



# Compliance Issues Related to COVID-19 Vaccine Mandates by Employers

Published on December 15, 2021

**This content is not to be considered legal advice. We recommend that you speak with legal counsel specializing in labor and employment law about employment law issues related to COVID-19 vaccines.**

Sun Life has prepared this whitepaper to address a variety of compliance issues related to vaccine mandates. The summary includes, among other things, an analysis of recent federal government vaccine mandate/testing orders, state laws that ban or limit vaccine mandates, and states that have adopted their own vaccine mandates. We also discuss legally recognized exemptions and whether employers are responsible for costs associated with testing.

## Contents

<b>SECTION 1: FEDERAL ORDERS</b> . . . . .	2	vi. Testing . . . . .	5
a) Federal Contractor Requirements . . . . .	2	vii. Notification and removal of employees . . . . .	5
i. Vaccine mandate . . . . .	2	viii. Face coverings . . . . .	5
ii. Verification of vaccination status . . . . .	2	ix. Employer duty to Inform employees . . . . .	5
iii. Mask wearing and other safety protocols . . . . .	2	x. Reporting requirements and availability of records . . . . .	6
iv. Designation of Safety Coordinator . . . . .	3	<b>SECTION 2: STATE LAWS LIMITING OR BANNING</b>	
v. Deadlines . . . . .	3	<b>EMPLOYER VACCINE MANDATES.</b> . . . . .	6
vi. Preemption of state laws . . . . .	3	<b>SECTION 3: STATES IMPOSING THEIR OWN</b>	
vii. Legal Challenges to the federal contractor guidance. . . . .	3	<b>VACCINE MANDATES.</b> . . . . .	10
b) Requirements for health care organizations that receive Medicaid or Medicare funding . . . . .	3	<b>SECTION 4: LEGALLY RECOGNIZED EXEMPTIONS.</b> . . . . .	11
c) OSHA Emergency Temporary Standard . . . . .	4	a. Medical/Disability accommodations . . . . .	11
i. Status of the OSHA Emergency Temporary Standard . . . . .	4	b. Sincerely held religious belief accommodations . . . . .	11
ii. Requirements of the ETS with regard to vaccinations . . . . .	4	c. Pregnancy-related accommodations . . . . .	13
iii. Ascertainment of vaccination status . . . . .	4	<b>SECTION 5: DO EMPLOYERS HAVE TO PAY FOR THE COST OF TESTING?</b> . . . . .	13
iv. Which employees must have their vaccination status ascertained? . . . . .	4	a) Do state laws require employers to have to pay for testing? . . . . .	13
v. Paid time off to become vaccinated and to recover from effects of vaccine . . . . .	5	b) What about ERISA? . . . . .	16
		c) Do employers have to compensate employees for time spent being tested? . . . . .	17

## SECTION 1: FEDERAL ORDERS



In September, the federal government issued orders imposing requirements on employers related to COVID-19 vaccines. First, the Biden Administration issued Executive Order 14042 requiring federal contractors to comply with certain COVID-19 vaccination requirements. Second, the Centers for Medicare & Medicaid Services (CMS) in collaboration with the Centers for Disease Control and Prevention (CDC) announced that they would be issuing emergency regulations requiring that vaccinations for nursing home workers be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition of participating in the Medicare and Medicaid programs. Third, President Biden also announced that OSHA was being directed to develop an Emergency Temporary Standard (ETS) to require all employer with 100 or more employees to ensure their workforce is fully vaccinated or subject to weekly COVID-19 testing before coming to work and to provide employees with paid time off to get vaccinated and recover from the side effects associated with the vaccine. Each of these requirements is addressed below.

### a) Federal Contractor Requirements

The [Safer Federal Workforce Task Force has issued updated guidance related to the federal contractor requirements \("Guidance"\)](#). The Task Force has also issued [FAQs](#), which, again, it regularly updates. Under the Guidance, impacted government contracts, contract extensions or contract modifications must now include a clause that requires the contractor and any subcontractors to have a mandatory vaccination policy. Shortly after the Guidance was issued, many federal contractors were contacted and advised that the new requirement is applicable and incorporated into the contract. Contractors are then required to ensure that their subcontractors also comply with the requirement.

#### i. Vaccine mandate

The scope of the requirement is very broad and requires all covered employees of federal contractors to be vaccinated, including employees who work remotely. Federal contractors who provide services with a value of \$250,000 or more are covered as are their subcontractors.

The only exemptions from the vaccine requirement that are recognized are those required by federal law, including for medical conditions or disabilities under the

Americans with Disabilities Act (ADA) and for sincerely held religious beliefs under the Title VII.

Under the Guidance, employees who work in a covered contract workplace and all support and overhead employees who provide any support to them are considered covered employees. A covered contractor workplace is a location controlled by a covered contractor at which an employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. An employee of a corporate affiliate of a contractor is considered a covered contractor employee if the employee performs work at a covered contractor workplace. In addition, unless the covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of a building will come into contact with an employee who is working on or in connection with a covered contract, the employer must ensure that these other employees are also vaccinated. This includes interactions in common areas, such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas and parking garages. Covered employees who work from home must be vaccinated.

The vaccine mandate also applies to all visitors at a covered contractor workplace. That is, they must be fully vaccinated or if legally entitled to an accommodation, comply with masking and physical distancing safety protocols while in the covered contractor workplace.

#### ii. Verification of vaccination status

The Guidance requires employers to gather and retain evidence to verify that employees have been vaccinated. Attestations are not acceptable proof.

#### iii. Mask wearing and other safety protocols

The Guidance requires that all covered federal contractors and subcontractors implement workplace safety protocols, including physical distancing and masking while in covered contractor workplaces. Masking is required in areas of high or substantial community transmission even for fully vaccinated employees. They must wear a mask in indoor settings except under special limited circumstances (e.g. when an individual is alone in an office with floor-to-ceiling walls and a closed door or when eating or drinking). In areas of low or moderate transmission, vaccinated individuals are not required to wear a mask. A covered contractor workplace does not include an employee's residence for purposes of mask-wearing requirements.

#### **iv. Designation of Safety Coordinator**

Covered contractors are also required to designate a person or persons to coordinate implementation of and compliance with the Guidance and the workplace safety protocols required by it.

#### **v. Deadlines**

The original deadline for compliance with the vaccine requirements was that all covered employees had to have received their final vaccination dose by December 8, 2021 but has been extended to January 4, 2022. Individuals are considered fully vaccinated two weeks after they have received the second dose in a two-dose series or two weeks after they have received a single-dose vaccine and, therefore, they must be fully vaccinated by January 18, 2022.

#### **vi. Preemption of state laws**

The Guidance indicates that it supersedes any inconsistent state and local laws that are less protective of workplace safety than the guidance, including those that ban or limit an employer's ability to require vaccinations, face coverings or testing. However, the Guidance does not preempt state or local laws that are more protective.

#### **vii. Legal Challenges to the federal contractor guidance.**

There are [several lawsuits pending](#) challenging the enforceability of the federal contractor mandate. On November 30, 2021, in a [45-page opinion](#), a federal judge in Kentucky temporarily blocked the government from enforcing its vaccine mandate for federal contractors in three states (Kentucky, Ohio and Tennessee) on the ground that the President's order exceed his authority under the Federal Property and Administrative Services Act (FPASA). The judge concluded that the vaccine mandate did not have a sufficient nexus to the purpose of the FPASA which, in the judge's opinion, is creating an economical and efficient system for procurement and supply. The scope of the injunction is not clear, and some have interpreted it to apply only when the contract itself was issued in one of those states and that if the contract was issued elsewhere employees in that state cannot rely upon the order. [On 12/7/21, a federal judge in Georgia](#) issued a nationwide stay of the federal contractor vaccine mandate.

#### **b) Requirements for health care organizations that receive Medicaid or Medicare funding**

On November 5, 2021, the Centers for Medicare & Medicaid Services (CMS) published an [interim final rule \(IFR\)](#) related to the vaccination requirements for staff at Medicare and Medicaid providers, including but not limited to hospitals, critical access hospitals, ambulatory surgical centers, hospices and skilled nursing facilities. Under the IFR, facilities must have a process for ensuring vaccination by December 5, 2021 and employees must be fully vaccinated by January 4, 2022. Employers must collect proof of vaccination, and attestation will not suffice. Only exceptions for medical conditions and disabilities under the ADA or for sincerely held religious beliefs will be acceptable. All staff who provide any care, treatment or other services for the provider or its patients, regardless of clinical responsibility or patient contact, are subject to the vaccine requirement. However, the requirement does not apply to those who work outside the Provider's setting, including exclusively providing telehealth or telemedicine, and who do not have any direct contact with patients and other staff.

On November 10, 2021, ten states [filed an action in federal court in Missouri](#) challenging the CMS IFR. They challenge the IFR as being arbitrary and capricious, contrary to law, in excess of CMS statutory authority, and issued in violation of procedural law. On November 15, 2021, the State of Texas also filed [an action in federal court in Texas](#) challenging the CMS IFR, and on November 17, 2021, the State of Florida [filed an action in federal court in Florida](#) also challenging the CMS IFR. The court denied Florida's request for a temporary restraining order or preliminary injunction [on November 20, 2021](#) on the ground that the State did not demonstrate irreparable harm warranting preliminary relief. However, on November 30, a federal district court in Louisiana ruled that the directive for health care workers is temporarily blocked nationwide, following [a decision on November 29, 2021](#) from a federal district court in Missouri that blocked the Biden administration's vaccine directive for health care workers in 10 states.

## c) OSHA Emergency Temporary Standard

### i. Status of the OSHA Emergency Temporary Standard

On November 8, 2021, OSHA issued its [Emergency Temporary Standard \(ETS\)](#) requiring all private employers with 100 or more employees to mandate COVID-19 vaccination or weekly COVID-19 testing. The ETS was scheduled to go into effect on December 5, 2021 and for employers requiring vaccinations, employers were to ensure that their employees had received their last dose of either Pfizer or Moderna, or their one dose of Johnson & Johnson by January 4, 2022. At this time, the ETS does not require a booster to be considered “fully vaccinated.”

The OSHA ETS has been challenged in a number of lawsuits. On November 12, 2021, the [Fifth Circuit Court of Appeals](#) issued an order staying the ETS and on November 15, 2021, [OSHA advised](#) that it was going to suspend efforts to implement and enforce the ETS pending future developments in the litigation. On November 16, 2021, the various lawsuits challenging the ETS were [assigned to the Sixth Circuit Court of Appeals](#) in a lottery process. On November 23, 2021, the Biden administration filed an [emergency motion to dissolve the stay](#) and a [briefing schedule](#) has been established. Many commentators believe there is a significant likelihood that the ETS may be held to be unenforceable and the 5th Circuit’s opinion notes that in its 50-year history OSHA has issued just ten ETS’s. Six were challenged in court and only one of those challenged survived.

While the ETS has been temporarily stayed, many employers are continuing to take steps to comply with it, including establishing a process to determine vaccine status and collect vaccine documentation and to arrange for testing either as an accommodation for those who are exempted from a vaccine mandate or as a voluntary option for employees in lieu of vaccination. In addition to the text of the ETS, OSHA has also issued an [extensive FAQ](#) document.

### ii. Requirements of the ETS with regard to vaccinations

While the ETS does not require employers to mandate vaccines, it makes clear that employers may choose to mandate vaccines. Under the ETS, employers must take one of the following steps:

1. Establish, implement and enforce a written mandatory vaccination policy.
2. An employer is exempt from a mandatory vaccination policy only if the employer establishes, implements and enforces a written policy allowing an employee to choose to be fully vaccinated against COVID-19 or to provide proof of regular testing for COVID-19 and wear a face covering.

### iii. Ascertainment of vaccination status

The ETS also requires employers to determine the vaccination status of each employee and to keep a roster of each employee and their vaccination status. In doing so, the employer must require each employee to provide acceptable proof of vaccination status, and an attestation is only acceptable when an employee is unable to produce acceptable proof of vaccination. In such instances, the employee must sign a statement attesting to their vaccination status, attesting that they have lost and are otherwise unable to produce proof of vaccination status and affirm that that their statement is true and that knowingly providing false information regarding their vaccination status may subject them to criminal penalties.

The ETS advises that if an employee does not provide adequate proof of vaccination status they should be treated as not fully vaccinated. The ETS requires employers to retain a record of each employee’s vaccination status and preserve acceptable proof of vaccination for each employee who is fully or partially vaccinated. These records are considered to be medical records and must be maintained in accordance with OSHA regulations relating to medical records, except that the records do not have to be held for 30 years as required by the regulation but, instead, need only be held as long as the ETS is in effect.

### iv. Which employees must have their vaccination status ascertained?

The ETS advises that the employer is to ascertain the vaccination status of “each” employee. However, the ETS also provides that it does not apply to employees who work fully remotely and do not have contact with others. Some commentators have concluded that the ETS mandates that employers ascertain the vaccination status of all employees, including those who work remotely. Others have suggested that while it may not be required, it may be prudent so that the employer has an adequate record of vaccination status in the event that the worker does start to attend in-person meetings.

The ETS advises that if an employer has ascertained an employee's vaccination status prior to the effective date of the ETS through another form of attestation or proof, and retained records of that ascertainment, the employer is exempt from the requirement of obtaining proof of vaccination but only for each employees whose fully vaccinated status has been documented prior to the effective date of the section. Commentators have disagreed about whether this section applies if the employer did not gather and retain proof of vaccination.

#### **v. Paid time off to become vaccinated and to recover from effects of vaccine**

The ETS requires employers to provide a reasonable amount of time for employees to receive vaccinations and must provide up to four hours of paid time, including travel time, for that purpose. The employer is also required to provide reasonable time and paid sick leave to recover from the side effects experienced following receipt of a vaccination. Currently, these requirements currently apply only to a "primary" dose and not to a booster shot.

#### **vi. Testing**

Employers must ensure that each employee who is not fully vaccinated is properly tested. Employees who report at least once every 7 days to a workplace where other individuals such as coworkers or customers are present must be tested at least once every 7 days and must provide documentation of the most recent COVID-19 test not later than the 7th day following the date on which the employee provided the latest result. Employers are required to keep a record of each test result, including a copy of the test result.

The FAQs for the ETS describe the type of tests that are acceptable and makes clear that at-home tests can only be used if they are observed by the employer or an authorized telehealth proctor (FAQ 6J and 6K).

The ETS itself does not require employers to pay for any costs associated with the testing but makes clear that an employer may be required to pay for the cost of testing by other laws, regulations, or collective bargaining agreements.

The ETS provides if that if an employee tests positive for COVID-19 or is diagnosed with COVID-19, employers may not require the employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis. This rule was adopted because there is evidence of people testing positive after being infected but not having a sufficient viral load to be infectious.

#### **vii. Notification and removal of employees**

Regardless of vaccination status, employers must require each employee to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19 and immediately remove such employee until the employee (1) receives a negative COVID-19 test as described in the ETS, (2) meets return to work criteria in the CDC's "Isolation Guidance" or (3) receives a recommendation to return to work from a licensed healthcare provider. The FAQs advise that the ETS does not require employers to pay for time that is missed when an employee is removed from the workforce (FAQ 7D).

#### **viii. Face coverings**

Employers must make sure that employees who are not fully vaccinated wear a face covering when indoors and when occupying a vehicle with another person for work purposes except when the employee is alone in a room with floor to ceiling walls and a closed door or for a limited time when the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.

The employer also does not have to require employees to wear a face mask where it is infeasible or creates a greater hazard that would excuse compliance, such as when it is important to see the employee's mouth for reasons related to their job duties, when the work requires use of an employee's uncovered mouth or when the use of face coverings presents a risk of serious injury or death to the employee. Employers are also not permitted to prevent employees from voluntarily wearing a face covering or face mask unless it would create a safety hazard.

#### **ix. Employer duty to Inform employees**

In addition to creating either a vaccination policy or a vaccination/testing policy, employers are required to inform each employee in a language at a literacy level the employee understands about:

1. The requirements of the ETS;
2. Employer policies and procedures established to implement the ETS;
3. COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated by providing the CDC document "[Key Things to know about COVID-19 Vaccines](#)";
4. The prohibitions on retaliation;
5. The prohibitions on and criminal penalties for providing false statements or documentation.



## SECTION 2: STATE LAWS LIMITING OR BANNING EMPLOYER VACCINE MANDATES

### x. Reporting requirements and availability of records

The ETS requires employers to report to OSHA each work-related fatality within 8 hours or in-patient hospitalization within 24 hours.

Employers must make available by the end of the next business day after a request for examination and copying the individual COVID-19 vaccine documentation and any COVID-19 test results for a particular employee to the employee and anyone having written authorized consent from the employee. The employer also must make available by the end of the next business day after a request by an employee or employee representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace. Finally, the employer must make available to OSHA for examination and copying within four business hours of a request the employer's written policy as required by the ETS and the aggregate vaccination numbers of employees and by the end of the next business day after a request all other records and documents required to be maintained by this section.

Currently, eleven states have passed laws or issued orders that prohibit an employer from having a COVID-19 vaccine mandate or impose limits on an employer's ability to mandate a COVID-19 vaccine. This is a rapidly changing area and employers need to stay up to date.

If the OSHA ETS is deemed enforceable, OSHA has taken the position that it preempts state laws that attempt to limit or ban employers from having vaccine mandates. At this point, since the OSHA ETS has been stayed, employers with employees in states that have adopted these laws need to be mindful of their requirements. Set forth below is a summary table of states that currently have laws impacting employers.

One of the most common provisions in these laws is to expand the number and nature of exemptions that employers must accept and to limit an employer's ability to challenge or scrutinize a written request for an exemption. For example, in some states, employers must recognize philosophical objections to vaccines in addition to sincerely held religious beliefs. Other state laws require employers to offer the choice of testing or vaccines. Violations of some of these laws can result in extensive fines, including for example, Florida and Kansas.

State	Law/Executive Order
Alabama	<p>On 11/5/21, Governor Kay Ivey signed <a href="#">SB9</a>.</p> <ul style="list-style-type: none"> <li>• Requires employers to allow employees to claim exemption from COVID-19 vaccination for medical reasons or sincerely held religious beliefs and provides for standard form for exemption.</li> <li>• Prohibits an employer from requiring a COVID-19 vaccine if the form is completed and submitted.</li> <li>• Employer must liberally construe employee's eligibility for exemption in favor of employee.</li> <li>• Grounds permitted include: <ul style="list-style-type: none"> <li>- Health care provider (HCP) recommends that employee refuse vaccine based on current health conditions and medications (HCP certification required)</li> <li>- Prior severe allergic reaction for any vaccines</li> <li>- Prior severe allergic reaction to polyethylene glycol or products containing it.</li> <li>- Receipt of monoclonal antibodies or convalescence plasma to treat COVID-19 in past 90 days</li> <li>- Bleeding Disorder or taking blood thinner</li> <li>- Severely immunocompromised</li> <li>- Diagnosed with COVID-19 in the past 12 months</li> <li>- Receiving COVID-19 vaccine conflicts with my sincerely held religious beliefs, practices or observances</li> </ul> </li> </ul>

State	Law/Executive Order
Arkansas	<p>On 10/13/21, Gov. Asa Hutchinson declined to veto two bills placing limits on vaccine mandates, allowing them to become law (<a href="#">SB 739</a> and <a href="#">HB 1977</a>).</p> <ul style="list-style-type: none"> <li>• Requires employers to offer testing options as an exception to employer COVID-19 vaccine mandates.</li> <li>• Employee can produce a negative antigen test result or molecular diagnostic test result no more than once per week or Proof of immunity for the virus that causes COVID-19 or its variants, including, without limitation, the presence of antibodies. T cell response or proof of a positive COVID-19 or its variants tests, on a basis of 2 times per year not to exceed once every 6 months.</li> <li>• If employee is terminated who is not vaccinated and was not offered testing option, then employee may be eligible for unemployment benefits in addition to other remedies under Arkansas or federal law.</li> <li>• Employee has to pay for tests if government or insurance funding is not available.</li> </ul>
Florida	<p>On 11/18/21, <a href="#">Governor DeSantis signed HB 1-B/SB 2-B</a></p> <ul style="list-style-type: none"> <li>• It prohibits private employers from imposing COVID-19 vaccine mandate without allowing 5 exemptions: <ul style="list-style-type: none"> <li>– Medical reasons including but not limited to pregnancy or anticipated pregnancy</li> <li>– Religious reasons</li> <li>– COVID-19 immunity</li> <li>– Periodic testing at employer’s expense</li> <li>– Use of employer-provided personal protective equipment</li> </ul> </li> <li>• Law becomes effective immediately, but FL Dept. of Legal Affairs and Dept. of Economic Opportunity will develop emergency rules to implement the law within 15 days. Employer vaccine mandate is deemed invalid until the rules are filed or 15 days after effective date of new law, whichever occurs first.</li> <li>• If FL private employer maintains a vaccination mandate that does not provide the 5 FL exemptions, and employer terminates an employee based on such a mandate, FL AG can impose a fine of up to (1) \$10,000 per violation for employer with fewer than 100 employees or (2) \$50,000 per violation for employer with 100 or more employees. AG cannot impose a fine if employer reinstates a terminated employee with back pay to the date that the complaint was received by FL Dept. of Legal Affairs.</li> <li>• No exceptions for healthcare business, including hospitals.</li> <li>• FL Department of Health has provided <a href="#">template forms</a>.</li> <li>• On 12/3/21, the <a href="#">FL Department of Legal Affairs</a> issued an emergency rule.</li> </ul>
Iowa	<p>On 10/29/21, Governor Kim Reynolds signed <a href="#">House File 902</a>.</p> <ul style="list-style-type: none"> <li>• Employer that requires employees to receive a COVID-19 vaccination must waive the requirement if the employee requests a waiver and submits either: <ul style="list-style-type: none"> <li>– A statement that receiving the vaccine would be injurious to the health and well-being of employee or an individual residing with the employee or</li> <li>– A statement that receiving the vaccine would conflict with the tenets and practices of a religion of which employee is an adherent or member.</li> <li>– Employee who is discharged for refusing to get a COVID-19 vaccination is not disqualified from unemployment benefits.</li> </ul> </li> </ul>

State	Law/Executive Order
Kansas	<p>On 11/23/21 Kansas Governor Laura Kelly signed <a href="#">HB 2001</a>.</p> <ul style="list-style-type: none"> <li>• If employer implements a COVID-19 vaccine mandate employer must exempt employees from this requirement without punitive action if employee submits a written waiver request to the employer stating that complying with such requirement would: <ul style="list-style-type: none"> <li>- Endanger life or health of employee or an individual who resides with employee, as evidenced by an accompanying written statement signed by a physician or someone under direction of physician;</li> <li>- Violate sincerely held religious beliefs of employee as evidenced by an accompanying written statement signed by employee. Religious beliefs include but are not limited to theistic and non-theistic moral and ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views.</li> </ul> </li> <li>• Employer must grant exemption requested for sincerely held religious beliefs without inquiring into sincerity of request.</li> <li>• Employer who fails to comply with this section and terminates employee based on COVID-19 vaccine requirement commits violation of this section. Termination includes functional equivalent of termination.</li> <li>• Terminated employee can file claim with secretary of labor. If secretary finds violation, attorney general shall impose a civil penalty not to exceed \$10,000 per violation for employer with fewer than 100 employees or \$50,000 per violation for employer with 100 or more employees. However, AG shall not impose penalty if employer, prior to issuance of final order, reinstates terminated employee with back pay. In deciding amount of penalty, AG is to consider several factors including whether employer acted knowingly and willfully, showed good faith in attempting to comply, has taken action to correct violation and has previously been assessed a civil penalty.</li> <li>• Law also provides that individuals terminated in violation of this section will be eligible for unemployment if otherwise eligible.</li> <li>• "COVID-19 vaccine requirement" is defined as an employer requiring employee to receive a COVID-19 vaccine, to provide documentation certifying receipt of a COVID-19 vaccine or enforcing a requirement by the federal government or any other entity to this effect.</li> <li>• Employee means an individual who is employed in this state for wages by an employer.</li> <li>• Employer means any person in this state who employs one or more persons.</li> </ul>
Montana	<p>On 5/7/21, Gov. Greg Gianforte signed <a href="#">Montana House Bill 702</a></p> <ul style="list-style-type: none"> <li>• Prohibits discrimination based on vaccination status.</li> <li>• This includes prohibiting private employers and government entities refusing employment to a person or discriminating against them in compensation or in a term, condition or privilege of employment base on person's vaccination status.</li> <li>• An individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.</li> <li>• Excludes health care facilities.</li> </ul>

State	Law/Executive Order
North Dakota	<p>On 11/12/21, <a href="#">Governor Doug Burgum signed HB 1511</a></p> <p>If employer requires employee or prospective employee to be vaccinated against COVID-19, employer must allow individuals to submit proof of COVID-19 antibodies as an exemption (proof is valid for 6 months from date of antibody test).</p> <ul style="list-style-type: none"> <li>• Employer must allow individual to submit to periodic COVID-19 tests as an exemption to vaccination requirement.</li> <li>• Employer must allow individual to submit certificates as an exemption from vaccination requirement: <ul style="list-style-type: none"> <li>– Certificate from Health Care Provider that immunization would endanger life or health of individual;</li> <li>– Certificate signed by individual that individual's religious, philosophical or moral beliefs are opposed to such immunization.</li> </ul> </li> </ul>
Tennessee	<p>On 11/12/21, Gov. Bill Lee signed <a href="#">HB9077/SB 9014</a>.</p> <ul style="list-style-type: none"> <li>• It prohibits employers from requiring proof of COVID-19 vaccination from employees, job applicants and customers.</li> <li>• Law prohibits employers from taking adverse action against individuals who refuse to provide proof of COVID-19 vaccination based on any objection for any reason to receiving the shot.</li> <li>• Business cannot deny employment or privileges based on refusal to provide proof of vaccination.</li> <li>• Individual whose rights are violated can sue for damages, injunction and attorney's fees.</li> <li>• Healthcare providers that are subject to fines by Centers for Medicaid/Medicare Services are excluded. Federal contractors or subcontractors may also seek an exemption from the law by applying in writing to the Tennessee Comptroller of the Treasury if the prohibition would result in loss of federal funding. Nursing homes, assisted living facilities, residential hospice facilities and entertainment venues are exempt and can ask for proof of vaccination or recent negative COVID-19 test.</li> <li>• Employees who leave employment because of refusal to receive COVID-19 vaccine are not disqualified from receiving unemployment benefits.</li> </ul>
Texas	<p>On 10/11/21, Gov. Greg Abbott issued <a href="#">Executive Order GA 40</a>.</p> <ul style="list-style-type: none"> <li>• It prohibits any entity in the state, including private employers, from enforcing COVID-19 vaccine mandates.</li> <li>• Order states that no entity in Texas can enforce vaccination against anyone, including an employee or consumer, who objects for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19</li> </ul>
Utah	<p>On 11/16/21, Gov. Spencer Cox signed <a href="#">SB 2004</a></p> <ul style="list-style-type: none"> <li>• The bill requires that an employer vaccination mandate include exemptions for: <ul style="list-style-type: none"> <li>– Health reasons;</li> <li>– Sincerely held religious beliefs;</li> <li>– Sincerely held personal beliefs.</li> </ul> </li> <li>• Bill prohibits employers from taking adverse action against employee or potential employee who is not vaccinated or asks for an exemption. Adverse action does not include reassignment or termination of an employee if reassignment is not practical.</li> <li>• Bill requires employers to pay for COVID-19 testing requirements; and</li> <li>• Prohibits employers from retaining a copy of any vaccination documents.</li> </ul>

State	Law/Executive Order
West Virginia	<p>On 10/22/21, Governor Jim Justice approved <a href="#">House Bill 335</a>.</p> <ul style="list-style-type: none"> <li>Provides that private employer must recognize exemptions from COVID-19 vaccination mandates when employee presents: <ul style="list-style-type: none"> <li>A notarized certification by HCP stating that medical exemption is required due to individual's physical condition or a specific precaution or because individual has COVID-19 antibodies from a previous infection or has recovered from COVID-19, or</li> <li>A notarized certification executed by individual stating that they hold religious beliefs that prevent them from taking the COVID-19 vaccination.</li> <li>Once certificate is provided, employer cannot penalize or discriminate against employee.</li> </ul> </li> </ul>

### SECTION 3: STATES IMPOSING THEIR OWN VACCINE MANDATES



As noted below the following states have some form of vaccinate mandate that may impact private employers. [Littler](#) keeps an updated article that has the citations for the laws and orders discussed below.

State	Law/Executive Order
California	Workers in health care and high-risk congregate settings and all school staff must show proof of vaccination or be tested at least once per week.
Colorado	Employees, contractors and support staff of licensed health care settings must be vaccinated, and all state contractors and subcontractors must be vaccinated if they enter state facilities.
Connecticut	All staff at long-term care facilities must be vaccinated.
Delaware	All staff in long-term care facilities and schools must be vaccinated or undergo weekly testing.
District of Columbia	All government contractors, health care workers and adults who are regularly in schools and childcare facilities must be vaccinated.
Hawaii	All state contractors and visitors at state facilities must provide vaccination status or test results prior to entry.
Illinois	All health care workers and teachers and staff must get vaccinated.
Maine	Healthcare workers, which includes individuals employed by a hospital, a multi-level health care facility, home health agency, nursing facility, residential care facility, and intermediate facility for individuals with intellectual disabilities must be vaccinated.
Maryland	Employees in nursing homes and hospital must show proof of vaccination or adhere to ongoing COVID-19 screening and testing.
Massachusetts	Nursing home staff and home care agencies staff must be fully vaccinated.
New Jersey	Workers in health care facilities, high-risk congregate settings, educational staff and state contractors who enter work at or provide services in any state agency must be fully vaccinated or subject to COVID-19 testing at least one to two times per week.
New Mexico	Workers in close-contact congregate settings, including hospitals, nursing homes, juvenile justice facilities, rehabilitation facilities, and more must be vaccinated.
New York	Health care workers including staff at hospitals and long-term care facilities must be vaccinated.
Oregon	Workers in health care settings must be vaccinated.
Pennsylvania	Workers in high-risk congregate facilities must be vaccinated.
Puerto Rico	Government contractors, workers in the hospitality sector and all health facility workers must be vaccinated. On November 15, 2021, the governor of Puerto Rico announced that all employers with 50 or more employees are subject to vaccine/testing requirements.
Rhode Island	Staff at state-licensed health care centers must be vaccinated.

State	Law/Executive Order
Washington	On-site state contractors, employees in health care and long-term care settings, and school staff must be vaccinated.
Wisconsin	All state contractors either have to submit vaccination status or be tested.

On [December 6, 2021](#), outgoing Mayor Bill de Blasio announced that private sector workers in New York City must require in-person employees to be vaccinated by December 27, 2021. Details have not yet been provided and it is not clear whether incoming Mayor Eric Adams will support the mandate. [On December 10, 2021](#), NY Governor Kathleen Hochul announced that starting 12/13/21 through at least 1/15/22, all employees and patrons in indoor public spaces must wear a mask unless the business requires all individuals on the premises to be vaccinated. And, the NY Health Commissioner has issued [FAQs](#) on the new mask guidance.

It also should be noted that on November 8, 2021, the Governor of Illinois signed into law [an amendment to the Illinois Health Care Right of Conscience Act \(“the Act”\)](#) that will prevent employees from relying on the Act to avoid employer COVID-19 vaccine mandates. The amendment goes into effect on June 1, 2022. The Act was originally passed in 1977 and was intended to protect health care workers who participate in, or refused to participate in, the delivery or receipt of health care services that were contrary to their conscience. The amendment clarifies that it is not a violation of the Act for an employer to take or enforce any measures or impose any requirements intended to prevent contraction or transmission of COVID-19.

## SECTION 4: LEGALLY RECOGNIZED EXEMPTIONS



Under federal law, there are really only two types of legally recognized exemptions: (1) medical, including disabilities under the Americans with Disabilities Act (ADA), and (2) sincerely held religious beliefs. It is worth also discussing pregnancy-related accommodations because even though there is no current federal law that mandates pregnancy accommodations (other than if they are deemed disabilities because of complications), there are many state laws that do impose this legal requirement. Further, there is a bi-partisan bill pending in Congress to create federal pregnancy accommodation requirements.

### a. Medical/Disability accommodations

Under federal law, employees are only legally entitled to accommodations for medical conditions that are considered disabilities under the Americans with Disabilities Act (ADA). However, the Biden administration guidance on the three mandates indicate that employers should also consider accommodations for medical conditions (regardless of whether they meet the definition of disability under the ADA). The accommodations can include exemption from the vaccine requirement or a delay in the requirement until the condition has resolved. The [CDC](#) has indicated that there are some conditions that are contraindications for receiving the COVID-19 vaccine, such as prior allergic reactions to the COVID-19 vaccines or to their ingredients. However, allergic reactions to other substances are not, according to the CDC, contraindications unless identified as such by the employee’s health care provider.

The [CDC](#) has also indicated that people with underlying health conditions that put them more at risk for a more severe case of COVID-19 should get COVID-19 vaccines.

Employers need to be mindful that mental health conditions can qualify as disabilities and that if an employee’s health care provider advises that the employee should not receive the vaccine because the increased anxiety of worrying about the vaccine would be detrimental, employers need to evaluate this type of accommodation request.

Under the ADA, employers must grant requests for reasonable accommodation unless they can show that doing so would create an undue hardship or create a direct threat to the safety of the employee or others.

### b. Sincerely held religious belief accommodations

Title VII of the Civil Rights Act requires employers to provide reasonable accommodations for an employee’s sincerely held religious beliefs unless the accommodation would impose an undue hardship on the employer.

There is legal authority that the undue hardship threshold is much lower than the undue hardship showing required under the ADA. Cases refer to it as “more than a de minimis cost.” Employers need to be aware, however, that some State laws that require accommodations for religious beliefs may have a higher standard for undue hardship, closer or identical to the standard for the ADA. For example, NY, NJ and CA use the same definition of undue hardship for religious accommodations as for disability accommodations.

The Equal Employment Opportunity Commission (EEOC) and courts have been generally deferential to employees on whether their beliefs are religious in nature and/or sincerely held. Employees are not required to submit independent verification (such as, for example, a note from a clergy member). There are some other interesting rulings about the religious belief exemption, including the following:

- The religious belief does not have to be an organized religion, and an individual does not have to believe in a supreme being.
- The individual's sincerely held religious belief does not have to be the official doctrine of that religion.
- Courts have found that a belief will be religious if, in the individual's own life view, it takes on a religious context, but it must be more than a philosophy or way of life.
- Past contradictory behavior is not enough to undermine the sincerity of a current religious belief.

The [EEOC has updated its COVID-19 guidance](#) to address requests for religious exemptions from a vaccine mandate. The EEOC suggests that employers should ordinarily assume that a request for a religious accommodation is based on sincerely held religious beliefs. The EEOC notes that if the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making limited factual inquiry and seeking additional supporting information. The EEOC advises that an employee who fails to cooperate with an employer's reasonable request for verification risks losing any subsequent claim that employer improperly denied the accommodation. (See Questions L4 – L6).

The EEOC also gives guidance about what may constitute undue hardship and advises that employers cannot rely on speculative hardships. Factors that can be considered include those relating to the dangers posed by the employee's individual working situation (e.g. indoors or outdoors) and the number of employees

requesting a similar accommodation (i.e. cumulative cost to employer). (Question L3).

Some employers have discussed whether it is appropriate to see how many employees request exemptions based on a sincerely held religious belief and then factoring in that volume in evaluating undue hardship in terms of granting the exemption. Employers have also discussed whether paying for testing and the administrative complexities of testing can justify an undue hardship for denying a request for accommodation on the basis of a sincerely held religious belief. At the current time, these are open issues.

There has been ongoing discussion about whether employers can permit exemptions from a vaccine mandate on the basis of a medical condition or disability but not on the basis of a religious belief. In that regard, the standard for undue hardship is much lower under Title VII for denying an accommodation based on a religious belief. Of note, a recent Second Circuit Court of Appeals [opinion dated November 4, 2021](#) denied a motion to enjoin a New York State vaccine mandate for health care workers which permits an exemption for medical reasons but not for religious belief. The mandate was challenged as violating, among other things, the First Amendment's Free Exercise of Religion Clause. The Second Circuit denied the motion to enjoin the mandate on the grounds that the state had demonstrated legitimate reasons for permitting a limited medical exemption but not an exemption based on religious belief, including among other things, that data suggested that requests for exemptions based on religious beliefs are more numerous than medical requests, and that the State has required health care employees to be vaccinated against rubella and measles since 1980 and 1991, respectively, without a religious exemption. The Second Circuit also noted that the exemption for medical reasons was not unduly subjective or discretionary but rather it required employees to present a certification from a physician or certified nurse practitioner attesting that the employee has a pre-existing health condition that renders the vaccination detrimental to their health, in accordance with generally accepted medical standards, and that employees are required to provide written documentation regarding the nature and duration of the condition. The Court also concluded that the fact that physicians and nurses must use their medical judgment to determine whether a particular individual has a contraindication or a precaution against receiving the vaccine did not make the exemption inappropriately discretionary.

The Second Circuit addressed whether the exclusion of the religious exemption violated Title VII, which prohibits discrimination in employment on the basis of religious belief, and concluded that it did not because employers could decide to provide an accommodation, such as reassignments to telemedicine. The court empathized the distinction between a religious “exemption” and a religious “accommodation,” and also noted that an employer can deny an accommodation under Title VII upon a showing of undue hardship.

### c. Pregnancy-related accommodations

If federal law governs an employee’s right to an accommodation from a vaccine mandate, the scope of the law regarding the duty to provide accommodations related to a routine pregnancy or other routine conditions (e.g. breastfeeding) is fairly limited. That

is, a routine pregnancy is not a disability under the ADA, and the CDC has advised that neither pregnancy nor breastfeeding are contraindications for receiving the COVID-19 vaccine and, to the contrary, the CDC recommends that pregnant or breastfeeding women do receive the vaccine. However, there are a substantial number of state and local laws that require accommodations for pregnancy-related conditions. If the OSHA ETS is not enforceable, those laws are probably relevant in evaluating an employee’s request for an accommodation for a pregnancy-related reason. If the OSHA ETS is enforceable, it is less clear whether those laws are applicable. It is also important to note that there is bipartisan legislation pending in Congress that would require employers to grant accommodations for pregnancy-related conditions.

## SECTION 5: DO EMPLOYERS HAVE TO PAY FOR THE COST OF TESTING?



### a) Do state laws require employers to have to pay for testing?

Many states have laws that require employers to pay for the cost of testing for current employees and/or applicants for employment. Please note that these laws are in addition to the recently-adopted laws limiting employers’ ability to impose a vaccine mandate, some of which make clear that employers must offer testing as an alternative and that this testing must be paid for by the employer (e.g., Arkansas, Florida, and Utah). The states with laws requiring that employers pay for medical examinations are listed below along with a brief summary of the laws’ requirements.

State	Law	Provisions
Arkansas	<a href="#">Ark. Code §11-3-203</a>	<ul style="list-style-type: none"> <li>It is unlawful to require either an applicant or EE to submit to a physical, medical examination or drug test unless it is provided at no cost to EE.</li> <li>Each violation is a misdemeanor punishable by a fine not exceeding \$100.</li> </ul>
California	<a href="#">CA Lab Code §222.5</a>	<ul style="list-style-type: none"> <li>No person shall withhold or deduct from compensation of any EE or applicant to pay for any pre-employment medical or physical examination taken as a condition of employment or required by any law or regulation of federal, state or local governments or agencies.</li> </ul>
Colorado	<a href="#">CO Rev. Stat. §8-2-118</a>	<ul style="list-style-type: none"> <li>It is unlawful for any ER to require an EE or applicant for employment to pay the cost of a medical examination or of furnishing records required by ER as a condition of employment.</li> <li>Violations are subject to penalty not to exceed \$100 per violation.</li> </ul>
Hawaii	<a href="#">HI Rev. Stat. §388-6</a>	<ul style="list-style-type: none"> <li>No ER may deduct or otherwise require EE to pay for medical or physical examination or medical report expenses which accrue due to services rendered to an EE or prospective EE where such examination or report is request or required by ER or prospective ER or required by any law or regulation of federal, state or local governments or agencies.</li> </ul>

State	Law	Provisions
Illinois	<a href="#">Ill. Admin. Code tit. 56 §300.860</a> <a href="#">820 ILCS 235/1</a>	<ul style="list-style-type: none"> <li>No ER shall require any EE or applicant to cost of medical examinations or cost of furnishing any records of such examination which are required by ER as a condition of employment.</li> <li>Violations are subject to penalty not to exceed \$100 for each offense.</li> </ul>
Kentucky	<a href="#">KY Rev. Stat. Ann. §336.220</a>	<ul style="list-style-type: none"> <li>It is unlawful for an ER to require any EE or applicant to pay cost of medical examination or cost of furnishing any records required by ER as condition of employment.</li> </ul>
Louisiana	<a href="#">LA Rev. Stat. §23:897(A)</a> <a href="#">LA Rev. Stat. §23:634(B)</a>	<ul style="list-style-type: none"> <li>23:897(A): Except as provided in subsection (K) and in R.S. 23:634(B) it is unlawful for any ER to require any EE or applicant to pay the cost of a medical examination or a drug test or the cost of furnishing any records as a condition of employment.</li> <li>Violations may result in fines not to exceed \$100 or up to 90 days in prison but not both.</li> <li>Subsection (K) permits reimbursement if EE terminates the employment relationship in less than 90 working days after first day of work or never reports to work (but compensation cannot be reduced below minimum wage).</li> <li>23-634(B): Addresses same exception as subsection (K).</li> </ul>
Maine	<a href="#">ME Rev. Stat. tit. 26 §592</a>	<ul style="list-style-type: none"> <li>No ER may require EE or accepted applicant for employment to bear medical expense of examination when examination is ordered or required by ER.</li> <li>Violations may result in a forfeiture of up to \$50 per offense.</li> </ul>
Massachusetts	<a href="#">MA GL c. 149 §159B</a>	<ul style="list-style-type: none"> <li>Any ER who request or requires a person who is present or prospective EE to undergo medical examination by a physician designated by ER as condition to securing or continuing in employment shall reimburse the person for medical expenses requested or required.</li> </ul>
Michigan	<a href="#">MI Comp. Laws §750.354a</a>	<ul style="list-style-type: none"> <li>It is unlawful for any ER in Michigan to compel newly hired EEs or EEs <b>reporting back to work after furlough or leave of absence to pay</b> cost of medical examination when requested by ER.</li> <li>Violations may be subject to penalty up to \$100 for each violation.</li> </ul>
Minnesota	<a href="#">MN Stat. §181.61</a>	<ul style="list-style-type: none"> <li>It is unlawful for any ER to require any EE or applicant to pay for cost of medical examination or cost of furnishing any records required by ER as condition of employment.</li> </ul>
Montana	<a href="#">Mont. Code §39-2-301</a>	<ul style="list-style-type: none"> <li>It is unlawful for ER to require any EE or applicant to pay cost of medical examination or cost of furnishing records as condition of employment.</li> <li>Violations are a misdemeanor and subject to a fine up to \$100 per offense.</li> </ul>
Nebraska	<a href="#">Neb. Rev. Stat. §48-221</a>	<ul style="list-style-type: none"> <li>It is unlawful for ER to require <b>any applicant for employment</b> to pay cost of medical examination required by ER as condition of employment.</li> </ul>
New Hampshire	<a href="#">NH Rev. Stat. §275:3</a>	<ul style="list-style-type: none"> <li>It is unlawful for any ER to require any EE or applicant to pay cost of medical examination or cost of furnishing any records required by ER as condition of employment.</li> </ul>

State	Law	Provisions
New Jersey	<a href="#">NJ Stat. §34:11-24.1</a>	<ul style="list-style-type: none"> <li>No ER or prospective ER may require EE or prospective EE to pay for cost of any medical examination of such EE or prospective EE when the examination is made at the request or direction of ER by a physician designated by ER as a condition of entering or continuing employment and if EE or prospective EE pays they must be reimbursed.</li> </ul>
New York	<a href="#">NY Labor Law §201-b</a>	<ul style="list-style-type: none"> <li>It is unlawful for an ER to require any applicant for employment or EE to pay cost of medical examination or furnish health certificate relating thereto where: (1) EE's health insurance does not cover the cost and (2) the examination or certificate is not required pursuant to a state or federal statute or municipal ordinance or local law <b>(appears to not apply if the examination is required by law)</b>.</li> <li>Violations may result in penalty of not more than \$50 for each violation.</li> </ul>
North Carolina	<a href="#">NC Gen. Stat. §14-357.1</a>	<ul style="list-style-type: none"> <li>It is unlawful for ER with 25 or more EEs to require <b>applicant for employment</b> to pay cost of medical examination or cost of providing records as condition of employment as part of initial act of hiring.</li> </ul>
North Dakota	<a href="#">ND Cent. Code §34-01-15</a>	<ul style="list-style-type: none"> <li>ER who requires EE or prospective EE to take a medical examination or furnish any medical records as condition of obtaining or retaining employment, ER must bear cost of examination or furnishing of records.</li> </ul>
Ohio	<a href="#">OH Rev. Code §4113.21</a>	<ul style="list-style-type: none"> <li>No ER may require <b>any prospective EE or applicant for employment</b> to pay cost of medical examination required by ER as condition of employment.</li> </ul>
Oklahoma	<a href="#">Okla. Stat. §40-191</a>	<ul style="list-style-type: none"> <li>ER may not require EE or applicant as condition of employment or continued employment to submit to or take a physical or medical examination without providing the examination at no cost to EE or applicant and without providing EE or applicant free of charge report or copy of report.</li> </ul>
Oregon	<a href="#">OR Rev. Stat. §659A.306</a>	<ul style="list-style-type: none"> <li>It is unlawful for ER to require EE as a condition of continuation of employment to pay cost of any medical examination or cost of furnishing any health certificate.</li> <li><b>It is not unlawful to require EE to pay for medical examination or health certificate for an examination or certificate that is required pursuant to a collective bargaining, agreement, state or federal statute or city or county ordinance.</b></li> </ul>
Pennsylvania	<a href="#">43 PA Stat. §1002</a>	<ul style="list-style-type: none"> <li>It is unlawful for ER to require EE or applicant for employment to pay cost of a medical examination or cost of furnishing any medical records required by ER as condition of employment if applicant or EE works for ER for one week.</li> <li><b>The provisions of this law shall not apply were medical examination is required by law as condition of employment.</b></li> </ul>
Rhode Island	<a href="#">RI Gen. Laws §28-6.2-1</a>	<ul style="list-style-type: none"> <li>Whenever ER requires a physical examination <b>prior to employment</b>, cost of examination must be paid by ER.</li> </ul>
South Dakota	<a href="#">SD Codified Laws §60-11-2</a>	<ul style="list-style-type: none"> <li>It is a Class 2 misdemeanor for ER to require any EE to pay cost of medical examination or cost of furnishing records required by ER as condition of employment.</li> </ul>

State	Law	Provisions
Utah	<a href="#">Utah Code §34-33-1</a> <a href="#">Utah Code §34-33-2</a>	<ul style="list-style-type: none"> <li>• It is unlawful for ER to charge any person a medical fee for physical examination of any applicant for employment or EE.</li> <li>• It is Class B misdemeanor to violate this law.</li> </ul>
Vermont	<a href="#">21 VT Stat. §301</a>	<ul style="list-style-type: none"> <li>• It is unlawful for any ER to require any EE or applicant for employment to pay cost of medical examination as condition of employment.</li> </ul>
Virginia	<a href="#">VA Code §40.1-28</a>	<ul style="list-style-type: none"> <li>• It is unlawful for ER to require EE or applicant for employment to pay cost of medical examination or cost of furnishing any medical records required by ER as condition of employment.</li> <li>• Violations may result in civil penalty of up to \$100 per violation.</li> </ul>
Washington	<a href="#">RCW §1.40.130</a>	<ul style="list-style-type: none"> <li>• It is unlawful for any ER to require any EE or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records required by ER as condition of employment.</li> <li>• Violations are misdemeanor and may result in fine of up to \$100.</li> </ul>
West Virginia	<a href="#">WV Code §21-3-17</a>	<ul style="list-style-type: none"> <li>• It is unlawful for any ER to require any EE or applicant for employment to pay cost of medical examination as condition of employment</li> <li>• ER who violates this provision of this section shall be liable to a penalty of not more than \$100 per violation.</li> </ul>
Wisconsin	<a href="#">WI Stat. §103.37</a>	<ul style="list-style-type: none"> <li>• No ER may require any EE or applicant for employment to pay cost of medical examination required by ER as condition of employment.</li> <li>• ER who violates may be fined up to \$100 per violation.</li> <li>• <a href="#">A Wisconsin law firm</a> said that the WI Department of Workforce Development advised that the law does not require payment for testing when it is an alternative to vaccine and where the vaccine/ testing is mandated by the federal government.</li> </ul>
Wyoming	<a href="#">WY Stat. §27-11-113</a>	<ul style="list-style-type: none"> <li>• ER must pay for medical examination for applicant or during employment.</li> </ul>

On December 2, 2021, [the Biden administration announced](#) that it will require insurers (including self-insured employers) to pay for the cost of at-home COVID-19 tests. More guidance will be provided in January.

## b) What about ERISA?

Section 514(a) of ERISA provides that it preempts any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. While this may seem helpful to employers, there are also limitations on charging employees under ERISA. As a general rule, when an employer provides or pays for its employees' medical care, the arrangement constitutes an ERISA Group health plan. There are some exceptions including that there is no ERISA plan if there is no "ongoing administrative scheme." This exception often applies to employer-sponsored health fairs and flu shot, which are generally not considered to be plans. If an employer pays for an employees' COVID-19 vaccination, this seems to be similar to flu shots and would not be an ERISA plan.

However, the OSHA ETS as well as the federal contractor mandate require employers to obtain and retain proof of vaccination, and [some commentators have suggested that this may rise to the level of an administrative scheme](#). The same is true if an employer provides for or pays for employees' COVID-19 testing. Commentators note that even though employers may argue that they are only addressing vaccinations and testing because they are legally required to do so, this may not be sufficient to take the program outside of ERISA.

If a vaccination or testing program is covered by ERISA, the health plan must either comply with or be exempt from the Affordable Care Act (ACA). If a plan is neither compliant nor exempt, there can be substantial penalties. Such a program would in all

likelihood not be compliant because it does not offer all of the ACA-required preventive services. And, it will only be exempt if it provides only “excepted benefits.” There are only two statutorily recognized excepted benefits that are relevant to these types of programs: (1) on-site medical clinics, and (2) employee assistance programs (EAPs). In order to meet the requirements to constitute an EAP, there are a number of requirements including but not limited to that there can be no cost-sharing requirement. Employers who intend to require employees to pay for testing should consult ERISA counsel for advice about the risks of doing so.

### **c) Do employers have to compensate employees for time spent being tested?**

As with many legal questions, the answer here is “maybe.” If an employee is subject to medical testing/screening during scheduled work hours, the [U.S. Department of Labor \(DOL\) advises](#) that they should be compensated (See FAQ #7). However, if an employer expects employees to be tested outside of work hours, or before they begin work, the answer is less clear. Under [guidance from the DOL](#), the time is compensable if the testing is necessary for them to perform their jobs safely during the pandemic (See FAQ #8). The DOL cites as an example that if a grocery store cashier who has significant interaction with the general public that time should be compensable because it is integral and indispensable to their work during the pandemic. Some commentators have suggested that this principle does not apply if an employer offers the choice of COVID-19 vaccination or testing because the employer is not mandating that the employee be tested. Rather, the employee has chosen to do so.

The most comparable cases are those involving security screenings. In 2014, in the case of [Integrity Staffing Solutions, Inc. v. Busk](#), the United States Supreme Court held that post-shift security screenings were not part of an employee’s principal duties and need not be compensated under the Fair Labor Standards Act. The Court reasoned that the employees were not hired to undergo security screenings but to retrieve produce from warehouse shelves and packages for shipment to Amazon customers.

There have been a handful of cases that have interpreted *Integrity Staffing* in the context of claims by employees arguing they should be paid for time spent being subject to COVID-19 health screenings. In [Adegbite v. United States](#) (Federal Claims Court 10/29/21), in a collective action brought by current and former correction workers employed at a federal correctional institution, the court concluded that ensuring the safety of inmates was not one of the key responsibilities of correctional officers and that, instead, that duty fell to others in the institution. Therefore, because waiting for COVID-19 screenings was not essential to their role, the court concluded this time was non-compensable. And, in [Perez v. Walmart, Inc. \(W.D. Missouri 10/25/21\)](#), employees who were required to arrive at work 30 minutes before their shift and wait in line for COVID-19 screening filed a claim arguing that these COVID-19 screenings were integral parts of their roles. The court granted the Walmart’s motion to dismiss on the ground that the employees were hired to stock and unload merchandise but not to submit to medical screenings.

In addition to the FLSA, employers must be mindful that state laws could require that employees be paid for off-duty time spent being tested. For example, the [California Department of Industrial Relations \(CA DIR\) has issued guidance](#) that COVID-19 testing time is working time, and, therefore, employers must pay for it. The CA DIR reasoned that “hours worked” means time during which a worker is subject to the control of an employer and includes all the time the worker is suffered or permitted to work, whether or not required to do so. The CA DIR has stated that if an employer requires that workers obtain a medical test or vaccination the time associated with completing the medical test or vaccination, including any time traveling and waiting for the test or vaccination to be performed will be deemed time worked. The CA DIR advised, however, that time spent waiting for COVID-19 test results is not compensable unless the employee is required to be isolated at the direction of the employer. Finally, the CA DIR advised that an employer cannot require an employee to use paid leave if the time is considered “hours worked.”

## **Conclusion**

Compliance issues related to COVID-19 vaccine mandates are currently confusing and rapidly changing. We will continue to provide you with updates as new developments occur.

Group insurance policies are underwritten by Sun Life Assurance Company of Canada (Wellesley Hills, MA) in all states except New York. In New York, group insurance policies are underwritten by Sun Life and Health Insurance Company (U.S.) (Lansing, MI).  
© 2021 Sun Life Assurance Company of Canada, Wellesley Hills, MA 02481. All rights reserved. Sun Life and the globe symbol are trademarks of Sun Life Assurance Company of Canada. Visit us at [www.sunlife.com/us](http://www.sunlife.com/us).