handbook creation, as well as crafting employment contracts, such as noncompete agreements, nonsolicitation agreements, and nondisclosure agreements.

Iván Resendiz Gutierrez is a litigation attorney serving the employment and appellate needs of public and private clients. Iván is known for handling complex cases and situations, providing practical advice, and finding creative solutions for clients from across the U.S. from such diverse industries as education, energy, and manufacturing.

Rebecca Schach represents employers in Washington and California on a wide range of employment matters. Her practice includes employment litigation in state and federal court, as well as arbitrations, mediations, and trials. Her experience includes defending employers in wage and hour class actions, collective actions, and representative lawsuits.