



HOW EMPLOYERS ARE ATTEMPTING TO NAVIGATE UNCERTAIN TIMES WITH IMPERFECT GUIDANCE AND UNKNOWN RISK



Taylor Festa, attorney at Globalaw's North Carolina firm Moore & Van Allen explores the complexities of vaccine mandates.

As we approach almost two years of the COVID-19 Pandemic and look to return to some semblance of normalcy, many employers have struggled with the balance between workplace safety and encouraging employees to return to work. In the United States, the tension between vaccinated and unvaccinated persons is high, leading employers to seek guidance from governmental authorities when determining whether to implement a mandatory vaccination policy for their workforces.

US: EXECUTIVE ORDER NO. 14042 & NO. 14043

As early as December 16, 2020, the United States Equal Employment Opportunity Commission (“EEOC”) issued guidance stating that employers could implement mandatory COVID-19 vaccine programmes without violating the discrimination laws enforced by the EEOC, with some limitations. Those limitations included providing exceptions for persons with qualifying disabilities and sincerely held religious beliefs in opposition to the COVID-19 vaccine. Despite this guidance, many employers hesitated to require vaccination as a condition of employment. Then, on September 9, 2021, President Biden issued two executive orders, Executive Order No. 14042 and No. 14043. Executive Order 14042 requires that each Executive agency implement a programme to require COVID-19 vaccination for all federal employees by November 22, 2021, subject to exceptions. Executive Order 14043 requires that federal contractors and subcontractors abide by guidance published by the

Safer Federal Workforce Task Force, which requires vaccination of all covered employees of federal contractors and subcontractors subject to the Order. These Executive Orders are the first hint of any mandatory vaccination policy authorised by the federal government.

Despite any actions undertaken by the federal government, states and local governments have taken different approaches to mandatory vaccination requirements in the workplace. Many states, such as Ohio, West Virginia, and New Hampshire, among others, have issued no guidance on this issue. Other states, including California, New York, Vermont, and Washington, require certain employees, such as health care workers and those in public education, to receive the COVID-19 vaccine, and in many cases, no test-out option is offered to non-vaccinated employees after a certain date.

THE PROHIBITION OF VACCINE MANDATES IN SOME STATES

On the other hand, some states, like Montana and Utah, prohibit vaccination mandates entirely. In October, Texas' governor issued Executive Order No. GA-40 which explicitly prohibits any "entity in Texas" from compelling receipt of a COVID-19 vaccine by any individual, including an employee or customer, by allowing an exception to mandatory vaccination that swallows the rule. Specifically, Executive Order No. GA-40 exempts, from vaccination, any individual who objects on the following grounds: "personal conscience", "religious belief" or for "medical reasons, including prior recovery from COVID-19." Similarly, Arkansas Governor Asa Hutchinson refused to sign or veto Senate Bill 739, and thus, the bill became law effective October 13, 2021. Senate Bill 739 exempts employees from COVID-19 vaccination mandates, whether required by the federal government or a private employer and imposes testing requirements for those who are not vaccinated.

A GLANCE AT THE REST OF THE GLOBE

Likewise, countries around the world have taken different approaches to mandatory COVID-19 vaccination in the workplace. According to the Globalaw article compiling different approaches among various countries, in India, vaccination is voluntary and an employer can only impose a vaccination requirement in a document for a prospective employee, but not for an existing one, whereas Nigeria is silent on whether vaccination is required, but like in India, employers cannot impose the mandate on existing employees, only prospective employees. In comparison, in Australia, recent guidance from the Fair Work Ombudsman and Safe Work Australia states that an employer may direct an employee to receive the COVID-19 vaccine where it is "a lawful and reasonable direction." What is considered "lawful and reasonable" is a fact-intensive inquiry and will depend upon the individual employee's circumstances. In a more extreme example, Brazil has issued legislation mandating the COVID-19 vaccine for its entire population, subject to limited exceptions. Indeed, in face of such uncertain and unclear guidance, it begs the question, what is the risk of liability if an employer gets it wrong or if an employee is unhappy with the outcome?

In the United States, litigation challenging mandatory vaccination policies has generally been unsuccessful. Thus far, thirty-nine federal cases have contested vaccination requirements imposed by employers or government authorities, with 85% filed after August 1, 2021. To date, seven of these lawsuits have been dismissed and twelve requests for temporary orders have been denied. Indeed, most petitions that have survived dismissal are those that challenge a specific mandate's failure to accommodate exceptions to mandatory vaccination, such as religious or medical exemptions.

Given this uncertain environment, employers will stand on uneven ground for the indefinite future as state, local, and federal law continue to adapt, and litigation presents an ongoing challenge to the certainty of it all.

By [Taylor Festa](#)

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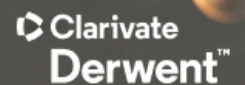
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