

MD DC CUA Town Hall

December 6, 2021

Vaccine Mandates: What the heck is going on?

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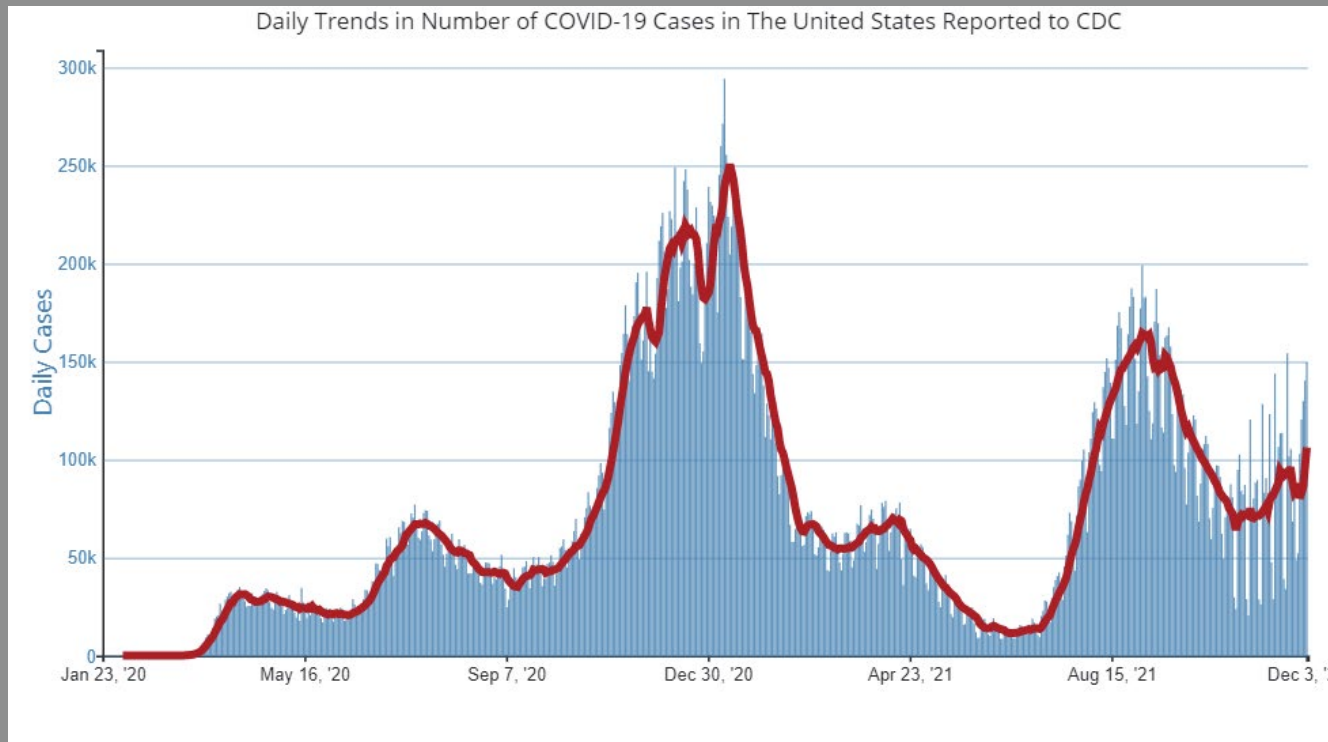
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Take-aways:

- The federal vaccine mandates are stayed; don't worry about effective dates
- Regardless of federal mandates, employers still have the ability to impose and enforce mandates
- Those seeking reasonable accommodation for disability or religion (OSHA estimates 5%) don't have a "get out of jail free" card

Trend is back upwards:

- 100,000 new cases a day (CNN)



New DC Leave Law:

- Two hours of paid leave for vaccine/booster
- Up to eight hours paid leave after the shot
- Can also take it for child (total 48 hours/year)
- This is in addition to all other paid leave (unless employer already has a leave program for vaccination)
- Clarifies COVID quarantine or care (or care for a child with closed school) qualifies under DC FMLA

Where are we today? (9/21)

- WHO/CDC “variants of concern”
 - Delta
 - Alpha, Beta, Gamma
- WHO/CDC “variants of interest”
 - Eta, Iota, Kappa, Lamda
 - Mu – 39 countries, designated 8/21, may be vaccine resistant

Omicron

- First detected November 24 (Botswana and South Africa)
- WHO “Variant of Concern” November 26
- First confirmed US case December 1
- Fourteen states (including Maryland)
- Delta remains the main variant in the US

Omicron

- “Current vaccines are expected to protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant. However, breakthrough infections in people who are fully vaccinated are likely to occur.” CDC
- “Masks offer protection against all variants.”

So, federal mandates

- Health care/CMS (not pertinent to CUs)
- Government contractor (pertinent to few CUs)
- All employers with 100 or more employees
 - All offices and all employees – not a FTE count
 - Affiliates and subsidiaries if “they handle safety matters as one company”
 - Does not apply if health care or federal contractor rules apply
 - Notice and comment for permanent rule: smaller?

All mandates on hold (almost)

- CMS has been stayed by two federal district courts, nationwide effect
- Government contractor rule (from an Executive Order) stayed by federal district courts, nationwide effect (December 7)
- A separate mandate for Head Start remains in effect 😊

Mandates on hold - timing:

- OSHA Emergency Temporary Standard (ETS) for 100-employee companies stayed by Court of Appeals for the Fifth Circuit
- OSHA has issued notice suspending implementation // December 1 notice extending comment period through Jan. 19
- All challenges to the ETS have been consolidated in the Court of Appeals for the Sixth Circuit
- Supreme Court is the likely destination

Will a federal mandate survive?

- **Police Power** of states and localities vs. the limited constitutional power of the federal government
- *Jacobson v. Massachusetts* (1905) (state's mandatory vaccine law does not violate the 14th Amendment); *Compagnie Francoise De Navagation a Vapeur v. Board of Health of Louisiana* (1902) (involuntary quarantine during yellow fever pandemic was reasonable exercise of police power).

Supreme Court guess?

- Court will uphold the regulation under the Commerce Clause
- By the time it gets to the Supreme Court, OSHA may have issued a permanent rule (rather than “emergency” rule)

OSHA ETS Requirements:

1. Vaccinate, or “mask-and-test or vaccinate” (not an option under the government contractor rule)
2. Strong preference stated by OSHA for full vaccination
3. Employees must provide proof of vaccination status and employer must maintain a “roster” of employee status

OSHA ETS Requirements:

4. Face coverings “strongly encouraged in a wide range of circumstances” even if vaccinated (e.g., customer contact)
5. Employer does not have to pay for face coverings
6. Employer pays for tests based on state law (Virginia – employer pays; DC and MD – employee pays)

OSHA ETS Requirements:

7. Any FDA approved test is okay (but cannot be self-administered and self-read)
8. Paid leave for getting the vaccine (4 hours)
9. Paid leave for side effects of the vaccine (not retroactive)
 - Two days generally reasonable
 - Can take from sick or PTO but not vacation
 - Cannot require to go negative on PTO

OSHA ETS Requirements

10. Policies must be in writing

11. Employees must receive notice of OSHA anti-retaliation provisions

12. Does not apply to employees:

- Who do not report to a workplace with others, or work exclusively from home, or “exclusively” outdoors
- Exemptions permitted where vaccine is medically contraindicated, there is a medical reason for delay, or reasonable accommodation based on federal civil rights law for disability or religion

Employer-imposed vaccine mandates are lawful

- *Legaretta v. Macias* (D.N.M. Filed 2/28/21): government officials at the County Detention Center cannot force employees to get the vaccine, because Emergency Use Authorization Statute requires “The Secretary” to advise patients of the option to refuse administration of the vaccine.
- *TRO denied. PI denied.*

Employer-imposed vaccine mandates are lawful

- *Bridges v. Houston Methodist Hospital* (S.D. Tex. June 12, 2021) . Rejects workers claims, dismisses case. Claims of constructive discharge, wrongful termination, “unlawful human experimentation” and violation of the Nuremburg Code!

Houston Methodist case

- “Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says she is being forced to be injected with a vaccine or be fired. This is not coercion. . . . Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.”

Houston Methodist case

- “If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker’s behavior in exchange for remuneration. That is all part of the bargain.”
 - » United States District Judge
 - » Lynn N. Hughes

Most private measures lawful:

- **EEOC UPDATED GUIDANCE, May 2021:**
- “Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations.”

Most private measures lawful:

- “Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party.”
- If employers choose to obtain vaccination information from their employees, **employers must keep vaccination information confidential pursuant to the ADA. (OSHA ETS says the same – but only for length of ETS, not three decades)**

Most private measures lawful

- Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive.
- Same principle applies when vaccines are required although not administered: you can offer incentives: additional PTO, cash awards, raffles.

Disability Exemptions:

- Process in precisely the same manner you would process any request for reasonable accommodation under the ADA.
- Duty to engage the employee in an interactive process to see if some accommodation can be made to allow the employee to perform the essential functions of the position without undue hardship or causing a **direct threat**

Religious exemptions:

- Process in the same manner as ADA requests
- Interactive process is just as important
- “Undue hardship” for RELIGION means more than a de minimis cost (Supreme Court may well reconsider this issue during October 2021 Term)
- Direct threat // essential functions analysis

What is a religion?

- Title VII protects “sincerely-held religious beliefs.” “It does not matter if you hold the beliefs of a traditional organized religion, such as Buddhism, Christianity, or Judaism, or if you hold what others consider nontraditional beliefs, such as Wicca and Rastafarianism.”
- U.S. EEOC: religion “include[s] moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of religious views.”

What is a religion?

- *EEOC v. Red Robin Gourmet Burgers* (W.D. Wash. 2004):

My Father Ra is
Lord



What is a religion?

- Chenzira v. Cincinnati Children's Hospital Medical Center (S.D. Ohio 2012): flu vaccine



Veganism

What is a religion?

- EEOC v. Consol Energy (4th Cir. 2016):

The Number of the Beast



What is a religion?

- Vaccine Exemption Letters
- Many people have asked if we provide religious liberty exemption letters concerning Covid vaccine.
- Yes, we do.
- For all Pastafarians who would like to be exempt from working in proximity to the unvaxxed, please use the form below to create an Official religious liberty exemption letter.



What is a religion?

- “Whether or not a practice or belief is religious is not an issue. . . .” 29 CFR 1605.1

Exempt does not mean you must let them in unvaccinated

- An employee who has substantiated an exemption request based on either disability or religion may be exempt from vaccination. This does not mean they must be allowed to work unvaccinated.
- Your obligation is to assess reasonable accommodations. If none exists, employee may be excluded from the workplace.

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