

## COVID-19 Vaccine and Mask Mandates – Chaos Rules

Public health experts predict that the United States could see a wave of COVID-19 vaccine mandates as soon as the Food and Drug Administration (FDA) grants full approval to one or more of the shots.

According to NBC News, “the three vaccines authorized by the FDA for emergency use against COVID-19 have proven safe and effective under that expedited review process and in the real world, and doctors and the nation’s top public health officials have said there’s no need for anyone to wait to get inoculated.”

The official regulatory signoff would remove a significant legal and public relations barrier for businesses and government agencies that want to require vaccinations for their employees and customers, former health officials from the Biden and the Obama administrations said.

“I think once the vaccines go through full FDA approval, everything should be on the table, and I think that everything will be on the table at the level of municipalities, states, employers, venues, government agencies,” said Andy Slavitt, who stepped down as President Joe Biden’s COVID-19 response coordinator last month and remains in close contact with administration officials.

So what do we really know?

When a mandate is created there is immediate politization. COVID variants, especially the stronger and more contagious Delta variant, complicate public health policy and government responses. While the primary goal is to vaccinate, especially vulnerable and older people (about 80% of these are already vaccinated), it’s been said that the pandemic is a pandemic of the unvaccinated. That’s why messaging is critical. Unfortunately, much of what we’ve been told over the past 19 months has confused, scared and angered us due to the ever changing rules.

### Vaccine Mandates

Is a vaccine mandate legal, moral and/or a restriction of freedom? You choose. Add that the mandate or passport is for COVID-19, and you might move from a simple debate to a full-blown argument! A sticking point (no pun intended) to mandates is the 9/11 statute that amended the Public Health Service Act. That statute established the Emergency Use Authorization (EUA) process to ensure that “recipients of the product “are informed” of certain things, including “the option to accept or refuse administration of the product.” FDCA Section 564(e)(1)(A)(ii)(III). In this case, that product is the COVID-19 vaccines.

The federal government’s authority to mandate any kind of vaccinations is limited. For example, during a small pox outbreak in Massachusetts in 1905, the state required all adults to be vaccinated. The Supreme Court ruled that a state can mandate vaccines, and accompany those vaccine mandates with a criminal fine for those not in compliance. More broadly, the Court ruled that the state can impose “reasonable regulations” to protect the public health, even when such regulations interfere with individual rights.

<https://supreme.justia.com/cases/federal/us/197/11> Since that time, both state and local governments have mandated immunizations (e.g., mumps, measles, chickenpox, etc.) as a prerequisite for attending public schools. The Court has heard several challenges to those mandates and has consistently ruled the mandates to be constitutional.

So, can an employer mandate or incentivize COVID-19 vaccination? YES, they can!

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## Employer Mandates

In May 2021, the Equal Employment Opportunity Commission (EEOC) set forth guidelines for employers who plan to require mandatory vaccination. The EEOC confirmed that mandatory vaccination programs were permissible as long as they comply with the requirements of the Americans with Disabilities Act (ADA) and Title VII, which prohibits discrimination based on race, color, religion, sex and national origin.

In Pennsylvania there have been a number of bills passed by the General Assembly, prohibiting vaccination information on ID cards, proof of vaccination, mandatory vaccination of residents, and employers taking action against unvaccinated employees. The State Senate sent Governor Tom Wolf a proposal that would block the state, as well as any county, municipality, school district, colleges and universities, from requiring proof of COVID-19 vaccination. The Governor vetoed the legislation.

Here's what we know thus far:

- Federal Government – At this time all Federal employees and on-site contractors are required to get vaccinated. If they are not vaccinated due to religious, health or other exemptions, they must be masked and frequently (at least weekly) tested for COVID, and will be restricted from travel.
- Military – The Defense Department is developing a plan for mandatory vaccination for the military which will require a waiver signed by President Biden because the FDA has yet to formally approve the vaccines. This requirement to offer a choice of accepting or rejecting use of an emergency use vaccine may only be waived by the president and “only if the president determines in writing that complying with such requirement is not in the interest of national security.” Recruiting, basic training and housing could be affected.
- State Government – Vaccine mandates fall under the auspices of individual states, for state employees and contractors and also for schools and state universities. California and New York governors have announced vaccine mandates for state employees. Other governors may follow. At the same time, governors of Florida, Texas and Arizona have banned both vaccine and mask mandates. More governors may opt to join them.
- Health Care Systems – 53 systems across the country have mandated that employees be vaccinated, including the Mayo Clinic, St Jude's and Children's Hospital of Philadelphia (CHOP). Rush and Vanderbilt offer a mixed bag. Their mandates cover health care workers as well as medical and nursing students. Houston Methodist made the news early on when their employee vaccine mandate was upheld by the courts. Part of the winning argument centered on “... their sacred duty and obligation to care...” for patients in the safest possible manner.
- Private Employers – Increasingly it seems that pressure is on employers to mandate employee vaccination. Delta and United Airlines, Wells Fargo, Walmart and Disney led the way.
- School Districts – Randi Weingarten, President of the American Federation of Teachers (AFT), said “we want to keep our kids and teachers safe and we can “try” to reopen schools.” No surprise there, since the AFT has been the strongest contingent for school closures. Still, while Weingarten repeated her view that everyone should get vaccinated unless they have a medical or religious exemption, she said mandates should be a mandatory subject of negotiation between employers and employees. A Harvard study revealed that many families also supported extended school closings, in part because they considered their local teachers union a trustworthy source on when it was safe to open schools. The NY state United Teachers union opposes a vaccine mandate. Denver, Colorado is requiring all school and child care personnel to be vaccinated.

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## Student Mandates

It's vexing that the Center for Disease Control (CDC) does not address vaccine mandate in its latest guidance. It notes, however, that keeping track of students' and workers' vaccination status can help inform the prevention strategies used in a school, such as masking and social distancing. Unfortunately, the CDC's most recent decisions have come just a few weeks before school begins.

- Universities – Initially most mandates for students came from private schools, e.g., William and Mary, Cornell, Ohio Wesleyan, Michigan and Indiana. Now some state schools are mandating student vaccination, e.g., the California State System, Michigan State and Rutgers.
- Closer to home, Penn State has, in a wordy announcement, said it “strongly encourages students, faculty and staff to get vaccinated and to share their vaccination status with the University as soon as possible.” These tactics are similar to last year – testing upon arrival to campus if unvaccinated, on or near campus isolation for positive students, rapid testing if desired and weekly testing for those unvaccinated. Hmm. And now, there's masking for everyone (vaccinated or not) everywhere on campus.
- Schools (K-12) – Schools and districts can't require vaccination but state legislatures or health officials can uphold the requirement. Vaccines have only been approved for use in children 12 years and older, making mandating for these students highly questionable.

## Mask Mandates

The swirling around masking continues to fuel dissent, confusion and anger, and we aren't going to tackle too much on this topic this week because the rules and guidelines will likely change again!

However, it's worth noting that many states eased or eliminated mask orders in May and June after the U.S. Centers for Disease Control and Prevention (CDC) said fully vaccinated people can safely forgo face-covering in most public settings. With the Delta variant fueling a new surge in COVID-19 cases, the federal health agency issued revised guidelines on July 7, recommending that vaccinated people wear masks indoors in areas with substantial or high rates of COVID-19 transmission.

So let's talk about our Commonwealth. Pennsylvania's mask mandate was implemented in April 2020 and rescinded June 28. Face-covering is required in health care facilities, group residential settings such as long-term care facilities, prisons and homeless shelters, and on public transit, as directed by the CDC.

## The Bottom Line

There's much debate about the validity of the CDC's data (such as occurrence, death, hospitalization rates), supporting mandates for vaccination and masking. Perhaps, as a start:

- Any employer that insists employees must be vaccinated cannot impose those requirements until the southern border is closed.
- Any entity that requires masks must provide an effective mask (like an N95) that prohibits disease transmission.

Less gobblety gook, more transparency and simpler, clearer messaging and full FDA approval of the COVID-19 vaccines could help fight vaccine hesitancy. Anticipated final FDA approval for Moderna and Pfizer vaccines is expected in September. Where do we go from there? Your guess is as good as ours.

*Sources:* National Law Review, WebMD, New York Times, The Advisory Board, Associated Press, Wall Street Journal, NBC News, Harvard Business School/Joshua Coval, AARP