

COVID-19 Vaccine Mandates in the Construction Industry

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Abstract

In early 2020, Covid-19 became a global pandemic, the effects of which are ongoing. Economic impacts continue to be widespread, with an estimated economic loss of \$8.5 trillion (United Nations, 2020). The construction industry has been impacted by Covid-19 in various ways. Using traditional legal research methodologies of searching primary and secondary legal resources, this paper explores the recent and developing policies related to Covid-19 vaccine mandates in the United States and their applicability in the construction industry. The Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors and the Occupational Safety and Health Administration's Emergency Temporary Standard applicable to employers with 100 or more employees will be analyzed and discussed. Relevant caselaw related to vaccine mandates and exemptions will also be analyzed and discussed. Legal challenges to these mandates are ongoing. Nevertheless, in deciding whether to require vaccines companies will need to weigh factors such as the type of projects the company undertakes, how best to protect their employees, and how to maintain their ability to obtain and deliver projects in the face of uncertainty about the future of Covid-19.

Keywords

Covid-19, Mandate, Vaccine

1. Introduction

In early 2020, Covid-19 became a global pandemic, the effects of which are ongoing. As of November 1, 2021 more than 246 million cases of Covid-19 have been confirmed (World Health Organization [WHO], 2021). As of said date, more than 4.9 million deaths have resulted from Covid-19 and more than 6.8 million vaccine doses have been administered worldwide (WHO, 2021). Economic impacts have been widespread and ongoing with an estimated economic loss of \$8.5 trillion (United Nations, 2020).

The construction industry has been impacted by Covid-19 in various ways. Initially, the most significant impact came in the form of government-ordered shutdowns and stay at home orders. The United States construction law firm of Foley and Lardner, LLP collected information showing that as of April 17, 2020, 17 states suspended construction activity. Those states only offered limited exceptions for certain categories of projects deemed essential such as healthcare, infrastructure, and emergency repairs (Foley & Lardner, LLP [Foley], 2020). In the remaining states, all types of construction were deemed essential and therefore work was allowed to continue (Foley, 2020).

In locations where construction was allowed to continue, additional precautions were required. Those precautions included things such as daily screenings for symptoms, social distancing, masks, disinfecting and contact tracing (Centers for Disease Control and Prevention [CDC], 2020). In the context of construction, precautions such as social distancing can be difficult to implement because certain tasks require workers to be in closer proximity to each other. Additionally, productivity can be diminished when social distancing requirements result in fewer workers being able to be on site and fewer concurrent activities scheduled. Contact tracing presents challenges on job sites and beyond. For example, if one member of a crew tests positive for Covid-19, the entire crew may then need to isolate or quarantine for a period of time. Outbreaks can hinder progress on the job site and have also hindered productivity in the manufacturing of materials needed for construction. Since early in the pandemic, supply chain interruptions and material shortage have been an issue and continue to be so (Friesen, 2021).

2. Methods

This paper explores the recent and developing policies related to Covid-19 vaccine mandates in the United States and their applicability in the construction industry. Traditional legal research methodologies of searching primary and secondary legal resources were used to derive relevant principles of law. Those principals of law were then used to predict possible outcomes to legal challenges to vaccine mandates.

3. Results

3.1 Covid-19 Vaccine Timeline

After Covid-19 was declared a public health emergency by the World Health Organization on February 1, 2020, the scientific community responded in record time. By December 2020, the United States Food and Drug Administration (FDA) issued Emergency Use Authorization (EUA) for the Covid-19 vaccine developed by Pfizer-BioNTech (Pfizer) (Immunization Action Coalition [IAC], 2021). One week later, also in December 2020, the FDA issued an EUA for the Covid-19 vaccine developed by Moderna (IAC, 2021). It subsequently issued an EUA for the Johnson and Johnson Covid-19 vaccine in February 27, 2021 (IAC, 2021). The EUAs were initially limited to adults age 16 and older with individual states establishing priority eligibility for the elderly, those with underlying illnesses, and those employed in occupations deemed high risk. The Pfizer vaccine received an EUA for adolescents 12-15 years of age in May, 2021 (IAC, 2021). In August, 2021 the Pfizer vaccine received full FDA approval for individuals 16 and older, while the EUA remains in effect for those aged 12-15 years (IAC, 2021). As of the time of submission of this paper, booster shots of the Pfizer and Moderna vaccinations are authorized for individuals 18 years of age and older under and emergency use authorization from the FDA (U.S. Food & Drug Administration (FDA), 2021).

5.2 Vaccine Mandates

In September 2021, the Biden Administration issued the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, Executive Order 14042 (White House, 2021-a). The Executive Order requires, among other things, that all employees of federal contractors and subcontractors either be fully vaccinated against Covid-19 or have a legal exemption from vaccination (White House, 2021-a). Legal exemptions will be discussed below. In the event the Executive Order is in conflict with a state or local law, the Executive Order governs (Franklin, et al., 2021). Ongoing legal challenges have resulted in the mandate being temporarily blocked in Kentucky, Ohio, and Tennessee, while remaining in effect in all other states (Franklin, et al., 2021).

In November 2021, the Biden Administration announced additional vaccine mandates. The first is a requirement that employers with 100 or more employees require that all employees be either fully vaccinated or tested for Covid-19 at least once per week (White House, 2021-b). As proposed, this requirement would apply regardless of whether a company conducts any business with the federal government or not. Exemptions from vaccination would not necessarily be required or at issue since testing is an acceptable alternative to vaccination. This mandate was enacted through the Department of Labor's Occupational Safety and Health Administration (OSHA), which is responsible for ensuring employers comply with requirements intended to prevent employees from being injured or acquiring illnesses while at work (White House, 2021-b). The mandate was enacted under an Emergency Temporary Standard (ETS), which is a temporary measure that can be used when a grave danger exists (Fisher & Phillips, 2021). The temporary implementation is then followed by a 45-day public comment period (OSHA, 2021). In the absence of a grave danger, the public comment period would precede enactment of a regulation (Fisher & Phillips, 2021). In response to legal challenges, the United States Court of Appeals for the Fifth Circuit – which covers Louisiana, Mississippi and Texas – ordered that OSHA temporarily take no action to implement nor enforce the mandate until the legal challenges have been resolved in court (OSHA, 2021). Similar challenges were filed in other districts and the issue will ultimately be decided by the Court of Appeals for the Sixth Circuit, which typically covers cases that arise in Ohio, Michigan, Tennessee, and Kentucky (Fisher & Phillips, 2021). The other mandate enacted in November 2021 related to the health care industry specifically, and is therefore not the focus of this paper.

Aside from Covid-19, vaccine mandates are well established in the United States. The Centers for Disease Control (CDC) recommends 16 vaccines between the age of birth and 18 years old (CDC, 2019). Some of those vaccines require multiple doses administered at specific ages and times. It is then up to each individual state to determine which vaccines are required to attend school (CDC, 2019). All 50 states and the District of Columbia currently require immunization for diphtheria, tetanus, pertussis, polio, measles, rubella and chicken pox, at a minimum

(Desilver, 2021). Many states require additional vaccinations for diseases such as hepatitis B (46 out of 51 states) and meningitis (34 out of 51 states), among others (Desilver, 2021).

The Americans with Disabilities Act requires provision for exemptions based on medical reasons. The Civil Rights Act of 1964 (Title VII) requires provisions for exemptions based on religious reasons. Provisions for medical and/or religious exemptions vary from state to state. The Mississippi State Department of Health states that medical exemptions may be requested if certain criteria are met and “there is no local or statewide occurrence of disease such that the exemption would cause undue risk to the community.” (Mississippi State Department of Health [MSDH], 2019). Even when a medical exemption is granted, children with medical exemptions may be excluded from attending school “if there is a threat of vaccine preventable diseases occurring in the community.” (MSDH, 2019). The exclusion from school will continue until the threat to the child or other children is no longer present. (MSDH, 2019). Although Mississippi considers requests for medical exemptions, exemptions are not allowed under state law for “religious, philosophical, or conscientious reasons.” (MSDH, 2019). Religious exemptions will be discussed in further detail in Section 3.3, below.

Beyond school-age children, additional vaccinations and/or booster vaccinations may be required to attend colleges and universities. Among adults, mandatory flu vaccinations have become common for those employed in health care and related fields. In response to a widespread flu season in prior years, in 2008 BJC Healthcare implemented a mandatory flu vaccine policy. Flu vaccination rates jumped from a pre-mandate rate of 70% to 98.4% after the mandate (Diamond, 2020). Vaccination rates have since remained above 97% in subsequent years (Diamond, 2020). Additionally, BJC Healthcare noted that employees started to get vaccinated earlier in the flu season and the number of religious and medical exemption requests decreased (Diamond, 2020).

3.3 Relevant Case Law

The validity of vaccine mandates has been well established in the United States since the 1905 Supreme Court case of *Jacobson v. Massachusetts*. In that case, Jacobson was challenging the validity of a Massachusetts statute requiring vaccination against smallpox. The Supreme Court found that such a statute was within the broad police power of the state to safeguard public health and safety (*Jacobson v. Massachusetts*, 1905). In so doing, the court stated that the liberty afforded to individuals under the constitution “does not import an absolute right in each person to be, all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.” (*Jacobson v. Massachusetts* at 26, 1905). The court noted that the vaccine mandate was adopted at a time when smallpox was prevalent in Massachusetts, giving the state the right to “protect itself against an epidemic of disease which threatens the safety of its members.” (*Jacobson v. Massachusetts* at 27, 1905). Regarding the safety and effectiveness of the smallpox vaccine, the Supreme Court cited the contemporaneous case of *Viemeister V. White*, in which the New York Court of Appeals stated “the common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession.” (*Jacobson v. Massachusetts* at 34, 1905, citing *Viemeister v. White*, 1904).

Vaccine mandates have not been without challenges in more recent times. In the case of *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, Fallon’s employment was terminated when he refused to be vaccinated for the flu after having sought and been denied a religious exemption. Fallon alleged that his termination constituted religious discrimination under Title VII of the Civil Rights Act of 1964 (*Fallon v. Mercy Catholic Medical Center*, 2017). While Fallon was able to establish that he had a sincere opposition to the vaccine and was subsequently terminated for failing to comply with the vaccine requirement, the case hinged on whether his opposition to the vaccine was a sincere religious belief (*Fallon v. Mercy Catholic Medical Center*, 2017). The court noted that both traditional and nontraditional faiths can be considered religious and “a belief in God or divine beings is not necessary” (*Fallon v. Mercy Catholic Medical Center* at 491, 2017). The court then referenced the three-part definition of religion established in *Africa v. Commonwealth of Pennsylvania*: “First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion can often be recognized by the presence of certain formal and external signs.” (*Fallon v. Mercy Catholic Medical Center* at 491, 2017, citing *Africa v. Commonwealth of Pennsylvania* at 1032, 1981). Fallon’s arguments failed to satisfy all three parts of the *Africa* test, with the court noting, among other reasons, that Fallon’s stated objections to the vaccine related to potential side effects, which are medical beliefs, not religious beliefs (*Fallon v. Mercy Catholic Medical Center*, 2017).

4. Discussion

4.1 Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

As of the date of submission, the Executive Order requiring federal contractors and subcontractors to require full vaccination or proof of a legal exemption is unambiguous and is likely subject to fewer successful legal challenges than the mandate for employers with 100 or more employees. Because the decision to enter into contracts with the federal government is optional and is considered to be a privilege for qualified contractors, the legal challenges to the Executive Order are less likely to be successful. The vaccine mandate could essentially be thought of as being similar to other prequalification criteria and other requirements for federal contracting, such as E-verification. Therefore, it is highly likely that construction companies that choose to enter into contracts with the federal government will be required to comply with the Executive Order after any legal challenges are resolved. After all, companies are not forced to enter into federal contracts. Contracting with the federal government is deemed a privilege, not a right, and can therefore be subject to conditions meant to protect the interests of the federal government. Therefore, companies that want to profit from federal projects should be prepared to comply with the Executive Order.

Companies may be hesitant to deny employee exemption requests out of concern that employees will file legal challenges. Those companies may therefore be tempted to be lenient in granting exemptions from the vaccine. However, documentation will be required and compliance checks should be expected. Similar to other federal contracting certifications and requirements, noncompliance would likely result in a range of possible consequences ranging from fines to being ineligible to enter into federal contracts in the future. As noted above in Section 3.3, religious exemptions must pass the *Africa* test, discussed above. Large companies are already taking different approaches to reviewing religious exemption requests. For example, employees at Tyson Foods, Inc. are reportedly only asked to complete an exemption request containing two questions (Cutter & Gryta, 2021). In contrast, employees at General Electric Co. and Amtrak are asked to complete much lengthier questionnaires, 13 and 31 questions respectively, that include questions about the nature and extent of their religious beliefs. For example, some questions ask whether the employee's religious beliefs prevent them from taking common medications such as Tylenol or Motrin, whether their religion prevents them from taking other precautions such as wearing a seatbelt, and whether the employee has tattoos or body piercings (Cutter & Gryta, 2021).

Those questions are intended to determine whether an employee's objection to the Covid-19 vaccine passes the *Africa* test. For example, if an employee has complied with all other mandatory vaccines without objection or seeking a religious exemption, what exactly is the nature of the religious exemption to the Covid-19 vaccine that did not apply to other vaccines? Similarly, if an employee has piercings, tattoos, and/or all other required vaccines but objects to the Covid-19 vaccine as an alteration of their body, why did that same religious belief not preclude the piercings, tattoos, and other vaccines?

4.2 Mandate for Employers with 100 or More Employees

The enforceability of the ETS requiring vaccination or testing for employers with 100 or more employees remains to be seen. As noted in *Jacobson v. Massachusetts*, vaccine mandates are typically the purview of health department of each state or local municipality. Similarly, at the federal level the CDC only makes recommendations regarding vaccines; it does not mandate them. It is up to each individual state to determine whether to require certain vaccinations. Nevertheless, Covid-19 has had catastrophic and ongoing health and economic impacts worldwide. Because this mandate is limited in context rather than a blanket nationwide mandate for all individuals, justification may be found for employment-related Covid vaccine mandates. Companies who are not subject to the Executive Order discussed above should still have contingency plans in place in case this OSHA-related mandate is upheld. If it is, compliance will be required. Noncompliance may result in citations and fines of more than thirteen thousand U.S. dollars per violation (Fisher & Phillips, 2021). It also seems possible that similar provisions may follow for employers with fewer than 100 employees.

A few important nuances apply specifically to the construction industry. It is worth noting that in the construction industry, each company on a jobsite is evaluated individually toward the 100-person threshold (Fisher & Phillips, 2021). A company with fewer than 100 employees would not be subject to the mandate simply by working on a jobsite that had more than 100 workers on site. Additionally, employees who work exclusively outdoors are counted in the number of employees to determine if the 100 employee threshold is met. If the company has more than 100 employees the ETS then applies, but employees who work exclusively outdoors do not need to show proof of vaccination or weekly testing (Fisher & Phillips, 2021). It is imperative that those employees at no time work indoors. OSHA specifically noted that holding a brief meeting indoors at the beginning of the day, such as a tool box talk,

disqualifies an employee from being considered an outdoor employee (Fisher & Phillips, 2021). While adjustments could potentially be made to day-to-day operations to qualify some employees as outdoor employees that could get complicated under certain weather conditions and may not be possible at all for certain trades. Additionally, it remains to be seen how “outdoor” is defined for these purposes in terms of completion of the building. Is it once an overhead structure is in place, once exterior walls are sheathed, once the building is dried-in, etc.?

5. Conclusions

Vaccine mandates continue to be an ongoing development, as does Covid-19 itself. Each company will need to assess its needs and strategic goals as a company, as well as potential impacts on an already-strained workforce. Companies will need to consider not only their ability to obtain future work, but also their ability to deliver projects. Even companies that do not enter into federal contracts and do not meet the 100 employee threshold may consider strongly encouraging or requiring the Covid-19 vaccine to minimize risks to employee health as well as reduce disruptions and delays to projects. With a free vaccine readily available, it will become more difficult for companies to assert delay claims and request additional time to complete a project. While beyond the scope of this paper, it also remains to be seen whether and for how long health insurance providers will cover the cost of Covid testing and treatment for those who are unvaccinated who become ill.

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