

# Managing COVID-19 Vaccination Mandates

In July and August 2021, various COVID-19 vaccination mandates were issued by the federal government, state governments or agencies, as well as private employers.<sup>1</sup> Many of these mandates apply not only to employees of the entity issuing the order, but also to the employees of companies that contract with the entity to perform services. As a result, employers and contractors have expressed concern about how best to manage such mandates. This memo notes some examples of recent mandates, discusses the impact of such mandates on employers, identifies various contract considerations, and provides short answers to some of the frequently asked questions.

## Recent Mandates

While there are several recently issued public and private mandates, a couple recently issued public mandates provide a good example of the different approaches to such mandates and serve as a good illustration of the challenges that must be managed and various strategies to consider:

- On August 2, 2021, the Denver Department of Public Health and Environment issued a Public Health Order (“PHO”) requiring not only the employees of the City and County of Denver (“CCD”) to be vaccinated by September 30, 2021, but also the employees of contractors hired by the CCD to provide contract services.<sup>2</sup> (Notably, however, those providing onsite services to or on behalf of the Denver International Airport on a contractual basis are excluded from the PHO.)<sup>3</sup> There is no option in the PHO to avoid the vaccine requirement through regular testing. Effectively, this means that employees of a CCD contractor must receive their final shot of a recognized COVID-19 vaccine by September 15, 2021, to meet the September 30<sup>th</sup> deadline.
- On July 29, 2021, President Biden announced similar requirements for federal employees as well as the employees of federal contractors.<sup>4</sup> Contrary to the CCD PHO, though, the federal announcement was relatively short on details, did not identify a date by which full vaccination would be required, and also provided a testing opt-out where agencies had to instead be willing to accept COVID-19 testing to be performed on individuals who did not attest to full vaccination on a once or twice a week basis. Information released on that same date by the Safer Federal Task Force relating the “COVID-19 Workplace Safety: Agency Model Safety Principles” also did not include information on the date by which the requirement would be enforced.<sup>5</sup>

Given that a full vaccination cycle of Pfizer’s COVID-19 vaccine (the only fully FDA approved vaccine at this time) takes a minimum of five weeks to complete, the effective date of any such vaccination mandate is important to consider. Notably, despite this current reality, on August 26, 2021, the Department of Interior, Bureau of Reclamation, issued notice of a vaccine mandate applicable to all contractors currently performing work “in any Federal building or

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Federally controlled indoor worksite.” This mandate purports to apply not only to the contractor’s employees, but also to the employees of any subcontractors. To comply, individual employees must certify under penalty of perjury that they have been fully vaccinated or had a negative COVID-19 test in the prior 72 hours, and the prime contractor’s on-site representative is required to certify that “all” contract personnel have completed their certifications, maintain the certification documentation on their person at all times, and be willing to show the certification to federal employees when asked. Notably, the Bureau of Reclamation has indicated to at least one contractor that the vaccine mandate became effective upon receipt of the email containing the notice.

In addition to the wave of governmental mandates, private entities have also started to issue vaccination mandates applicable to employees of third-party contractors. For example, several private hospitals as well as other large entities with ongoing construction contracts have implemented or announced plans to implement vaccination mandates for onsite workers similar to those issued by governmental agencies.<sup>6</sup>

### **Impact on Employers: Risks, Legal Obligations, and HR Management**

Mandates like those noted above can clearly have a significant impact on employers. Throughout the country and across many industries, the worker shortage is real, so the threat of employees quitting to avoid a vaccination mandate is also real. Employers that have historically tried to avoid asking employees for medical information are now being required to carefully manage their legal obligations under such mandates with competing laws that protect employees with disabilities and genuinely held religious beliefs or practices. Also, contractual issues relating to the imposition of the mandates— for example, who pays for the cost and schedule impacts that may arise as a result of worker shortages or disruptions—are complex and, oftentimes, based on contract language that likely was not drafted with vaccine mandates in mind.

Personal opinions and political beliefs aside, the vaccination mandates that have been tested in the courts have, thus far, largely been upheld and are currently supported by the federal Department of Justice.<sup>7</sup> As such, any employer that has had a mandate imposed on it will likely have to determine how to properly staff its work in compliance with the mandate or potentially face some form of legal penalty and/or contractual consequence for failing to comply.

Indeed, even employers who are not subject to any specific mandate may still want to consider how to manage this issue. For example, employers may encounter certain employees who are hesitant to or refuse to work in close proximity with unvaccinated co-workers. Depending on the goods or services provided, some employers may elect to self-impose some version of a vaccination mandate on its employees in order to meet the concerns or requirements of its customers.

In short, educating employees about vaccines and whether to incentivize or require them to become vaccinated are quickly becoming critical considerations for all employers whether they are currently subject to a vaccination mandate or not.

### **Current Vaccination Progress and Contract Considerations re: Vaccine Mandates**

During the beginning of the Coronavirus Pandemic in 2020, there was a concerted effort for vaccines to be safely developed and manufactured that could prevent serious illness and death. President Trump's administration launched "Operation Warp Speed" to "pioneer, develop, and manufacture therapies and vaccines in record time."<sup>8</sup> In December 2020, the Pfizer and Moderna vaccines were approved for Emergency Use Authorization ("EUA"), and the Trump Administration touted them as an "incredible success."<sup>9</sup>

Current data shows that just over 60 percent of the U.S. population over 12 years old has been fully vaccinated against COVID-19.<sup>10</sup> State-by-state vaccination rates, though, vary widely. Recently, the Pfizer vaccine obtained full FDA approval, which may increase the number of individuals choosing to be vaccinated.<sup>11</sup>

Given the numbers of individuals not vaccinated, current mandates like those referenced earlier may have a significant effect on a contractor's workforce. On new projects, consideration will need to be given as to whether sufficient personnel will be available to perform the work in the planned timeframe. Significant schedule coordination will be required.

To the extent mandates affect ongoing projects, a contractor may consider seeking compensation for any disruption to its work or schedule due to the reduction of unvaccinated workers from its planned labor force on a particular project. Potential bases for recovery may include a request for compensation due to a change in law or regulation which occurred after the contract was executed. In situations where a particular mandate was not the result of any governmental action, a contractor may be able to seek compensation from the owner for a directed change. Such circumstances will vary widely and will be heavily dependent on the contract language.

### **Frequently Asked Questions and Very Short Answers**

- **Can I require my employees to receive the COVID-19 vaccine?** Most likely yes. Employers must first conduct a direct threat analysis and consider potential accommodations based on an employee's disability or sincerely held religious belief, practice, or observance.<sup>12</sup>

Note that some of the mandates being imposed, including the CCD PHO, do not include exceptions for disability or a sincerely held religious belief which puts employers in a difficult position. Additionally, the process for determining whether a reasonable accommodation must be granted for either a disability or a sincerely held religious belief is fact intensive and involves a number of nuanced legal factors and requirements. In fact, the legal standards relating to the accommodation of an individual with a disability differs from someone requesting an accommodation based on a sincerely held religious belief.

Proper documentation of the employer's direct threat analysis and decisions made with regard to accommodation requests will be critical in avoiding future liability.

In short: seek legal counsel to ensure any vaccination requirement is properly drafted,

communicated, and implemented.

- **Can I ask my employees if they've been vaccinated?** Yes. Employers may ask their employees *whether* they have received the COVID-19 vaccination, but inquiries beyond this should be carefully considered to avoid violating the Americans with Disabilities Act<sup>13</sup> (“ADA”) and other federal nondiscrimination laws.<sup>14</sup>
- **Can I ask to see to see my employees' vaccination cards?** Yes. Employers may ask their employees for documentation of their COVID-19 vaccine. Any document the employer receives is considered confidential medical information, and the employer must keep the information confidential.<sup>15</sup> Generally speaking, this information should likely be maintained in a separate file that is only accessible to a limited number of people who need to know the information in order to comply with restrictions on the employee's work or duties, comply with reasonable accommodations made for the employee, or otherwise perform human resources related functions that necessitate the information be known to them.

While some employers have elected to operate on the “honor system” when inquiring about vaccination status, such an approach carries significant risks when mandates are at play. Some of the governmental mandates impose financial penalties on contractors who have unvaccinated workers on-site. Beyond that, if an unvaccinated employee is deemed to be the source of an outbreak on a site where vaccinations are required, the employer could be exposed to significant liability if they did not take reasonable measures to ensure its employees were properly vaccinated as required by the mandate.

- **What do I do if a project owner or upstream contractor mandates onsite workers be vaccinated?**
  - Read your contract. Most likely, consideration should be given to treating the imposition of a vaccine requirement as any other change request. Determine if the requirement will impact contract performance progress or cause the company to incur additional expenses. For example, is the company going to be short of workers while they are involved in the vaccination process (anywhere from 2-6 weeks depending on what vaccine is taken)? Will the company have to pay for multiple COVID-19 tests each week while workers are undergoing the vaccination process? Does the contract at issue contain provisions that put the burden of compliance on the company?
  - Consider reallocation of workers. Is it possible to reallocate your workforce so that only vaccinated workers are working on projects that mandate vaccination? If so, this may eliminate the need for your entire workforce to be vaccinated to comply with the mandate.
- **Am I obligated to ensure my subcontractors' employees are vaccinated on a jobsite that includes a vaccination mandate?** It depends on the language of the vaccination mandate at issue. It is certainly possible that an upstream contractor will be responsible for ensuring subcontractor compliance with a vaccination mandate. In such a case, again, it will be important to read the contract documents at issue—both upstream and downstream. The upstream contractor may need to pass through claims of its subcontractors relating to time

and money, and you should determine if provisions in the upstream agreements address who bears the risk of compliance.

Remember that upstream contractors are often held liable for the employment-related sins of a subcontractor. For example, upstream contractors are often held liable if a subcontractor fails to properly pay prevailing wages to its workers, and a subcontractor's safety violations can be held against an upstream contractor in certain cases as well. Contract language may exist that requires indemnification from the subcontractor in such cases. If so, upstream contractors will want to review such language for potential applicability in the event that a subcontractor fails to comply with a vaccination mandate in connection with its employees.

### **Action Steps for Consideration**

- **Consider Conducting an Employee Survey.** Unless and until you know the actual vaccination status of your workforce, you're only guessing about how a vaccination mandate would impact your business. As noted, the EEOC permits employers to ask whether employees have been vaccinated. If this option is pursued, employers should consider a carefully drafted letter that accompanies the survey that explains why the employer is asking for the information and how it plans to use the information. Additionally, a statement should be included addressing potential reasonable accommodations for individuals with disabilities and those with sincerely held religious beliefs.
- **Familiarize Yourself with Applicable Mandates.** Government contractors and subcontractors should review whether the public entities with which they're contracting have issued any mandates relating to COVID-19 vaccinations. To the extent such mandates are being considered, these employers will want to review what is under consideration and determine whether advocacy efforts should be undertaken to limit or shape the scope of such a mandate, including providing for the possibility of COVID-19 testing in lieu of vaccination. Future contracts should be carefully reviewed for any reference to actual or potential mandates.
- **Reach Out for Help.** These are difficult topics, and there are very few black and white answers. Seek legal counsel. Woods Aitken maintains numerous resources on issues relating to COVID-19 that are publicly available for review.<sup>16</sup> Additionally, our Labor and Employment practice group as well as our Construction practice group regularly address topics relating to the issues set forth herein.

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<sup>1</sup> Examples include: July 29, 2021 announcement by President Biden relating to federal employees and on-site contractors other than active-duty military members; the Pentagon's August 23, 2021 announcement relating to active duty troops; CVS Pharmacy; Disney World; Tyson Foods, Inc.; AT&T Inc.; New York City's Department of Education; and Chevron. *See, e.g.,* Wall Street Journal, Hufford and Abdel-Baqi, "Disney Strikes Vaccine Deal With Unions, as Labor Groups Negotiate Mandates," August 24, 2021, *available at* <https://www.wsj.com/articles/disney-strikes-vaccine-deal-with-unions-as-labor-groups-negotiate-mandates-11629814660> (last visited August 29, 2021); New York Times, "Covid-19 Updates: F.D.A.'s Vaccine Approval Leads Pentagon and Others to Add Requirements," Aug. 23, 2021, *available at* <https://www.nytimes.com/live/2021/08/23/world/covid-delta-variant-vaccine> (last visited August 29, 2021); New

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York Times, Steinhauser, “As Biden Moves to Vaccinate Federal Workers, Troops Get a Pass,” July 29, 2021, *available at* <https://www.nytimes.com/2021/07/29/us/politics/biden-military-vaccine-mandate.html> (last visited August 29, 2021).

<sup>2</sup> City and County of Denver, Public Health Order – August 2, 2021, *available at* <https://www.denvergov.org/files/assets/public/covid19/documents/public-orders/ddphe-pho-8.2.21.pdf> (last accessed August 29, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> Whitehouse.gov, “Fact Sheet: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant,” July 29, 2021, *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/> (last visited Aug. 29, 2021).

<sup>5</sup> Safer Federal Workforce Task Force, “COVID-19 Workplace Safety: Agency Model Safety Principles,” July 29, 2021, *available at* [https://www.saferfederalworkforce.gov/downloads/revised%20COVID19\\_Safe%20Federal%20Workplace\\_Agency%20Model%20Safety%20Principles\\_20210728.pdf](https://www.saferfederalworkforce.gov/downloads/revised%20COVID19_Safe%20Federal%20Workplace_Agency%20Model%20Safety%20Principles_20210728.pdf) (last visited August 29, 2021).

<sup>6</sup> *See, e.g.*, Fortune, Mathews, “All the major companies requiring vaccines for workers,” August 23, 2021, *available at* <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/> ((last visited August 29, 2021).

<sup>7</sup> *Bridges v. Houston Methodist Hospital*, Civil Action H-21-1774 (S.D. Tex. June 12, 2021); Dept. of Justice Memorandum Opinion, July 6, 2021, “Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization,” *available at* <https://www.justice.gov/sites/default/files/opinions/attachments/2021/07/26/2021-07-06-mand-vax.pdf>.

<sup>8</sup> Trump White House, Press Release, “President Donald J. Trump’s Effort to Provide Americans with A Safe and Effective Vaccine Is Delivering Results,” Dec. 8, 2020, *available at* <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-effort-provide-americans-safe-effective-vaccine-delivering-results/>.

<sup>9</sup> Trump White House, Remarks, “Remarks by President Trump at the Operation Warp Speed Vaccine Summit,” Dec. 8, 2020, *available at* <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-operation-warp-speed-vaccine-summit/>.

<sup>10</sup> CDC, COVID Data Tracker: COVID-19 Vaccinations in the United States, [https://covid.cdc.gov/covid-data-tracker/#vaccinations\\_vacc-total-admin-rate-total](https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total) (data as of Aug. 29, 2021 at 6:00 AM ET) (last visited Aug. 29, 2021). Twelve is the minimum age currently approved to receive a EUA vaccine (Moderna) or fully-FDA-approved vaccine (Pfizer). Currently, individuals must be 18 to receive the Johnson & Johnson vaccine.

<sup>11</sup> FDA, News Release, “FDA Approves First COVID-19 Vaccine,” Aug. 23, 2021, *available at* <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (last accessed Aug. 29, 2021).

<sup>12</sup> U.S. Equal Employment Opportunity Commission (EEO), *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (last updated May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter FAQ].

<sup>13</sup> Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2018).p

<sup>14</sup> FAQ, *id.* at K.9.

<sup>15</sup> *Id.*

<sup>16</sup> Woods Aitken LLP, Coronavirus Resources, <https://www.woodsaitken.com/coronavirus-resources>.