



***Employer Vaccination  
Mandates and Health  
Care Surcharges***



Christensen Group  
Insurance

# Panelists



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# What is a Vaccine “Mandate”?

- A “**soft mandate**” does not require vaccination as a condition of employment.
- Rather than facing discipline, unvaccinated workers are required to undergo additional steps (e.g., masking, weekly testing, education).
- A “**hard mandate**” requires vaccination as a condition of employment (but you need to consider religious or medical accommodation).

# COVID-19 Vaccine Mandates

- **Healthcare**

- Allina, CentraCare, Children's Minnesota, Essentia Health, Hazelden Betty Ford Foundation, HealthPartners, Hennepin Healthcare, M Health Fairview, Mayo Clinic, North Memorial, Northfield Hospital and Clinics, Sanford Health, St. Luke's, Winona Health.

# COVID-19 Vaccine Mandates

## ▪ Higher Education

- Augsburg College, Carleton College, College of St. Benedict's and St. John's University, Gustavus Adolphus College, Hamline University, Macalester College, Minnesota State colleges and universities, Minneapolis College of Art and Design, Mitchell Hamline School of Law, St. Catherine University, St. Mary's University, St. Olaf College, University of Minnesota, University of St. Thomas.



# COVID-19 Vaccine Mandates

- **Federal and State Government**
  - Minnesota state agencies, Ramsey County, Hennepin County, and Metropolitan Council.
  - St. Paul Public Schools, Minneapolis Public Schools.
  - Federal government and federal contractors.

## Sweeping new vaccine mandates for 100 million Americans

By ZEKE MILLER September 9, 2021



President Joe Biden speaks in the State Dining Room at the White House, Thursday, Sept. 9, 2021, in Washington. Biden is announcing sweeping new federal vaccine requirements affecting as many as 100 million Americans in an all-out effort to increase COVID-19 vaccinations and curb the surging delta variant. (AP Photo/Andrew Harnik)



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WASHINGTON (AP) — In his most forceful pandemic actions and words, President Joe Biden on Thursday ordered sweeping new federal vaccine requirements for as many as 100 million Americans — private-sector employees as well as health care workers and federal contractors — in an all-out effort to curb the surging COVID-19 delta variant.

# Executive Action re: Vaccine Mandates

## “Soft Mandate” for Employers with 100+ EEs

- OSHA issue a new Emergency Temporary Standard (or “ETS”) that will require all employers with **100+ employees** to enforce a “soft” mandate
- Employees will be required to either: (a) receive the COVID-19 vaccine or (b) submit to weekly testing.
- New ETS will also require paid time off for employees to receive and recover from being vaccinated.



# Vaccine Mandate (cont.)

## “Hard” Mandate for Federal Employees

- New EO requires federal employees to be vaccinated.
- Exceptions to the vaccine mandate will be made “only as required by law.”

## “Hard” Mandate for Federal Contractors

- Will be added to any “new” or “renewed” federal contract on or after September 9.
- “Task Force” will develop policy, but likely to follow federal workers.

# Vaccine Mandate (cont.)

## “Hard” Mandate for Healthcare Organizations

- New CMS rule will “require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.”
- May not be limited to “employees” of the organization.
- CMS published a notice stating that it anticipated issuing the new rules in October 2021, but that “facilities across the country should make efforts now to get health care staff vaccinated . . . .”

# Caveats re: OSHA ETS Rule

- **First**, although President Biden announced a new ETS rule, no rule has been published yet.
  - No details yet on who pays for the testing, the results of non-compliance, etc.
- **Second**, even after OSHA publishes the rule, it will likely be subject to challenge.
- **Third**, even if the ETS rule is published and upheld by the courts, employers are required only to implement a “soft” mandate (i.e., employees are given the choice to get vaccinated or submit to weekly testing).

# June 2021 OSHA ETS Rule

- OSHA Healthcare ETS rule issued on June 21, 2021.
  - In response to January 2021 Executive Order.
- Legal Standard [29 U.S.C. § 655(c)]
  - The OSH Act provides that OSHA secretary “shall” issue an ETS if he finds that the ETS is necessary to address a “grave danger” to workers.
  - Exempt from APA.
- OSHA Fines
  - Max fine is \$13,653 (if no willful or prior violation)

# Predicting the New ETS Rule

- Likely require employers to adopt a “soft mandate.”
  - OSHA will set the minimum standards for the employer’s policies.
- Likely require employers to provide PTO or vacation for time off for being vaccinated.
  - Similar to June 2021 ETS rule.
- Likely provide for fines for non-compliance.
  - Similar to June 2021 ETS rule.

# SAMPLE MANDATORY POLICY

As a condition of employment, all employees must, no later than [date]: (a) provide written documentation to the Human Resources Department demonstrating they have been fully vaccinated, or (b) obtain a religious or medical exemption as an accommodation. An employee is considered to be fully vaccinated for the purposes of this policy two weeks following the second dose of a two-dose vaccine (Pfizer or Moderna) or two weeks following one dose of a single dose vaccine (Johnson & Johnson).



# SAMPLE MANDATORY POLICY

Any Employee who fails to comply with this policy will be prohibited from working or providing services in EMPLOYER'S facility and may be subjected to disciplinary action, up to and including termination.



# “Hard Mandate” Considerations

- Must provide for medical and religious accommodation process.
  - ADA, Title VII, and MHRA.
- Sample policy includes a procedure document: Reasonable Accommodation and Medical and Religious Exemption for Covid-19 Vaccinations.



# SAMPLE MANDATORY POLICY

Exemption from the mandatory vaccination policy may be granted **for medical contraindications** and **sincerely held religious beliefs and practices**.

Employees seeking a religious or medical exemption from the mandatory vaccination policy must complete one of the attached Exemption Request Forms (discussed in more detail below) and submit it to the EMPLOYER's HR Department. Requests for exemption/accommodation will be handled in accordance with the Reasonable Accommodation and Medical and Religious Exemption Process for Covid-19 Vaccinations.



# “Hard Mandate” Considerations

## Medical Accommodation Process

- Application (verified by employee)
- Medical Exemption Form (completed by medical provider), including a GINA safe-harbor

**REQUEST FOR MEDICAL EXEMPTION/ACCOMODATION FROM MANDATORY COVID-19  
VACCINATION**

**Part 1 – To Be Completed by Employee:**

Name: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
Phone No: \_\_\_\_\_ E-mail: \_\_\_\_\_

Please provide detailed information as requested to ensure an individualized and timely review of the request (these requests will be reviewed on a case-by-case basis).

Please describe your medical condition and why your medical condition requires you to be exempted from receiving the COVID-19 vaccine.

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**Verification and Accuracy**

I have read and understand the EMPLOYER's policy on mandatory COVID-19 vaccination. By my signature below, I verify that I have a medical condition which exempts me from receiving the COVID-19 vaccine. I understand that the EMPLOYER may request further information from me, including supporting documentation, regarding my medical request for an exemption. I understand that any intentional misrepresentation contained in this request may result in disciplinary action.

I also understand that my request for an exemption/accommodation may not be granted if it creates an undue hardship or if it poses a direct threat to the health and/or safety of others the workplace and/or to me.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_



**REQUEST FOR MEDICAL EXEMPTION/ACCOMODATION FROM MANDATORY COVID-19 VACCINATION**

**Part 2 – To be completed by Employee’s Medical Provider:**

PLEASE PRINT THE FOLLOWING INFORMATION:

Name: \_\_\_\_\_  
 Phone No: \_\_\_\_\_

Date of Birth: \_\_\_\_\_  
 E-mail: \_\_\_\_\_

Dear Provider:

To protect our employees, their families, our patients, and their families, and to protect the community from Sars-Cov-2 (COVID-19) and others who spend time in our facilities from acquiring or transmitting COVID-19, the EMPLOYER has adopted a policy that all employees must receive the COVID-19 vaccine or obtain a documented exemption/accommodation as a condition of employment.

The above-named person is requesting an medical exemption from this vaccination requirement. A medical exemption from the COVID-19 vaccine is allowed for recognized contraindications. Available at: <https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html#Contraindications>.

Please complete the form below:<sup>1</sup>



**The above person should not be immunized for COVID-19 for the following reasons (Please check all that apply):**

- A history of severe allergic reaction (e.g., anaphylaxis) after a previous dose of a COVID-19 vaccine or any of its components.
- The physical condition of the person or medical circumstances relating to the person are such that immunization is not considered safe. In the space below, please indicate the specific nature and probable duration of the medical condition or circumstances that contraindicate immunization with the COVID-19 vaccine.
- Other – in the space below, please describe the medical condition and basis for the exemption in detail (these requests will be reviewed on a case-by-case basis).

**Please attach supporting DOCUMENTATION or MEDICAL RECORDS.**

I certify that \_\_\_\_\_ has the above contraindication and recommend a medical exemption from the COVID-19 vaccination.

Provider Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
 Provider Name: \_\_\_\_\_ Phone: \_\_\_\_\_

**Please Mail or email completed form to:**

[Address] OR [Email]

<sup>1</sup> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you do not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. This authorization does not cover, and the information to be disclosed should not contain, genetic information.

# “Hard Mandate” Considerations

- **Religious Accommodation Process**
  - Application (verified by employee)
  - Explanation of religious beliefs and how they conflict with receiving the COVID-19 vaccine
  - Ask about other vaccinations and ***how this vaccine is different.***



REQUEST FOR RELIGIOUS EXEMPTION OR ACCOMMODATION FROM MANDATORY COVID-19 VACCINATION

**Part 1 – To Be Completed by Employee:**

Name: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
Phone No: \_\_\_\_\_ E-mail: \_\_\_\_\_

To protect our employees, their families, our patients, and their families, and to protect the community from Sars-Cov-2 (COVID-19) and others who spend time in our facilities from acquiring or transmitting COVID-19, the EMPLOYER has adopted a policy that all employees must receive the COVID-19 vaccine or obtain a documented exemption as a condition of employment.

If you are seeking an exemption from the COVID vaccine based on a sincerely held religious belief and practice, please provide the following information (these requests will be reviewed on a case-by-case basis):

- Please explain in your own words why religious beliefs and practices prevent you from complying with the EMPLOYER's required vaccination policy.  
\_\_\_\_\_  
\_\_\_\_\_
- Identify your specific religious belief(s) and practices or membership in a church or religious body that prevents you from receiving the COVID-19 vaccination.  
\_\_\_\_\_  
\_\_\_\_\_
- Describe how receiving a COVID-19 vaccine conflicts with your religious beliefs.  
\_\_\_\_\_  
\_\_\_\_\_

Have you received other vaccinations? If yes, please explain how your current religious beliefs or practices prohibit you from receiving a COVID-19 vaccine \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**VERIFICATION AND ACCURACY**

I have read and understand the EMPLOYER's policy on mandatory COVID-19 vaccines. By my signature below, I verify that my religious belief and practice is sincerely held. I understand that the EMPLOYER may request further information from me regarding my religious belief and practice to further evaluate my request for an exemption from receiving the COVID-19 vaccination. I understand that any intentional misrepresentation contained in this request may result in disciplinary action.

I also understand that my request for an exemption/accommodation may not be granted if it creates an undue hardship or if it poses a direct threat to the health and/or safety of others the workplace and/or to me.

Signed: \_\_\_\_\_  
Print Name: \_\_\_\_\_

Date: \_\_\_\_\_



# “Soft Mandates”

- No Accommodation Process Needed
  - See Horvath v. City of Leander, 946 F.3d 787(5th Cir. 2020).
- Consider having unvaccinated employees:
  - Undergo vaccine education;
  - Wear a mask at all times (or indoors); or
  - Submit to weekly testing.

## Horvath v. City of Leander (2020)

- Fire Department required employees to receive the TDAP vaccine.
- Those who refused the vaccine were given two options:
  - (1) transfer to a code enforcement job that did not require a vaccination, or
  - (2) wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing.
- Affirmed award of summary judgment to the Fire Department.

# Pay for Getting the Shot

- **“Hard Mandates”**
  - Time is likely compensable (since vaccination is a condition of employment).
  - Employer can offer shots during the employee’s shift.
- **“Soft Mandates”**
  - Likely not compensable.
  - May be addressed by OSHA ETS Rule.

# Reimbursement for Shots and Testing

- Minn. Stat. § 181.61 requires reimbursement for “medical examinations.”
- What costs should an employer cover?
  - COVID-19 vaccines?
  - COVID-19 tests?
- Can the employer submit a claim to the employee’s health insurance?

# Reimbursement (cont.)


- Forthcoming OSHA ETS Rule may address rules for testing cost reimbursement and compensability of time.
- MN COVID-19 Vaccination Policy (HR/LR #1446)
  - C. Procedure for agencies that have facility testing on site:
    1. The agency will determine testing dates which will occur at least weekly.
    2. Testing will occur during work hours and be considered work time.
    3. Covered staff undergo COVID-19 test.
    4. Staff are provided the MDH “COVID-19 Post-Test Instructions” form.
    5. COVID-19 test specimens are submitted to the designated testing laboratory for testing.
    6. COVID-19 test results are communicated as follows:

# Labor Unions

- Vaccine Policies are a mandatory subject of bargaining.
- Employer cannot make “unilateral change” without providing notice and opportunity to bargain.
  - Be careful to provide union with “planned” policy.
  - You can be firm on your position, but bargain in good faith.



# Incentives and Penalties

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A Delta airlines plane takes off.  
 Photographer: Nicolas Economou/SOPA Images/LightRocket via Getty Images

## Delta Air Tells Workers to Get Covid Shot or Pay \$200 Charge (1)

Aug. 25, 2021, 1:18 PM Listen  

- Carrier's \$200 monthly fee applies for health-plan members
- Airline is first major U.S. company to announce such a levy

Delta Air Lines Inc. will impose a \$200 monthly surcharge on employees who aren't vaccinated against Covid-19, becoming the first major U.S. company to levy a penalty

 **Mary Schlangenstein**  
 Bloomberg News 

**Companies**



# Laws & Delta's Fine for Unvaccinated Workers



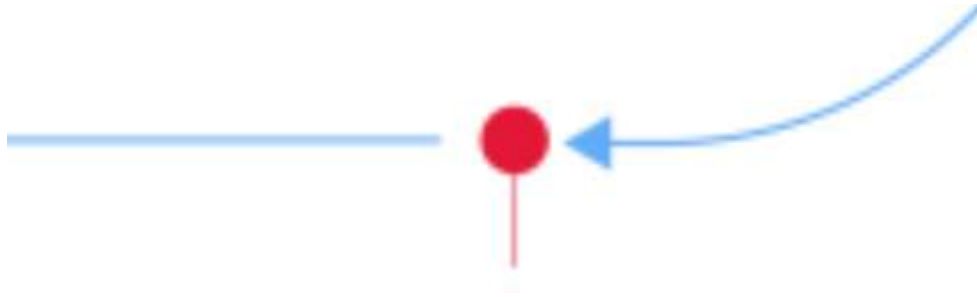
Bloomberg Law





## **Affordable Care Act:**

Protects those buying individual insurance policies from being charged more due to their health status. Expanded wellness programs, which allow employers to offer premium or cost-sharing incentives for participating.



## **Americans with Disabilities Act:**

Employee enrollment in wellness programs must be voluntary if the worker is disclosing medical information. Financial perks – or penalties such as surcharges – must not coerce workers into enrolling. Penalties must not discriminate against disabled workers who can't get the vaccine.

Source: Bloomberg Law





## **Genetic Information Nondiscrimination Act:**

Similar to the ADA, requires employee enrollment in wellness programs be voluntary, and employer incentives or penalties must be coercive.

Source: Bloomberg Law



## **Employee Retirement Income Security Act:**

Employer group health plans fall under the 1974 law that sets minimum standards for voluntary benefits. Delta's surcharge is tacked on to its ERISA – governed group health plan administered by United Healthcare

Source: Bloomberg Law



## **Health Insurance Portability and Accountability Act:**

Bans employers from charging employees a higher premium based on their health status, but allows for an exception within the context of a wellness program. Employers can impose premium or cost-sharing incentives of up to 30% of the full cost of the plan for participation in or adherence to a wellness program.

Source: Bloomberg Law



## **Title VII of the 1964 Civil Rights Act:**

Policies (including related surcharges) can't discriminate against workers based on race, color, religion, sex, or national origin. Attorneys recommend a carve – out from the penalty for workers who are unvaccinated for religious reasons.

Source: Bloomberg Law



Christensen Group  
Insurance

September 23, 2021

# ACA/HIPAA Non-Discrimination

- ACA/HIPAA regulations allow a vaccine-related reward or penalty to an employee's health insurance premium *if* it satisfies the following “**Health-Contingent Wellness Program**” criteria:
  1. Individuals have the opportunity to qualify once per year.
  2. The reward/penalty cannot exceed **30% of the total** cost of the employee-only coverage under the plan.

[cont.]





# ACA/HIPAA Non-Discrimination

## “Health-Contingent Wellness Program” Criteria:

3. The program must have “uniform availability” and provide for “reasonable alternative standards” for employees for whom participation is “unreasonably difficult due to a medical condition” or “medically inadvisable,” including if the employee has a disability.
4. The program must provide notice of availability of the “reasonable alternative standard”, including a statement that recommendations of an individual’s doctor will be accommodated.

# ADA Non-Discrimination

- Under the ADA, an employer cannot conduct a “medical examination” or “inquiry” unless such examination or inquiry is shown to be “job-related and consistent with business necessity.” However, an employer may conduct “voluntary” examinations and inquiries that are part of an “employee health program.”
- Simply obtaining proof of vaccination is not such an “examination” or “inquiry” under recent EEOC guidance, so long as the vaccine is not required to be provided by the employer.

# ADA Non-Discrimination (cont.)

- If the employer does conduct an “examination” or “inquiry” (for instance, if it attempts to verify claimed disabilities), then the question becomes whether participation in the program is “voluntary.”
- The regulations regarding the “voluntary” aspect of an employee health program are unsettled. Originally, the EEOC tried to match the 30% figure from the ADA/HIPAA regulations and prohibit the reward/penalty from exceeding that amount. Due to litigation, that rule was vacated.

# ADA Non-Discrimination (cont.)

- The EEOC (under Trump) then proposed a drastically different “de minimis” threshold for “voluntariness.”
  - “Water bottle rule”
- But, the Biden administration withdrew that proposed rule.

# ADA Non-Discrimination (cont.)

- An employer cannot discriminate against a disabled employee in regard to their compensation or benefits and must make “reasonable accommodations” to such disabled employees.
- So, if an employee has a disability that prevents them from receiving a vaccine, their participation in a wellness program should be reasonably accommodated (like the “reasonable alternative standard” above).

# Title VII Non-Discrimination

- Title VII prohibits discrimination against an employee on the basis of religion, including in regard to their compensation or benefits.
- Title VII also requires that employers “reasonably accommodate” an employee’s religious observance or practice, unless it causes an “undue hardship on the conduct of the employer’s business.” So, if an employee has a sincerely held religious belief that prevents them receiving a vaccine, their participation in a wellness program should be reasonably accommodated (like the “reasonable alternative standard” above).

# QUESTIONS?

## Thank you.

