

# The Impact of Vaccination Status on Jury Pools

Skadden

09 / 28 / 21

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

## Eben Colby

Partner / Boston  
617.573.4855  
eben.colby@skadden.com

## Emily Kline

Associate / Boston  
617.573.4848  
emily.kline@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

500 Boylston Street  
Boston, MA 02116  
617.573.4800

With the emergence of new COVID-19 variants and vaccine hesitancy among some in the United States, a “return to normal” for in-person jury trials remains elusive. Courts that postponed jury trials until they could be held safely in person may now see no clear path to that end. As courts move forward with various forms of in-person, remote and hybrid jury trials, litigants may find themselves faced with the new challenge of how juror vaccination status may directly or indirectly impact jury pools and their overall case strategies.

## Excluding the Unvaccinated May Be Challenged on Fair-Cross-Section Grounds

As some federal judges have considered or instituted vaccine mandates for juries that would excuse any potential juror who is unvaccinated, litigants may want to consider challenging the requirement as a violation of the fundamental right to have a jury selected from a representative cross-section of the community. A party establishes a *prima facie* fair-cross-section violation by showing: (1) the group alleged to be excluded is a “distinctive group” within the community; (2) the representation of the group *in venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

For example, in a multidistrict opioid action pending in Ohio, U.S. District Judge Dan Aaron Polster issued an order requiring that any juror serving on the case be vaccinated, citing safety concerns. A substantial portion of the jury pool could have been excused on these grounds, as recent data from Ohio’s Department of Health showed that only 42.6% of the state’s population was fully vaccinated. The pharmacy defendants successfully challenged the order, citing demographic data suggesting that excluding unvaccinated individuals would violate the “fair cross section of the community” standard for jury trials, noting key differences between the statewide vaccinated and unvaccinated populations along gender, racial, age, income, education level, geographic and political lines.

The defendants further argued that the remaining pool of eligible (vaccinated) jurors would be highly unlikely to reflect the community as a whole. Judge Polster agreed, granting the defendants’ motion for reconsideration and rescinding his order requiring jurors to be vaccinated.

Conversely, in the California fraud trial of Theranos founder Elizabeth Holmes, U.S. District Judge Edward Davila dismissed nine members of the jury pool because they were not vaccinated against COVID-19. Both the prosecution and the defense supported the court’s decision to excuse unvaccinated jurors and have not challenged the decision.

As courts continue to propose excluding unvaccinated jurors, litigants may want to assess the ways in which demographics are associated with vaccination status and consider challenging such mandates if necessary.

## Juror Requests for Excusal May Lead to Less Representative Juries

Litigants may also want to consider how jury trial practices that fail to address potential jurors’ COVID-related concerns may lead to a wave of requests for excusal that could skew jury selection. For instance, it stands to reason that to the extent that unvaccinated individuals wish to be excused from jury service due to their increased risk of contracting the virus, a cross-section of the population will not be represented. Similarly,

# The Impact of Vaccination Status on Jury Pools

---

vaccinated people (including parents of children too young for a vaccine) may ask to be excused to avoid contracting the virus from unvaccinated jurors, potentially raising the same concerns as broad court-imposed vaccine mandates on a jury-by-jury basis.

## Accommodations Based on Vaccination Status Also Present Potential Representation Issues

In order to promote safe and speedy trials and avoid further jury trial delays, courts have begun adopting alternative measures, such as instituting masking requirements, attempting to reconfigure courtrooms to allow jurors to social distance and holding jury trials remotely.

Many courts have already moved motion practice, conferences and nonjury proceedings to a virtual platform. However, virtual jury trials may implicate issues of fairness to the parties. For instance, it is not clear to what extent courts will accommodate or excuse jurors without access to technology or the internet at home. Even jurors with adequate technology might be at home with children, may not have a private room in which to work or may resist having their camera on such that a court can monitor attentiveness. These challenges may constitute major distractions from the trial.

However, excusing all potential jurors without a private space, personal computer and adequate internet connection could threaten the right to select a jury from a representative cross-section of the community or otherwise skew a panel and raise many similar issues.

Courts may instead choose to implement hybrid in-person and virtual juries. For example, the Supreme Court of Texas's remote jury proceeding questionnaire asks about familiarity with videoconferencing technology as well as access to highspeed or broadband internet, a webcam or camera, and a private place at home from which to participate as a juror. The questionnaire notes that jurors who cannot serve remotely will be "provided alternative methods to serve, including spaces equipped with technology or the opportunity to appear in person."

## Conclusion

A return to normal courtroom procedure is unlikely while COVID-19 remains a public health crisis and some potential jurors remain hesitant to get the vaccine. As this issue evolves in courts across the country, parties must adjust their case assessments and prepare for a variety of possible scenarios. Faced with consistent delays, parties may need to adjust assumptions about time to trial. Parties also must decide how to react to jury pools that may be skewed, whether by a vaccine requirement or COVID-related requests for excusal, and must adapt jury research techniques and jury testing accordingly. Where litigants face judge-imposed vaccine mandates, local demographic data on vaccination rates may support a challenge to the composition of the jury pool. Additionally, parties may want to adjust trial themes or strategy based on the composition or location (physical or virtual) of the jury.