

Return-to-Office Update and Considerations for Employers

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

David E. Schwartz

Partner / New York
212.735.2473
david.schwartz@skadden.com

Anne E. Villanueva

Counsel / Palo Alto
650.470.4596
anne.villanueva@skadden.com

Lauren R. NuDelman

Law Clerk / New York
212.735.2601
lauren.nudelman@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

525 University Avenue
Palo Alto, CA 94301
650.470.4500

Since our [June article](#), which addressed key labor considerations for return-to-office plans, the COVID-19 situation in the U.S. has continued to evolve. One vaccine has received full and final approval from the U.S. Food and Drug Administration (FDA), and more individuals are eligible for and have access to vaccines. Still, the country is grappling with the surge of the dominant Delta variant, which has caused many states and municipalities to renew restrictions, while employers are expanding vaccine mandates. From updated federal guidance to developing legal standards, we highlight some of the most significant changes below.

COVID-19 Action Plan

On September 9, 2021, in a sweeping effort to increase vaccination rates in the U.S., President Joe Biden announced a [COVID-19 Action Plan](#) that could affect up to 100 million Americans. The plan requires employers with 100 or more workers to institute a vaccine mandate or require testing of unvaccinated employees on at least a weekly basis. The plan also requires health care workers, federal employees and federal contractors to be vaccinated against COVID-19. Federal employees who do not qualify for exemptions but continue to refuse to be vaccinated will be counseled and disciplined, including potential termination of employment.

President Biden charged the Occupational Safety and Health Administration (OSHA) with responsibility for implementing an emergency temporary standard (ETS) for businesses with 100 or more employees. OSHA will also issue a rule requiring these employers to provide paid time off to employees for time spent getting the vaccine or for post-vaccine recovery time. If employers fail to comply, the government will take enforcement actions, which could include substantial fines per violation.

As directed by President Biden's Executive Order 14042, (Order), on September 24, 2021, the Safer Federal Workforce Task Force (the Task Force) released [new guidance](#) for federal contractors and subcontractors. The Order directs executive departments and agencies to ensure that covered contracts and contract-like instruments include a clause requiring contractors (and their subcontractors) to comply with all guidance for contractor or subcontractor workplace locations published by the Task Force for the duration of the contract. Additionally, the Task Force requires contractor employees to be vaccinated, subject only to medical and religious accommodations. Such contractor employees must be fully vaccinated by December 8, 2021, but may not be able to comply with that deadline, given contracts' varying renewal times. Consequently, the Task Force allows agency heads to grant exceptions to the vaccine requirement based on urgent, critical needs.

Updated CDC and OSHA Guidance

CDC

On July 27, 2021, the Centers for Disease Control and Prevention (CDC) released [updated guidance](#) in response to steadily growing numbers of COVID-19 cases, which have since increased further. According to the CDC, this increase was reminiscent of rates before the vaccine was widely accessible. The guidance recommends that everyone in areas of substantial or high transmission wear a mask in indoor public places, even if fully vaccinated, to maximize protection from the Delta variant. Soon after this update, the [CDC also announced](#) that in areas of substantial or high community transmission, agencies must require all federal employees, on-site contractors and visitors to wear

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masks inside federal buildings, regardless of their vaccination status. (The [CDC announcement](#) includes details about the level of community transmission by state and county.) However, the greatest risk of transmission of COVID-19 is still among unvaccinated individuals, who are much more likely to contract, and subsequently transmit, the virus.

States have reacted in a variety of ways to the CDC's recent updates and to the Delta variant. Most have issued recommendations, rather than mandates, for indoor mask-wearing.

OSHA

On August 13, 2021, OSHA issued [updated guidance](#) that aligned with the CDC's July 27, 2021, guidance by stating that employers should consider requiring workers to get the vaccine or get tested for COVID-19 on a regular basis. Additionally, unvaccinated workers should continue to wear masks and physically distance. Like the CDC, OSHA also recommended (but did not require) that all workers wear masks in areas of substantial or high community transmission, even if fully vaccinated.

Federal Updates

Vaccine Authorization

Emergency Use Authorizations. On June 12, 2021, in *Bridges v. Houston Methodist Hospital* — a case [discussed in our June article](#) — a Texas district court had dismissed a challenge to a hospital's mandatory COVID-19 vaccination policy for its employees. The court clarified that the plaintiff was not coerced into receiving the COVID-19 vaccine, since she could freely refuse the vaccine and work elsewhere. The court considered and rejected the argument that vaccines — at that time — were approved under the FDA's emergency use authorization (EUA) powers and, therefore, could not be mandated.

In a [slip opinion](#) published on July 6, 2021, the Office of Legal Counsel examined Section 564 of the Food, Drug and Cosmetic Act (FDCA), which authorizes the FDA to issue an EUA for a medical product, such as a vaccine, under certain emergency circumstances. In the U.S., the FDA has granted EUAs for three COVID-19 vaccines. The slip opinion concluded that Section 564 of the FDCA does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under EUAs.

Formal Approvals. On August 23, 2021, Pfizer's COVID-19 vaccine became the first to be formally [approved by the FDA](#). On a practical level, employers are likely to issue more vaccine mandates following the FDA's full approval of additional vaccines.

Booster Shots. On September 22, 2021, the [FDA amended](#) the EUA for the Pfizer COVID-19 vaccine to authorize a single booster dose to individuals who are:

- 65 years of age and older.
- 18-64 years of age and at high risk of severe COVID-19.
- 18-64 years of age and whose frequent institutional or occupational exposure to the coronavirus puts them at high risk of serious complications of COVID-19.

Children Under 12. While the FDA still has not approved the Pfizer vaccine for children under age 12, on September 20, 2021, Pfizer announced that its COVID-19 vaccine shows promising results for children ages 5-11, and it will soon seek authorization in the U.S. for this age group. The FDA likely will not formally approve the vaccine for children ages 5-11 [until the end of 2021](#).

Federal Employees and On-Site Contractors

Additionally, on July 29, 2021, President Biden announced [new requirements](#) surrounding federal employees and on-site contractors. Individuals who are not fully vaccinated (or decline to provide their vaccination status) will be required to wear a mask, physically distance and comply with a weekly or biweekly screening testing requirement, and will be subject to government restrictions on official travel.

Shifting State and Local Laws or Announcements

New York

On September 6, 2021, New York Gov. Kathy Hochul [announced the designation](#) of COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health under the recently enacted New York Health and Essential Rights (HERO) Act. Signed into law on May 5, 2021, the HERO Act requires all New York employers to implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases in the workplace. Since COVID-19 has now received the designation, many New York private employers must promptly implement such plans.

Starting September 13, 2021, New York City began requiring proof of vaccination or weekly COVID-19 tests for all city workers, a [rule expected to affect over 300,000 people](#). That same day, a [new rule went into effect](#) that mandates COVID-19 vaccines for participating in certain indoor activities. Consequently, New York City will require proof of vaccination for employees and customers at places including indoor restaurants, gyms and entertainment venues.

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California

California Gov. Gavin Newsom [announced](#) that all state employees would be ordered to get vaccinated starting in August 2021, or undergo COVID-19 testing at least weekly. The California rule is expected to affect over 246,000 people.

Florida

Employers should consider how any mandatory vaccination policies would interact with their respective state and local legislation. Certain states have taken legislative and executive measures to prohibit vaccine mandates or proof of vaccination, including Florida. On May 3, 2021, [Florida law SB 2006](#) went into effect, preventing business entities from requiring that customers provide documentation certifying COVID-19 vaccination status to enter or obtain service. The law functions as an extension of [Florida Executive Order 21-81](#), which prohibits businesses from requiring vaccine passports. Both the law and executive order do not appear to prohibit private businesses from requiring that their employees show proof of vaccination.

Montana

Montana's [House Bill 702](#), signed on May 7, 2021, made it the first jurisdiction to recognize an individual's vaccination status as a protected category. The law, which prohibits employers from requiring employees to disclose their vaccination status, does not prohibit employers from merely asking about vaccination status. However, the employee may not be discriminated against for not responding or not being vaccinated.

Texas

[Texas enacted a law](#) on June 7, 2021, that prohibits, among other things, businesses from requiring customers to provide COVID-19 vaccine documentation in order to receive services. This law follows a similar [executive order](#), which applies only to state agencies and private organizations receiving state funding.

Louisiana

In Louisiana, college faculty members are arguing over whether to require vaccines for a return to campus, while parents and teachers disagree about whether masks should be required at secondary schools. Such arguments stem from Louisiana's surge in COVID-19 cases and hospitalizations. However, on August 18, 2021, a federal judge ruled for students at a Louisiana medical college, who filed suit after the school required them to either get the COVID-19 vaccine or face significant restrictions. The three students who filed suit refused the vaccine for religious beliefs and concerns over its emergency use-only authorization status.

Additional Measures

By comparison, other states have passed laws or ordinances explicitly permitting or encouraging employers to mandate vaccination. California, Massachusetts, New Jersey, North Carolina and Oregon are examples of such states, while New York is in the process of adopting a similar policy. Counties encouraging such practices include Contra Costa, Santa Clara and San Francisco counties in California.

More Employers Requiring Vaccines

In the wake of the fast-spreading Delta variant, more employers have instituted mandatory vaccination policies, including requiring vaccines for office access or for continuing employment. As noted in our [June article](#), employers generally have the right to mandate vaccines for employees, subject to limited exceptions under anti-discrimination laws. At least one state (Montana) imposed its own limitations.

In July 2021, the Department of Veterans Affairs, which runs one of the largest health care systems in the U.S., [announced it will mandate COVID-19 vaccines](#) for its front-line workers, who include physicians, dentists and registered nurses. Around the same time, the [Mayo Clinic announced](#) it will require all employees to get the vaccine or complete a declination process by September 2021. (Employees who decline the vaccine must complete education modules and wear masks). Numerous health systems nationwide are implementing similar requirements. Significantly, these policies mandating vaccines could undercut wrongful termination in violation of public policy claims, especially if and when FDA approvals of the vaccines are received.

Facebook, Google, Lyft, Microsoft, Netflix and Tyson Foods are among the companies that have mandated COVID-19 vaccinations for employees returning to their U.S. offices. Many of these companies additionally impose vaccine requirements on vendors or guests. Other companies limit their policies to only specific offices or a particular group of workers. For example, Walmart's vaccine mandate applies to all corporate and management employees, while store employees must wear masks in high-risk areas. The Walt Disney Company requires vaccines for non-union employees working on-site.

Further, some employers are pushing back their previously planned return-to-office dates, as a result of local surges in COVID-19 cases and hospitalizations. Apple pushed back its return-to-office deadline from September 2021 to January 2022, and Google announced that it would push back its deadline until at least January 10, 2022.

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Insurance Premiums

Delta Air Lines recently announced that workers who are not vaccinated by November 1, 2021, will have to pay extra insurance premiums per month to remain on the company's health plan. Since that announcement, other companies are considering similar fees for unvaccinated employees.

Stronger Legal Basis for Mandatory Vaccine Policies

Despite preliminary uncertainty over the legality of a mandatory COVID-19 vaccine policy in light of the vaccine's emergency use authorization status, recent developments following *Bridges v. Houston Methodist Hospital* have helped to clarify that an employer vaccine mandate is generally legal. In *Klaassen v. Trustees of Indiana University*, an Indiana district judge upheld Indiana University's policy requiring students to be vaccinated as a condition for returning to the campus. Later, the Supreme Court refused to grant the university students' requests to block the mandate.

Labor unions challenged the requirement that teachers and other staff at New York City schools must receive at least one COVID-19 vaccine dose by September 27, 2021. However, on September 22, 2021, New York State Supreme Court Justice Laurence Love ruled that the city could move forward with this mandate. The judge dismissed the unions' argument that the requirement violates due process rights and concluded that both state and federal courts have consistently held that vaccine requirements

do not impede such rights and are, in fact, within the state's police power. Justice Love stated he expects to issue a final decision this week.

A local Teamsters union also challenged an employer's mandatory COVID-19 vaccination, arguing that the policy violates workers' collective bargaining agreements, and that the requirement has an impact on terms and conditions of employment. The union claimed that requiring workers to return to work fails to give employees a sufficient amount of time to receive the two doses of the vaccines. The union also pointed out that employees who refuse to get the vaccine provided good-faith and reasonable concerns about it, such as potential health risks. While the court has not yet ruled on this claim, other unions with members who oppose vaccination mandates are likely to argue similar claims if the Teamsters union's claim proves successful.

Another notable recent case for employers involves the airline industry. On June 23, 2021, a Maryland federal court dismissed a case brought by a flight attendant, who alleged that the airline she worked for held an unsafe training that exposed her to COVID-19 and resulted in her husband's death. While the court found that the majority of factors weighed in favor of the plaintiff, allowing the suit to proceed would "open the floodgates" for lawsuits against employers by third parties who could bring a claim that the employers of their family members, friends or acquaintances exposed them to the virus. However, the court granted the plaintiff leave to amend her suit and replead the case.