

VACCINE MANDATES FOR HEALTHCARE WORKERS



KIM C. STANGER

Utah Rural 9
(10-21-21)

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.

WRITTEN MATERIALS

- *CMS, Biden-Harris Administration to Expand Vaccination Requirements for Health Care Settings,*
<https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings>
- *Stanger, Vaccine Mandate for Healthcare Providers,*
<https://www.hollandhart.com/vaccine-mandate-for-healthcare-providers>

VACCINE MANDATES

Federal Mandates

- Healthcare workers
 - CMS rules
- Employers with more than 100 employees
 - OSHA rules
- Federal workers and contractors
 - Executive Order

Other Mandates

- State mandates
 - Private employer mandates
- ***Providers may be subject to more than one mandate.***



September 9, 2021



PATH OUT OF THE PANDEMIC

PRESIDENT BIDEN'S COVID-19 ACTION PLAN



Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly

Requiring Vaccinations for all Federal Workers and for Millions of Contractors that Do Business with the Federal Government

Requiring COVID-19 Vaccinations for Over 17 Million Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings

Calling on Large Entertainment Venues to Require Proof of Vaccination or Testing for Entry

Requiring Employers to Provide Paid Time Off to Get Vaccinated

HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

Applies to:

- Hospitals
- Nursing facilities
- Ambulatory surgery centers (ASCs)
- Dialysis facilities
- Home health agencies
- Other participating “facilities”

May not apply to:

- Healthcare providers that are not associated with a participating “facility”, e.g.,
 - Physician groups
 - Non-participating providers

<https://www.whitehouse.gov/covidplan/#vaccinate>

HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

“[CMS]” is taking action to 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. This action builds on the vaccination requirement for nursing facilities recently announced by CMS....”

(White House Website,
<https://www.whitehouse.gov/covidplan/#vaccinate>)

HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

“My plan will extend the vaccination requirements that I previously issued in the healthcare field. Already, I’ve announced, we’ll be requiring vaccinations that all nursing home workers who treat patients on Medicare and Medicaid.....

“Tonight, I’m using that same authority to expand that to cover those who work in hospitals, home healthcare facilities, or other medical facilities -- a total of 17 million healthcare workers.

“If you’re seeking care at a health facility, you should be able to know that the people treating you are vaccinated. Simple. Straightforward. Period.”

(Pres. Biden, 9/9/21, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>)



HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

- “The Biden-Harris Administration will require COVID-19 vaccination of staff within all Medicare and Medicaid-certified facilities... Facilities across the country should make efforts now to get health care staff vaccinated to make sure they are in compliance when the rule takes effect.
- “[E]mergency regulations requiring vaccinations for nursing home workers will be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition for participating in the Medicare and Medicaid programs.
- “CMS will continue to work closely with all Medicare and Medicaid certified facilities to ensure these new requirements are met.”

<https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings>)

HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

“Facilities” at <https://www.cms.gov/Outreach-and-Education/Find-Your-Provider-Type/Facilities/Facilities-page>

- Hospitals
- Critical Access Hospitals (CAHs)
- Inpatient Rehabilitation Facilities (IRFs)
- Ambulatory Surgical Centers (ASCs)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs)
- Federally Qualified Health Centers (FQHCs)
- Rural Health Clinics (RHCs)
- Long-term care facilities & Skilled Nursing Facilities (SNFs)
- Durable medical equipment suppliers (DMEs)
- Pharmacy
- Durable medical equipment, prosthetics, & orthotics (DMEPOS)
- Home Health Agencies (HHAs)
- Hospice
- Clinical labs
- Ambulance

HEALTHCARE VACCINE MANDATE: TO WHOM DOES IT APPLY?

The mandate “will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. These requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country....”

(White House Website,
<https://www.whitehouse.gov/covidplan/#vaccinate>)

HEALTHCARE VACCINE MANDATE: WHEN DOES IT TAKE EFFECT?

- “CMS is developing an Interim Final Rule with Comment Period that will be issued in October.
- “CMS expects certified Medicare and Medicaid facilities to act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements. Health care workers employed in these facilities who are not currently vaccinated are urged to begin the process immediately. Facilities are urged to use all available resources to support employee vaccinations, including employee education and clinics, as they work to meet new federal requirements.”

<https://www.cms.gov/newsroom/press-releases/biden-harris-administration-expand-vaccination-requirements-health-care-settings>)

- CMS representative reportedly confirmed the rule would be subject to 60-day comment period before it takes effect.

HEALTHCARE VACCINE MANDATE: PENALTIES FOR VIOLATION?

- Don't know...
- Violation of Medicare conditions
 - Conditions of participation
 - Conditions of coverage
 - Medicare contracts
- Civil penalties?
- Program exclusion?

- Penalties likely imposed against facility/employer, not individuals.

HEALTHCARE VACCINE MANDATE: WILL THERE BE EXEMPTIONS?

- We don't know.
 - Unlike other mandates, the announcements concerning healthcare worker mandate does not refer to exemptions.
- Vaccine mandates typically contain exemptions for:
 - Medical conditions (e.g., allergic reactions to vaccines, treatment with monoclonal antibodies, history of multisystem inflammatory syndrome, pregnancy, etc.).
 - Sincerely held religious beliefs.
 - Others?
- Exemptions may be necessary to survive legal challenges.
 - Constitution
 - Religious Freedom Restoration Act of 1993
 - Others?

HEALTHCARE VACCINE MANDATE: WILL THERE BE ALTERNATIVES?

- We don't know.
 - Unlike the OSHA mandate, the announcements concerning healthcare worker mandate does not refer to alternatives.
- Other vaccine-related rules allow for alternatives to vaccination, e.g.,
 - Masking.
 - Weekly COVID-19 testing.
 - Isolation.
 - Others?

HEALTHCARE VACCINE MANDATE: WILL IT SURVIVE LEGAL CHALLENGE?

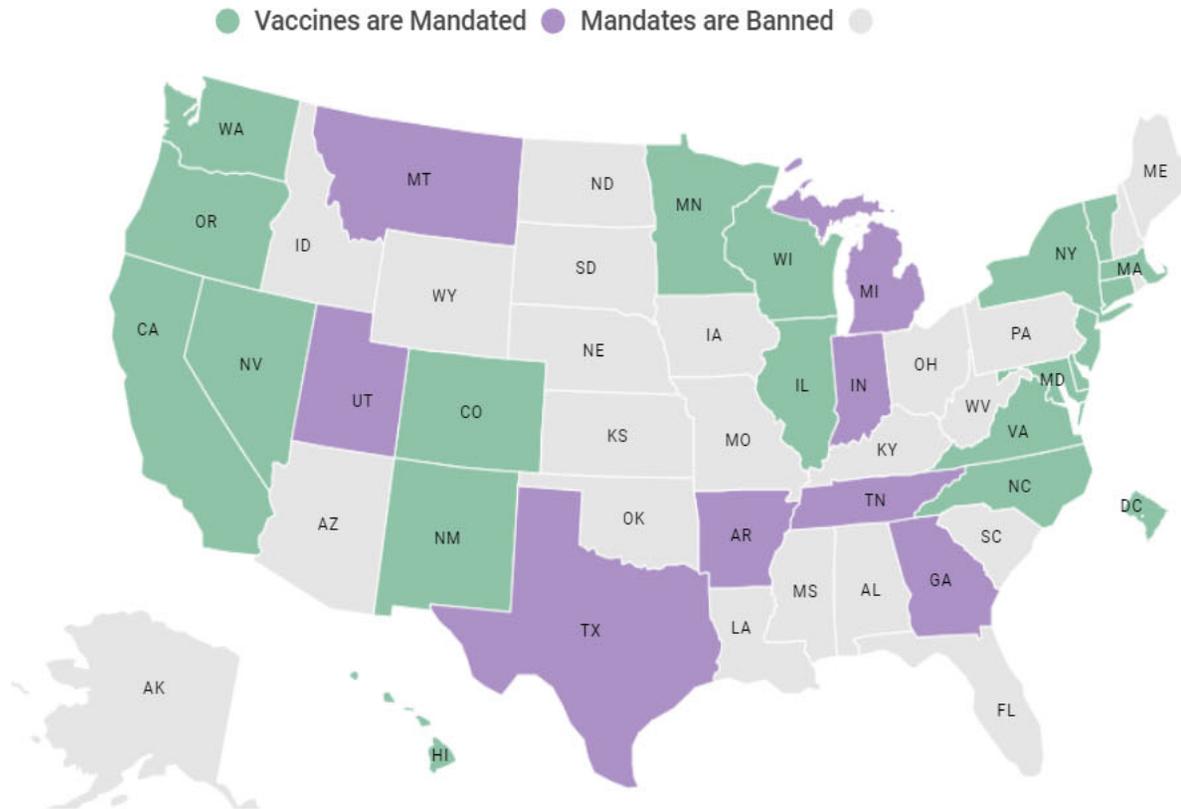
- Probably.
 - Supreme Court has upheld vaccine mandates. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
 - Supremacy Clause of Constitution.
 - Tied to acceptance of Medicare/Medicaid dollars.
 - Providers may always choose forego participation in Medicare/Medicaid.
- So far, courts have upheld COVID-19 vaccine mandates, especially if they contain religious and medical exemptions.

STATES WITH LAWS AFFECTING MANDATES

KS1

State Worker Mandates ▾

Action	# of States
Vaccines are Mandated	19
Mandates are Banned	8



Utah statute prohibits certain governmental entities from mandating vaccines subject to emergency use authorization (“EUA”) but contained exemptions for healthcare workers subject to federal mandates.

Slide 17

KS1

Kim Stanger, 10/19/2021

HEALTHCARE VACCINE MANDATE: WHAT SHOULD YOU DO NOW?

- Don't count on an injunction or adverse court action.
- Watch for the CMS rules.
 - Likely will issue this month.
- Begin educating staff about your anticipated obligations.
- Review CDC Guidance for Workplace Vaccination Programs at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.
- Review EEOC guidance concerning vaccines in the workplace, e.g., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
 - But new rules may affect this.
- Consider offering incentives for vaccinations or imposing penalties for failing to vaccinate.
 - Consider existing employee benefit plans.
- Begin planning for implementation.
- Beware privacy issues...

[HTTPS://WWW.HHS.GOV/HIPAA/FOR-PROFESSIONALS/SPECIAL-TOPICS/HIPAA-COVID19/INDEX.HTML](https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html)

HIPAA and COVID-19 | HHS.gov x +

hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html

HHS.gov U.S. Department of Health & Human Services
Health Information Privacy

I'm looking for...  [HHS A-Z Index](#)

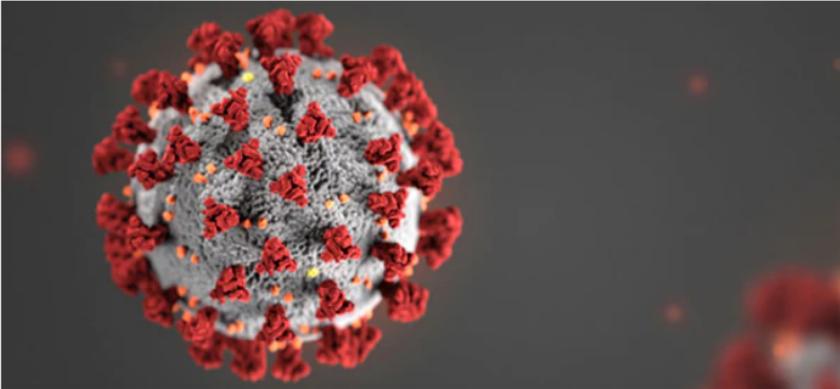
 **HIPAA for Individuals**  **Filing a Complaint**  **HIPAA for Professionals**  **Newsroom**

[HHS](#) > [HIPAA Home](#) > [For Professionals](#) > [Special Topics](#) > HIPAA & COVID-19

- [HIPAA for Professionals](#)
- [Regulatory Initiatives](#)
- [Privacy](#) +
- [Security](#) +
- [Breach Notification](#) +
- [Compliance & Enforcement](#) +
- [Special Topics](#) -
 - [HIPAA and COVID-19](#)
 - [HIPAA and FERPA](#)

Text Resize [A](#) [A](#) [A](#) | [Print](#) | [Share](#)   

HIPAA and COVID-19



[HTTPS://WWW.EEOC.GOV/WYSK/WHAT-YOU-SHOULD-KNOW-ABOUT-COVID-19-AND-ADA-REHABILITATION-ACT-AND-OTHER-EEO-LAWS](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws)

 An official website of the United States government [Here's how you know](#) ▼



U.S. Equal Employment Opportunity Commission

 Languages ▼

Search

[About EEOC](#) ▼

[Employees & Job Applicants](#) ▼

[Employers / Small Business](#) ▼

[Federal Sector](#) ▼

[Contact Us](#) ▼

[Home](#) » [What You Should Know](#) »

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

20

• All EEOC materials related to COVID-19 are collected at

Table of Contents

[Introduction](#)

[A. Disability-Related Inquiries and](#)

[HTTPS://WWW.OSHA.GOV/CORONAVIRUS/ETS](https://www.osha.gov/coronavirus/ets)

COVID-19 Healthcare ETS | Occur x +

osha.gov/coronavirus/ets

 UNITED STATES DEPARTMENT OF LABOR

[f](#) [t](#) [i](#) [r](#) [e](#) [v](#)

Occupational Safety and Health Administration

[CONTACT US](#) [FAQ](#) [A TO Z INDEX](#) [ENGLISH](#) [ESPAÑOL](#)

OSHA ▾ STANDARDS ▾ TOPICS ▾ HELP AND RESOURCES ▾

Coronavirus Disease (COVID-19) / COVID-19 Healthcare ETS

⚠ Alert: Due to routine maintenance on the OSHA website, some pages may be temporarily unavailable. To report an emergency, file a complaint with OSHA or ask a safety and health question, call 1-800-321-6742 (OSHA).

EMERGENCY TEMPORARY STANDARD

COVID-19 Healthcare ETS



[HTTPS://WWW.HOLLANDHART.COM/HEALTHCARE-SERVICES](https://www.hollandhart.com/healthcare-services)

Healthcare Law | Hospital Law | H x +

hollandhart.com/healthcare-services

OVERVIEW

MENU INTRODUCTION PEOPLE

HOLLAND & HART

CLICK HERE FOR COVID-19 RESOURCES FOR HEALTHCARE PROFESSIONALS

Search by Keyword

PRACTICES/INDUSTRIES

NEWS AND INSIGHTS

CONTACTS


Blaine Benard
Partner
Salt Lake City


Kim Stanger
Partner
Boise

 **WEBINAR RECORDINGS**
Click here to get access to our health law webinar recordings.

 **PUBLICATIONS**
Click here to get access to our health law publications and more on our Health Law blog.

In recent years, healthcare has experienced dramatic change, extraordinary competition, and increasingly complex regulation.

Our experienced attorneys help clients navigate through and respond to these challenges. By remaining on the forefront of healthcare law, we are able to provide coordinated services to meet our clients' business, transactional, litigation, compliance and regulatory needs.

Clients We Serve

- Hospitals
- Individual medical providers
- Medical groups
- Managed care organizations (MCOs)
- Third-party administrators (TPAs)
- Health information exchanges (HIEs)
- Practice managers and administrators
- Insurance providers
- Associations (IPAs)
- Health plans
- Health care providers
- Health care companies
- Rehabilitation centers
- Extended and eldercare facilities

Free articles and webinars

8:26 PM 11/4/2020

QUESTIONS?



Kim C. Stanger
office 208-383-3913
cell 208-409-7907
kcstanger@hollandhart.com