

## Vaccine Mandates are Becoming the Rule and Not the Exception: What Employers Need to Know

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The COVID-19 pandemic threw the world into a state of uncertainty and life-threatening risk with ever changing health and safety recommendations and mandates. The alleged “two weeks” that it would take to combat the virus has turned into an eighteen month plus ordeal, with no true end in sight. Why? Because businesses are still navigating how to safely operate and return to work amid a still uncertain and ever-changing patchwork of guidelines and rules. One of the most recent looming questions that hangs over the heads of employers is: what do you do about employees’ or applicants’ vaccination status? What does your state’s vaccine legislation mean for the operation of your business? Will the forthcoming emergency temporary standard (ETS) from the Occupational Safety and Health Administration (OSHA) provide one overarching standard? And what can be expected as a result?

In this article, we will discuss a broad overview of the current state of business operation in the pandemic, what to know about vaccine mandates (or mandate bans), and what employers should be aware of going forward.

### State Laws Regarding Vaccines

This year, a number of states have passed legislation which either promote or prohibit vaccine mandates. Some states have passed legislation which require “vaccine passports” among public and private employees, customers and patrons.

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Private and Public Sector Employment Litigation

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A majority of these laws affect public employees of state and local governments, agencies, or other public entities, mandating them to be vaccinated as a condition of employment or undergo weekly testing. For instance, public employees in California, Delaware, Hawaii and Nevada are required to show proof of vaccination at least once a week, whereas other locales like Colorado, Illinois and Washington, D.C. have mandated vaccines for public employees in certain divisions of the government. Many of these same states, in addition to a few others, have implemented vaccine mandates for healthcare workers and school faculty and staff. Specifically, California, Colorado, Connecticut, Delaware, Washington, D.C., Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, Virginia, Washington and Wisconsin have passed vaccine mandates to some extent.

Eight states have banned state and local governments from mandating the vaccine for employees, while twenty-one states have banned employers from requiring vaccine passports. Arkansas, Georgia, Indiana, Michigan, Montana, Tennessee, Texas and Utah have banned public employers from mandating the vaccine.

Employers in the private sector have more leeway in choosing whether or not to implement a vaccination policy, except private employers in Montana, and most recently, Texas. At first, Montana was the only state that had passed legislation affecting private employers and prohibiting discrimination based on vaccine status. Montana law prohibits private employers from requiring vaccination as a condition of employment when a vaccine is allowed under emergency use authorization.

On October 11, Governor Abbott of Texas passed an executive order prohibiting any entity in Texas from requiring vaccines from employees and customers. Public entities in Texas were already banned from mandating the vaccine, but the recent, all-encompassing language of Executive Order GA-40 has now extended that prohibition to private entities and calls on the state legislature to act.

### The Labor Shortage

As businesses have started to open again, the return to work has not necessarily followed suit. Currently, the labor market is experiencing a vast labor shortage affecting a variety of industries. For example, about 16% of hospitals in the United States are experiencing critical staffing shortages, almost 11% of hospitality jobs remain open, and food manufacturing employees have gone on strike, leaving production lines empty. Some have viewed these moves by labor organizations and unions to be the latest strategy to obtain better wages and benefits for employees, but in turn, has contributed to an amplified supply chain and production issue.

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As of September 2021, a study found that job postings on Indeed that required a COVID vaccination had risen 242%—a significant increase from the already high 119% surge in postings from July to August 2021. The increased job postings have centered around positions in healthcare, community and social services, education, and legal fields, but companies in other fields share in the search for applicants, responding with incentives like raising wages, hiring bonuses, discontinuing pre-employment drug screens for marijuana and widening consideration for applicants with criminal and conviction records.

### Considerations for Employers Going Forward

Not only should employers be aware of their respective state's laws regarding vaccines and vaccine passports, but they should also be mindful of their potential obligations under various federal mandates proposed by President Biden. In September, the Biden administration **announced** new vaccine and/or weekly testing requirements for healthcare workers, employers with 100 or more employees, and federal employees and contractors. **Guidance related to the mandate impacting federal workers and contractors** was released on September 24, 2021 and generally provides that all federal employees and employees of a federal contractor must be vaccinated by December 8, 2021 subject to legally required accommodations. Moreover, the federal employee/contractor guidance makes clear that the time spent in obtaining a test is compensable time.

Regarding the mandate that impacts large employers and employees in certain healthcare settings, OSHA has been tasked with developing an emergency temporary standard to enforce those portions of President Biden's mandate, however, nothing has been published as of October 18, 2021. OSHA's rule could affect as many as 80 million private-sector workers, but questions of who will bear the cost of weekly testing, the potential penalties imposed for noncompliance, whether independent contractors count toward the 100-employee threshold, and how it will affect employers' costs of employment benefits still remain unanswered. Additionally, dozens of state Attorneys General have already issued letters opposing the OSHA rule which signal legal challenges once the rule becomes effective.

Going forward, should an employer choose to implement a vaccine requirement, it first and foremost should be wary of unintentional bias towards the hiring pool, as filtering applicants based on vaccine status can lead to liability for hiring discrimination under Title VII or the Americans with Disabilities Act (ADA). Further, for current employees, employers should continue to make clear that religious or medical exemptions will be honored and engage in the interactive process with employees that request such an accommodation.

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Lastly, should your business be affected by the Biden administration's proposed rules, be prepared to consider the implications of your state's wage and hour and reimbursement laws. The time an employee takes to get the vaccine or to be tested could be considered to be compensable time and even qualify for reimbursement as a job-related expense.

Please contact your Laner Muchin servicing attorney if you have questions about how your business could be impacted by vaccine mandates at the local, state, or federal level.