

LEGAL ROUNDTABLE:

STANDING IN QUICKSAND: The Current Status and Requirements of Vaccine Mandates

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AGENDA

❑ **Current State of Government Mandates**

- Federal Mandates
 - Biden Administration Regulations
 - OSHA ETS
 - CMS Interim Final Rule
 - Federal Contractor/Subcontractor Guidance
- State Laws
- Municipal Requirements to Consider for Business Travel



AGENDA

☐ **What is Permissible with Private Employer Mandates**

- State Laws to be Aware of
- What Courts Have Said

☐ **Where Things Stand for HR**

- Initial Questions to Consider
- Workplace Vaccination Policy
- Recordkeeping Requirements
- Evaluating Accommodation Requests



CURRENT STATE OF GOVERNMENT MANDATES

CURRENT STATE OF GOVERNMENT MANDATES

❑ FEDERAL MANDATES



- The Biden Administration Regulations

- OSHA ETS

- (<https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>): EFFECTIVE (FOR NOW)

- OSHA policy/recordkeeping compliance started January 10th

- OSHA requires testing compliance by February 9th

CURRENT STATE OF GOVERNMENT MANDATES

□ FEDERAL MANDATES



- The Biden Administration Regulations
 - OSHA ETS (cont'd.)
 - Penalties: \$13,653 for first violation, up to \$136,532 for any “willful” or “repeat” violations
 - WHAT IS THE CURRENT STATE OF CHALLENGES?
 - Supreme Court argument
 - OSHA proposed Final Standard

CURRENT STATE OF GOVERNMENT MANDATES

❑ FEDERAL MANDATES

- The Biden Administration Regulations

- CMS Interim Final Rule

- (<https://www.cms.gov/files/document/qso-22-07-all.pdf>):

- EFFECTIVE IN 25 STATES (FOR NOW)

- Potential remedies:

- Monetary penalties
 - Denial of Medicare/Medicaid payments
 - Termination of Medicare/Medicaid program



CURRENT STATE OF GOVERNMENT MANDATES

□ FEDERAL MANDATES

- The Biden Administration Regulations
 - CMS Interim Final Rule (cont'd.)
 - WHAT IS THE CURRENT STATE OF CHALLENGES?
 - Supreme Court argument
 - 12/28/21 Guidance
(<https://www.cms.gov/files/document/qso-22-07-all.pdf>):
 - 30/60/90-day compliance requirements



CURRENT STATE OF GOVERNMENT MANDATES

❑ FEDERAL MANDATES

- The Biden Administration Regulations

- Safer Federal Workforce Task Force Guideline

(https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf):

ENJOINED

- WHAT IS THE CURRENT STATE OF CHALLENGES?



CURRENT STATE OF GOVERNMENT MANDATES

❑ STATE MANDATES

- Currently, the only state laws mandating COVID-19 vaccination relate to healthcare workers
 - 9 states and D.C. mandate COVID-19 vaccination of healthcare workers
 - 5 states mandate COVID-19 vaccination for workers at certain types of healthcare facilities



CURRENT STATE OF GOVERNMENT MANDATES

□ STATE MANDATES

- State OSHA agencies required to enforce federal workplace safety rules mainly taking “wait and see” approach
 - Iowa already indicated it will not implement the OSHA ETS regardless of Supreme Court decision
 - Several states are parties to the Supreme Court suit, and thus are awaiting ruling (North Carolina, South Carolina)
 - Others are preparing to implement the federal standard, or have indicated they will implement the standard, but are monitoring litigation (MI, NV, OR, MN, NY, IL)

CURRENT STATE OF GOVERNMENT MANDATES

❑ MUNICIPAL REQUIREMENTS TO CONSIDER FOR BUSINESS TRAVEL

- City vaccine requirements to attend indoor events much broader than OSHA ETS
- Does not generally include hotel stays
 - Sample of cities requiring proof of vaccination:
 - Boston
 - New York City
 - Philadelphia



CURRENT STATE OF GOVERNMENT MANDATES

❑ MUNICIPAL REQUIREMENTS TO CONSIDER FOR BUSINESS TRAVEL

- Sample of cities requiring vaccination or negative test result:
 - Chicago (for employees only)
 - New Orleans
 - Seattle



CURRENT STATE OF GOVERNMENT MANDATES

❑ MUNICIPAL REQUIREMENTS TO CONSIDER FOR BUSINESS TRAVEL

- Sample of cities requiring vaccination and indoor masking when not eating/drinking:
 - Washington, D.C.
 - San Francisco
 - Los Angeles
 - Chicago



WHAT IS PERMISSIBLE WITH PRIVATE EMPLOYER MANDATES

PRIVATE EMPLOYER MANDATES

- ❑ **Remains the most legally permissible action by employers**
 - Issue of private contract; employers generally have power to set and enforce terms of employment
 - Employers also have general obligation to keep workers safe
 - **DO NOT FORGET COLLECTIVE BARGAINING REQUIREMENTS!**



PRIVATE EMPLOYER MANDATES

❑ STATE LAWS TO BE AWARE OF

- Generally, two categories of state laws as to PRIVATE employers to be aware of:
 - COVID-19 vaccination requirement permitted PROVIDED exemptions allowed
 - Explicit prohibition AGAINST requiring COVID-19 vaccination
- 37 states and D.C. are SILENT as to whether private employers can mandate vaccination

PRIVATE EMPLOYER MANDATES

❑ STATE LAWS TO BE AWARE OF (cont'd.)

- Laws explicitly permitting private employers require COVID-19 vaccination PROVIDED exemptions allowed
 - 11 states permit COVID-19 vaccination mandate SO LONG AS exemptions exist
 - At a minimum, accommodation in compliance with anti-discrimination laws (sincerely held religious belief, medical disability)

PRIVATE EMPLOYER MANDATES

❑ STATE LAWS TO BE AWARE OF (cont'd.)

- Other types of exemptions states require for vaccine mandate:
 - Texas prohibits compelling receipt of vaccine based on objection due to religious belief, medical condition, prior recovery from COVID-19, or personal conscience
 - Florida prohibits mandate unless employee can opt-out for religious reason, medical exemption, natural immunity, regular testing, or usage of PPE
 - Arkansas permits opt-out of employer mandate based on weekly testing or proof of antibodies

PRIVATE EMPLOYER MANDATES

❑ STATE LAWS TO BE AWARE OF (cont'd.)

- Other types of exemptions states require for vaccine mandate:
 - North Dakota:
 - State government prohibited from requiring private business to obtain vaccine documentation before employment
 - permits exemption if proof of antibodies, philosophical or moral belief opposing immunization, or periodic testing opt-out

PRIVATE EMPLOYER MANDATES

☐ STATE LAWS TO BE AWARE OF (cont'd.)

- Explicitly PROHIBITS requiring COVID-19 vaccination
 - Montana: HB 702 prohibits discrimination based on vaccination status
 - Tennessee: SB 9014 prohibits private business from taking adverse action against person or compelling proof of vaccination

PRIVATE EMPLOYER MANDATES

□ WHAT COURTS HAVE SAID

- Resounding YES to private employer mandates
 - Supreme Court rejection of suits attempting to block vaccine requirements
 - *Klaassen v. Trustees of Indiana University* (staff and students)
 - *Maniscalco v. NY City Dept. of Education* (school staff)
 - *Dr. A, et al. v. Hochul* (healthcare workers)

PRIVATE EMPLOYER MANDATES

□ WHAT COURTS HAVE SAID

- *Bridges v. Houston Methodist Hosp.*, Case No. 4:21-cv-01774 (S.D. Tx. June 12, 2021)
 - Texas law only protects employees from termination for refusing to commit an act carrying criminal penalties; receiving vaccination is not an illegal act
 - Statutes identified in plaintiffs' public policy claims do not apply to actions of the private employer hospital

PRIVATE EMPLOYER MANDATES

□ WHAT COURTS HAVE SAID

- *Harsman v. Cincinnati Children's Hospital Medical Center, et al.*, Case No. 1:21-cv-00597 (S.D. Oh. September 30, 2021)
 - Claims of constitutional violations in support of prohibiting vaccine mandate inapplicable to private employer
 - Vaccine mandate is not requiring vaccination against an employee's "will" since individual is free to choose to comply with condition of employment, and can choose other avenues of employment if they disagree

PRIVATE EMPLOYER MANDATES

□ WHAT COURTS HAVE SAID

- *Hayes v. University Health Shreveport LLC*, Case No. 2021-CC-01601 (La. January 7, 2022)
 - Medical informed consent law pertains to healthcare provider-patient relationship, not employment
 - Constitutional right to privacy relates to state actors, not private entities
 - Thus, no exception to state's at-will employment doctrine applies to COVID-19 vaccine mandates, thus employer entitled to terminate employees for failure to comply

WHERE THINGS STAND FOR HR

WHERE THINGS STAND FOR HR

□ INITIAL QUESTIONS TO CONSIDER

- Comply with OSHA ETS or do “something else”?
 - If private employer with 100 or more employees, as of January 10th should be complying with OSHA ETS other than testing requirement
 - Gamble on SCOTUS until February 9th?



WHERE THINGS STAND FOR HR

□ INITIAL QUESTIONS TO CONSIDER (cont'd.)

- What is “something else,” and what factors to consider?
 - Vaccine mandate with opt-outs?
 - What is the level of vaccine hesitancy?
 - More opt-outs permitted, less staff objections
 - Incentives for vaccination?
 - Do I have staff volatility?
 - Carrot cannot be excessive

WHERE THINGS STAND FOR HR

□ INITIAL QUESTIONS TO CONSIDER (cont'd.)

- What is “something else,” and what factors to consider?
 - Silence on vaccination?
 - Potential liability risk?
 - Alternative forms of protection



WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY

- Require vaccination, or weekly testing and face covering

Effective ____, [Company] will require its employees, workers, and contractors to be either fully vaccinated against COVID-19 or submit to weekly COVID-19 testing requiring a negative result. Unvaccinated individuals opting to test weekly must wear an appropriate face covering when indoors or occupying a vehicle with another person for work purposes.



WHERE THINGS STAND FOR HR

□ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

- Provide accommodation for medical condition or religious belief

[Company] provides reasonable accommodations, absent undue hardship or a direct threat to health and safety in the workplace, to qualified individuals with disabilities, medical conditions, or a sincerely held religious belief, observance, or practice that prevents them from getting vaccinated. Reasonable accommodation may include appropriate adjustment or modification of this policy. If you believe you need an accommodation regarding this policy, you are responsible for requesting a reasonable accommodation from the HR Department.

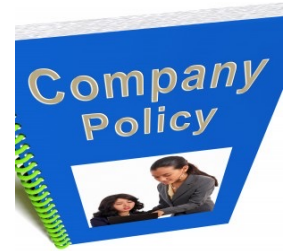


WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

- Identify Process for Seeking an Accommodation
 - Identify form for request, information to include in request, and to whom to submit such request
 - Confirm Company's obligation to engage in an interactive process to determine limitations on ability to comply and potential reasonable accommodations
 - Determination made on case-by-case basis based on individualized assessment and various factors



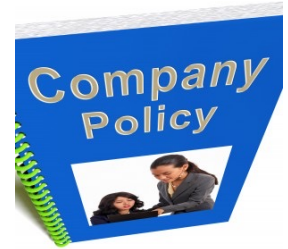
WHERE THINGS STAND FOR HR

□ WORKPLACE POLICIES

■ OSHA VACCINATION POLICY (cont'd.)

- Identify when policy applies to “remote” workers

“Remote” workers are subject to this policy only in the event that they visit the office or come into physical contact with company employees, workers, or customers. In such event, the “remote” worker must submit proof of full vaccination or a negative COVID-19 test dated no more than three days prior their return to the workplace. “Remote” workers are individuals who work exclusively from home, do not report to a workplace where other individuals are present, and/or work exclusively outdoors.

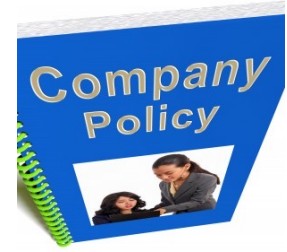


WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

- Identify what evidence is required for full vaccination
 - Define what constitutes full vaccination
 - Employee must submit documentation containing the type of vaccine received, dates of administration, and the name of the health site administering the vaccine
 - Confirm person is acknowledging information is true and correct, and false documentation subject to discipline



WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

- Identify what employee must do if choosing to test and wear face coverings
 - Employee responsible for obtaining proper weekly test, and the due date for submission of testing results
 - What type of tests are acceptable
 - When an employee can remove a face covering
 - Standard requirement for any face covering



WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

- Identify what procedures an employee must follow in the event of a positive COVID-19 test
 - Notice requirements to employer
 - Confirm temporary removal from workplace
 - Cannot return to the workplace unless (1) negative result on a nucleic acid amplification test; or (2) after 10 days isolation, at least 24 hours without a fever, and improvement as to other symptoms

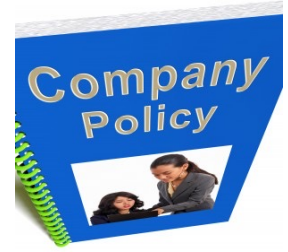


WHERE THINGS STAND FOR HR

❑ WORKPLACE POLICIES

▪ OSHA VACCINATION POLICY (cont'd.)

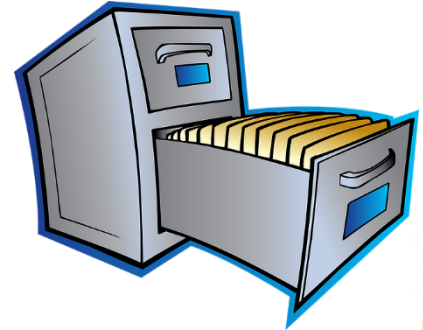
- Non-retaliation for reporting of illness or violation of policy
- Provide information regarding where an employee can get vaccination
- Paid time off up to four hours for getting vaccination or recovering from vaccination side-effects during work hours
- Identify other COVID-19 policies still applicable
- Employee acknowledgement of review and receipt



WHERE THINGS STAND FOR HR

❑ RECORDKEEPING

- OSHA RECORDKEEPING REQUIREMENTS
- Records are medical records to keep confidential and separate from personnel files
 - Employee vaccination status in the form of:
 - Record of immunization;
 - Copy of vaccination card; OR
 - Declaration with vaccine information, reason for inability to produce proof, and certification of truth



WHERE THINGS STAND FOR HR

□ RECORDKEEPING

- OSHA RECORDKEEPING REQUIREMENTS (cont'd.)
 - Records of each test result from unvaccinated employees
 - Aggregate number count of total employees and employees who are fully vaccinated
 - Report to OSHA of any work-related COVID-19 fatality within eight hours
 - Report to OSHA of any work-related COVID-19 hospitalization within 24 hours

WHERE THINGS STAND FOR HR

□ RECORDKEEPING

- OSHA RECORDKEEPING REQUIREMENTS (cont'd.)
 - Documentation provided to employees:
 - Company policies related to ETS requirements
 - “Key Things to Know About COVID-19 Vaccines” document from the CDC
 - 29 CFR 1904.35(b)(1)(iv) notice regarding retaliation
 - Potential criminal penalties under 18 U.S.C. 1001 and OSH Act

WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

▪ RELIGIOUS BELIEF

- Personal beliefs or philosophies do not qualify
- If employer is aware of objective facts questioning sincerity of belief, employer may request additional information



WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

▪ RELIGIOUS BELIEF (cont'd.)

• Practical Tips:

- Know your employees to know their religious belief history
- Familiarize yourself with “fake” forms on the internet
- Request written narrative explaining religious objection
- Ask questions to determine if this is belief based on politics or personal freedom instead
- Can ask for letter or comment from religious leader



WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

▪ MEDICAL CONDITION

- CDC identification of health conditions limiting vaccination are limited:

- Receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment (delays vaccination for 90 days)
- Known COVID-19 exposure (delays until after quarantine)
- Severe allergic reaction to prior dose (consult with physician)



WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

▪ MEDICAL CONDITION (cont'd.)

- Follow the same rules used in any other ADA request to confirm existence of a medical condition:
 - Ask employee to provide documentation for treating physician substantiating condition
 - If insufficient documentation, request employee consent to consult with treating physician
 - Can request independent medical examination if explain to employee why documentation is insufficient

WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

▪ MEDICAL CONDITION (cont'd.)

- Other conditions to consider:
 - Allergy to animal fats and products
 - Existing heart condition due to potential myocardial issues
 - Women over 50 with potential risk of thrombosis as to Johnson & Johnson vaccine
 - Awaiting organ transplant or receiving treatment for cancer

WHERE THINGS STAND FOR HR

❑ EVALUATING ACCOMMODATION REQUESTS

- *EEOC v. ISS Facility Services, Inc.*, Case No. 1:21-cv-3708 (N.D. Ga. September 7, 2021)
 - EEOC brought suit alleging disability discrimination
 - Employer denial of employee request for accommodation to work remotely two days a week due to pulmonary condition placing her at greater risk of contracting COVID-19. After denying request, employer terminated employee.
 - Employer allowed other employees in her position to work from home

Thank You

QUESTIONS?



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