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Legal Sidebar

Federal Employees and COVID-19 Vaccination Attestations: Immediate Takeaways

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Executive Order 13991 established the Safer Federal Workforce Task Force (Task Force) to provide ongoing guidance to heads of executive agencies on government operation and employee safety during the Coronavirus Disease 2019 (COVID-19) pandemic. On July 29, 2021, the Task Force issued revised "model safety principles" to executive agencies and departments. Among other safety principles, this guidance instructs federal agencies to determine the vaccination status of federal employees and onsite contractors, and requires employees and onsite contractors to "sign an attestation confirming their vaccination status." Those who decline to provide an attestation must wear a mask and be subject to testing and other safety measures. This effort to promote COVID-19 vaccination, similar to some state and municipal employers' requirements, follows newly reported increases in COVID-19 cases and related hospitalizations attributable to the spread of the contagious Delta variant of COVID-19.

While some news reports have colloquially described the Task Force's guidance as a "vaccine mandate," receiving a COVID-19 vaccine is not required under the policy. Unlike vaccination mandates that require employees to either receive COVID-19 vaccination or obtain an exemption as a condition of employment—such as the vaccination requirement recently imposed by the Veterans Health Administration on its medical employees—the Task Force provides employees and onsite contractors with the option to either attest to full vaccination status *or* adhere to specified safety measures.

This Sidebar begins by providing background on the Task Force and the vaccination attestation policy. It then describes the primary authorities federal agencies may employ to implement the policy and relevant constitutional considerations. Next, the Sidebar discusses key requirements under federal antidiscrimination laws that may inform the implementation of the guidance. Finally, the Sidebar briefly considers whether COVID-19 vaccines' current emergency use authorization (EUA) status affects the federal government's ability to impose requirements related to vaccination.

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Background

Upon taking office on January 20, 2021, President Joe Biden issued Executive Order 13991, which requires federal employees, onsite federal contractors, and other individuals in federal buildings and on federal lands to adhere to the Centers for Disease Control and Prevention's (CDC) safety guidelines. The Order cites as its legal basis the President's authority under the Constitution and the "laws of the United States"—specifically 5 U.S.C. § 7902(c), which authorizes the President to "undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies."

The Executive Order also created the Task Force, composed of several agency heads, to provide ongoing guidance regarding government operations and employee safety during the COVID-19 pandemic. Days after the Order was issued, the Task Force and the Office of Management and Budget (OMB) provided agencies with the initial set of model safety principles to help them tailor COVID-19 workplace safety plans to be consistent with CDC guidelines. At the time, COVID-19 vaccines were not yet widely available, and applicable CDC guidelines recommended mask wearing, maintenance of social distance, and other public health measures to prevent the spread of COVID-19. In May 2021, after the CDC revised its guidelines to provide that vaccinated individuals do not need to wear masks outside and in most indoor settings, OMB supplemented the model safety principles to provide that fully vaccinated federal employees, onsite contractors, and visitors were no longer required to wear masks in federal buildings.

On July 27, 2021, the CDC updated its masking guidelines in light of new evidence on the transmissibility of the Delta variant of COVID-19, recommending that fully vaccinated people wear a mask in public indoor settings in areas of substantial or high transmission. On July 29, 2021, the Task Force issued revised model safety principles to reflect the updated CDC guidelines and set forth the vaccination attestation policy. Under the policy, federal employees and onsite contractors may decline to provide their vaccination status, but they will be treated as not fully vaccinated for purposes of safety protocols. Under the safety protocols, unvaccinated individuals and those who decline to provide vaccination status must wear a mask, physically distance, and be subject to a weekly or twice-weekly screening test requirement and to restrictions on official travel. The guidance directs agencies to establish a program to test, on a weekly or bi-weekly basis, employees and onsite contractors who are not fully vaccinated or decline to provide their vaccination status.

Authority for the Vaccination Attestation Policy and Potential Implementation Questions

The Task Force's authority to issue its new guidance, like earlier policies, appears to flow from Executive Order 13991. Neither the new guidance nor any prior iteration specifies a mechanism to ensure compliance with the directives. Instead, agencies appear expected to implement the new guidance through existing legal authorities. The most pertinent authority appears to be 5 U.S.C. § 7902(d), which directs agency heads to "develop and support organized safety promotion to . . . encourage safe practices, and eliminate work hazards and health risks."

The Task Force's new guidance does not specify how agencies should handle employees who decline attestation and refuse to comply with mask and testing protocols. Agencies may take different approaches to dealing with noncompliance, but it seems that disciplinary action may be possible. An employee's refusal to comply with an agency's workplace health and safety protocols may potentially be treated as misconduct that could result in an adverse employment action. If an agency were to take action against a noncompliant employee, such as removal, suspension for more than 14 days, or a reduction in grade or pay, the action might be appealed to the Merit Systems Protection Board. An employee who appeals a personnel action to the Board is entitled to a hearing and representation. In general, final Board decisions may be subject to judicial review.

An adverse action taken for allegedly discriminatory reasons, as well as for failure to adhere to an agency's health and safety protocols, may be reviewed by the Board and the Equal Employment Opportunity Commission (EEOC). In so-called "mixed cases" appealed to the Board, the Board will decide both the discrimination issue and any appealable action. Alternatively, an employee may raise discrimination claims in a mixed case complaint filed with the employee's agency. An agency's final decision may then be appealed to the Board. Employees who have received a final Board decision on a mixed case appeal or mixed case complaint may petition the EEOC for review of that decision. If the EEOC concurs with the Board, the Board's decision becomes judicially reviewable. If the EEOC disagrees with the Board, the matter will be referred back to the Board for further consideration. A Board decision that affirms or reverses its initial decision may be subject to judicial review.

Constitutional Constraints on the Vaccination Attestation Policy

The vaccination attestation policy, as a federal government action, is subject to constitutional constraints. While the constitutionality of a federal government-wide employer vaccination policy does not appear to have been previously litigated, relevant case law suggests the level of scrutiny that courts would apply to the policy may depend on the nature of the rights asserted. In general, courts have not applied heightened constitutional scrutiny in reviewing challenges based on an asserted liberty interest and corresponding right to be free from compulsory vaccination. Even where a challenge to a vaccination policy involves a fundamental right under the Constitution, such as a claim under the First Amendment's Free Exercise Clause, courts have generally evaluated such requirements under rational-basis review if they are neutral and generally applicable. Under rational-basis review, courts generally uphold the relevant government action so long as it is reasonably related to a legitimate government interest.

In *Klaassen v. Trustees of Indiana University*, for instance, several students challenged a state university's policy that requires students to either receive a COVID-19 vaccination or qualify for a medical or religious exemption as a condition of in-person attendance for the Fall 2021 semester. Under the policy, those who obtain an exemption are subject to extra requirements of masking, testing, and social distancing. The district court concluded—at the preliminary injunction stage—that the university's policy withstands rational-basis review.

The U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), in an order denying the plaintiffs-students' procedural motion to enjoin the university's policy while they appeal the district court's order, signaled that it agrees. In an opinion by Judge Frank H. Easterbrook on behalf of a three-judge panel, the circuit court concluded that under *Jacobson v. Massachusetts*, in which the Supreme Court in 1905 upheld a state law that authorized the local board of health to require all inhabitants of a city or town to be vaccinated against smallpox, individuals lack a fundamental right under the Due Process Clause to be free from compulsory vaccination. Instead, the Seventh Circuit observed, "vaccination requirements, like other public-health measures, have been common in this nation," and thus warrant no stricter scrutiny than rational-basis review.

Under rational-basis review and *Jacobson*, the university's policy, in the Seventh Circuit's view, presents no constitutional problems because it is *less* compulsory than the requirements at issue in *Jacobson* in two ways. First, the university's policy provides both medical and religious exemptions. Those who obtain an exemption "just need to wear masks and be tested"—requirements that, in the Seventh Circuit's view, "are not constitutionally problematic" on this record. Moreover, unlike the vaccination requirement at issue in *Jacobson* that required all adults within a city to be vaccinated and subjected those who refused to fines or imprisonment, the university's requirements are imposed as a condition of enrollment. Each university, the Seventh Circuit observed, "may decide what is necessary to keep other students safe in a congregate setting," and vaccination (or masking and frequent testing of the unvaccinated) are among the conditions that are "normal and proper," particularly because they "help all students remain safe when

learning." Students who do not want to be vaccinated, the Seventh Circuit observed, may attend a university elsewhere.

The Seventh Circuit's last observation echoes that of the district court, which more specifically responded to the plaintiffs-students' argument that the university's policy is "coercive." The district court observed that the university's policy—which allows only those who qualify for an exemption to be excepted from the vaccination requirement—nevertheless presents students with "real options," including getting the vaccine, applying for an exemption (and being subject to extra safety measures if obtained), transferring to a different school, or foregoing school for the semester or altogether. While these options may present "a difficult choice," that choice "doesn't amount to coercion."

On this point, another district court reviewing a private hospital's similar COVID-19 vaccination requirement for its employees agreed. Though unnecessary to resolve the state law claims at issue in that case, the court specifically rejected the plaintiff-employee's argument that she was coerced by "being forced to be injected with a vaccine or be fired." In the court's view, the choice presented by the vaccination requirement, which the hospital adopted "to keep staff, patients, and their families safer," did not amount to coercion where the plaintiff remained free to choose to accept the vaccine or refuse and "work somewhere else." Both of these policies are stricter than the Task Force guidance's vaccination attestation policy, which gives any federal employees—not just those who qualify for a medical or religious exemption—the option to adopt alternative safety measures rather than attesting to full vaccination status.

In *Klaassen*, the plaintiffs-students also separately raised before the district court an argument potentially relevant to the vaccination attestation policy. In particular, they argued that the additional safety measure involving masking—to which those who obtain an exemption are subject—burdened the exercise of their religion because "masking essentially labels them with a 'scarlet letter' that targets them for religious bullying." The district court, on the record before it, rejected this claim. In the court's view, mask wearing under these circumstances "doesn't signify to others that the individual religiously objects to the vaccination" because students could choose to wear a mask for a variety of other reasons, including because they qualify for a medical exemption, because they are vaccinated but are concerned about COVID-19 variants, or because they are vaccinated but have immunosuppressing conditions. Thus, the court held that the masking requirement did not warrant heightened scrutiny. Under rational-basis review, the court continued, the additional safety measures are reasonably related to the university's legitimate interest in promoting public health in its campus community.

To the extent a court applies similar reasoning to the vaccination attestation policy, which shares the underlying rationale of the university policy in *Klaassen* but more broadly gives federal employees the option to decline to disclose vaccination status, the policy would likely withstand rational-basis review. However, to the extent that any agency provides a medical exemption to the alternate safety measures of masking, testing, and social distancing, there may be an open legal question as to whether the agency must also provide a religious exemption under the First Amendment.

Potential Constraints, Under Federal Antidiscrimination Law, to the Vaccination Attestation Policy

The Task Force guidance instructs that agencies ensure that employees either attest to vaccination or take other safety precautions, including masking. Although federal civil rights laws do not bar vaccine or masking requirements for federal employees and contractors, they may affect the requirements' application to certain individuals. These protections afforded by civil rights laws may sometimes be more robust than those required under the Constitution. Accordingly, agencies' implementation of the Task Force guidance may be informed by these legal requirements.

As explained more fully in an earlier Legal Sidebar, employer vaccine, testing, and masking mandates would likely come under the purview of federal civil rights statutes addressing discrimination in the workplace. The EEOC, which enforces these federal civil rights protections for federal and private employment, has issued guidance on COVID-19 and vaccination policies.

Disability protections, for example, restrict employers from making certain medical examinations or inquiries. In the case of COVID-19 vaccinations, the EEOC has stated that a vaccination itself is not a medical examination. The EEOC has further concluded that requiring proof of vaccination is not a disability-related inquiry, although vaccination status must be kept confidential. In the EEOC's view, employers may generally require vaccinations and ask for documentation. At least one court has cited the guidance approvingly. Moreover, in the EEOC's view, the circumstances of the pandemic mean that employers may also require COVID-19 testing. Although disability law restricts some employer-mandated medical tests, the EEOC has declared that it "does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate."

Disability protections may also require exemptions or modifications to workplace vaccination rules. In particular, the Rehabilitation Act of 1973 (applying Americans with Disabilities Act standards to federal employers and grant recipients) requires federal employers to provide reasonable accommodations for employees with disabilities.

Other federal laws protect employees with religious objections to vaccines. Title VII of the Civil Rights Act of 1964 requires employers to accommodate workers' religious practices unless they impose an "undue hardship on the conduct of the employer's business." Whether an accommodation is an undue hardship takes into account other employees' rights, efficiency, cost, and other considerations.

Requests for accommodations—for either religion or disability—must be evaluated under the worker's unique circumstances. An accommodation may take the form of an exemption to COVID-19 response measures, such as vaccination, if providing this accommodation does not impose an undue hardship on the employer. Still, an accommodation may impose alternative COVID-19 protections, such as masking, testing, telework, or social distancing even if these measures are not required of other employees. The Task Force guidance does identify masking and testing as an alternative for employees who do not want to attest to their vaccination status. Whether this alternative provides sufficient accommodation, or whether further accommodation or exemptions must be provided for this alternative in some instances, is not entirely certain.

Federal workers, including contractors, may enjoy additional protections under the Religious Freedom Restoration Act (RFRA), which restricts actions that "substantially burden" a person's exercise of religion. While the interplay between RFRA and Title VII is uncertain, RFRA may limit some government employers' vaccine policies and affect future legislation governing vaccine mandates. (For more on considerations under RFRA, see this CRS Legal Sidebar.)

Whether the COVID-19 Vaccines' EUA Status Affects Employers' Ability to Issue Requirements Related to COVID-19 Vaccination

The Food and Drug Administration (FDA) has not yet licensed the available COVID-19 vaccines under a biological license application, the standard regulatory framework under which vaccines are typically made available to patients. Some commentators and litigants have argued that the Federal Food, Drug, and Cosmetic Act's EUA provisions, and in particular Section 564(e)(1)(A)(ii)(III), preclude entities from requiring the receipt of a medical product subject to an EUA because the provision requires potential EUA product recipients be informed "of the option to accept or refuse the administration of the product." As noted, however, the vaccination attestation policy gives federal employees the option to either attest to

vaccination status *or* undertake specified safety measures. Thus, unlike a vaccination mandate that requires receipt of a vaccine and subjects those who refuse to certain adverse consequences, the vaccination attestation policy likely does not directly implicate the legal question regarding whether entities (including the federal government) may require an EUA product under § 564(e)(1)(A)(ii)(III). Nevertheless, those employees who decline to disclose their vaccination status may argue that the burdens associated with the alternative safety measures give rise to a functional mandate to receive vaccination. Accordingly, this section provides a brief analysis of this issue.

Section 564(e)(1)(A)(ii)(III) directs the Health and Human Services Secretary, when issuing an EUA for a medical product, to impose conditions necessary to protect the public health, including appropriate conditions designed to inform individuals "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." Pursuant to this requirement, the FDA has required vaccination providers to distribute certain approved fact sheets with the relevant information to potential vaccine recipients. Because the provision requires individuals to be provided with "the option to accept or refuse" vaccination, some have argued that vaccination mandates involving an EUA product are categorically prohibited.

At least one district court, in a suit filed by certain employees challenging a private hospital's policy requiring COVID-19 vaccination, has rejected this argument. The court concluded that § 564(e)(1)(A)(ii)(III) only "confers certain powers and responsibilities to Secretary of Health and Human Services in an emergency" and does not expand or restrict responsibilities of employers, which, in this case, is a private employer.

Consistent with this reasoning, the Department of Justice's Office of Legal Counsel (OLC) recently issued an opinion that more broadly concludes that § 564(e)(1)(A)(ii)(III) "concerns only the provision of information to potential vaccine recipients and does not prohibit public and private entities from imposing vaccination requirements for vaccines that are subject to EUAs." According to the OLC, this interpretation follows from the provision's plain text—which effectively requires parties administering the product to provide certain FDA-prescribed information—as well as the surrounding provisions in § 564(e)(1)(A)(ii) that require other factual information (such as the known potential benefits and risks of such emergency use) to be provided to potential vaccine recipients.

While the OLC notes that the relevant legislative history does not appear to explain this provision's purpose, it posits, among other possibilities, that Congress may have viewed this requirement as a variation on the "informed consent" requirement. The face of the provision, the OLC explains, does not purport to restrict entities from requiring use of an EUA vaccine, nor do such vaccination mandates typically undermine an individual's ultimate "option" of refusing the vaccine, given that such mandates generally are not imposed as direct legal requirements to receive the vaccine. Had Congress intended to restrict entities or certain categories of entities from requiring the use of an EUA product, in the OLC's view, Congress could have directly created such a restriction. The OLC observed that under the relevant canon of statutory construction, courts typically reject statutory interpretations positing that Congress chose an "obscure path"—in this case, embedding a restriction prohibiting entities from mandating an EUA product in a provision that on its face requires only the dissemination of specified information—to reach a "simple result."

Assuming that § 564(e)(1)(A)(ii)(III) does not generally restrict entities' ability to require COVID-19 vaccination, other related statutory provisions may nevertheless place limitations on certain entities' ability to do so. The OLC notes, for instance, that the Department of Defense (DOD) construes 10 U.S.C. § 1107a to mean that DOD may not require service members to take an EUA product subject to § 564(e)(1)(A)(ii)(III) unless the President exercises the waiver authority under § 1107a. Under § 1107a, the President may waive the condition designed to ensure that individuals are informed of an option to

accept or refuse administration of an EUA product only if the President determines, in writing, that complying with such requirement is not in the interest of national security.

Considerations for Congress

In general, existing federal laws impose certain limits, but likely do not preclude, employers (including the federal government) from generally requiring employees to undertake specified safety measures (including vaccination) to promote the public health of the workplace. As the pandemic evolves, the relevant legal frameworks generally give employers flexibility to impose relevant measures to address changed circumstances.

There are, however, uncertainties in the application of existing laws in the pandemic context. For example, Title VII and the Rehabilitation Act each require individualized assessments of whether an accommodation must be granted to a particular employee, making it difficult to predict how managers, agencies, and courts will apply them. In addition, it may be hard for federal employers to make some of the required decisions and evaluations quickly because the statutes require an interactive process that allows for back-and-forth communication, input from medical providers, and case-specific analysis.

To the extent Congress determines that a more uniform response would be appropriate, Congress might, for instance, opt to specify whether or not unvaccinated or unmasked employees, or certain categories of employees (taking into account their interactions with vulnerable populations) present a "direct threat" under the Rehabilitation Act, which would preclude disability-accommodation eligibility. Congress could also consider exempting vaccination policies during the pandemic from Rehabilitation Act, RFRA, and Title VII coverage. Alternatively, Congress could specify whether certain protective measures, such as isolation or wearing protective gear, constitute reasonable accommodations.

To the extent Congress determines that the ability of the federal government as an employer, or employers in general, to impose specified safety measures should be further constrained, it could also consider legislation with that aim. The Vaccine Passport Prevention Act of 2021 (H.R. 4126), for instance, would—among other provisions—prohibit the federal government from requiring a federal employee to receive a COVID-19 vaccine as a condition of employment.

Author Information

April J. Anderson
Legislative Attorney

Jon O. Shimabukuro
Legislative Attorney

Wen W. Shen
Legislative Attorney

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