

VACCINE POLICIES, COVID MANDATES AND PROPERTY USE RESTRICTIONS

As the COVID-19 pandemic stubbornly lingers, vaccines have proven effective at controlling the spread of the disease and reducing the severity of cases. With threats to public health persisting—mostly among unvaccinated populations, complicated by the unpredictability of new variants—a range of related policies are being implemented at all levels of government.

Vaccine mandates, now and throughout history, have generated important discussions about balancing the need to protect public health and the need to protect individual freedoms, and this tension is being reflected in the current wide range of related policies. For the commercial real estate industry, the issue adds yet another layer of COVID-related considerations that affect employers generally and medical office buildings specifically.

THE CRE PERSPECTIVE



The policy landscape on vaccine mandates is wildly complex, with the federal, state and local levels of government all weighing in, sometimes with dramatically different viewpoints and objectives. Some states are passing vaccine mandates while other states are restricting them. The situation can quickly become challenging, with an influx of seemingly complex and competing policies and mandates, compounded by an excess of information and disinformation.

As always, BOMA local associations will best understand the local situation and the perspective of its members in any particular market. With that as a given, BOMA International's viewpoint is relatively straightforward, as everyone in CRE should continue to focus on the following points of emphasis:

- **Follow the law and public health guidance**
- **Stay apprised of the latest developments**
- **Always put health and safety first**

Can the government mandate vaccines?

The general answer is “yes,” based on the 1905 U.S. Supreme Court decision in the case of *Jacobson v. Massachusetts*, which upheld a mandatory vaccination law in Massachusetts. However, it is important to note that the ruling in *Jacobson* was narrowly defined and established a reasonableness test, weighing public safety over individual liberty. So, while *Jacobson* has established that the government can mandate vaccines, the Court may revisit the issue if it is properly challenged as unreasonable. For now, the seriousness of the disease and the subsequent strain on the medical system make it likely the court would find that the threat to public safety is greater than the harm caused to an individual being vaccinated.

Can employees claim exemptions?

The right to request an exemption from vaccine mandates stems from the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. These laws provide rights to disabled citizens and protect workers from discrimination on the basis of religion. If an exemption is granted, employers must provide reasonable accommodations for workers who are medically unable or who have proven that they have “sincerely held religious beliefs.” ADA exemptions would most likely be based on a medical opinion issued by the individual’s doctor. The “sincerely held religious belief” can be more difficult to ascertain. If an exemption is granted, the employer is required to make reasonable accommodation; however, the employer decides what is a reasonable accommodation that doesn’t create an “undue hardship” on the employer and other employees.

Are mask mandates legal?

Congressional Research Service guidance concludes that the ability of the president or Congress to mandate mask wearing is similar to the federal government’s limited power to mandate vaccines. As in the *Jacobson* ruling, the government has the responsibility to protect the public from known public health threats, weighing public safety versus individual liberty. Further, although there are no existing federal laws that explicitly address mask mandates, certain authorizing laws appear to form the basis for executive or congressional action, including the Public Health Service Act. Also, in general terms, a federal mask mandate can be ordered for people and property directly under the federal government’s jurisdiction, just as for most CRE, properties can opt to require masks. As to non-governmental properties, Congress has powers under the Spending Clause and Commerce Clause to influence state mandates by providing financial incentives.

FEDERAL MANDATES (SELECTED)

HEALTHCARE WORKERS

On June 21, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued its first emergency temporary standard ("ETS"), aimed specifically at protecting healthcare workers from contracting COVID.

- Includes employees in hospitals, nursing homes and assisted living facilities; emergency responders; home health care workers; and employees in ambulatory care settings where suspected or confirmed coronavirus patients are treated.
- Requires non-exempt facilities to conduct a hazard assessment and have a written plan to mitigate virus spread.
- Requires healthcare employers to provide some employees with N95 respirators or other personal protective equipment, and to ensure six feet of distance between workers where possible.
- Requires covered employers to provide workers with paid time off to get vaccinated and to recover from any side effects.
- Exempts fully vaccinated workers from masking, distancing and barrier requirements in certain defined situations.

LARGE EMPLOYERS

On September 9, 2021, the Biden Administration announced that OSHA is developing another emergency temporary standard that will reach a much wider population.

- Requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require unvaccinated workers to provide a negative COVID-19 test result at least weekly before coming to work.
- Mandates paid time off for employees to get vaccinated as well as to recover from vaccination.
- Also applies to state and local government workers in those states with OSHA-monitored state plans.

FEDERAL EMPLOYEES

Also on September 9, President Biden issued a pair of executive orders covering federal workers and contractors, with guidance from the Safer Federal Workforce Task Force.

- Requires all federal executive branch workers to be vaccinated against COVID-19, without the alternative of weekly testing; federal employees need to be fully vaccinated by November 22, 2021.
- Directs the vaccination requirement for federal employees be extended to employees of federal government contractors.
- Expands previous healthcare requirements to mandate vaccinations for workers in most healthcare facilities that receive Medicare or Medicaid reimbursement, covering about 17 million healthcare workers.
- Provides limited exemptions for legally recognized reasons, such as disability or religious objections.

STATE MANDATES (SELECTED)

Many states and localities have implemented various versions of vaccine mandates. Following are three examples of state-level mandates, all of which were implemented by executive order of governors and all signed in August 2021.

WASHINGTON STATE

Facing a rise in delta variant cases, Governor Jay Inslee announced an executive order that requires most state officials, healthcare workers and school employees to be vaccinated by October 18 or lose their jobs. Since the mandate, more than 90% of Washington state government workers and 88% of hospital workers have been verified as fully vaccinated. Some state and local government employees have joined a lawsuit as plaintiffs against the governor's mandate, but none has been successful so far. Of particular interest to medical office buildings, the order defines an applicable "health care setting" as "any public or private place that is primarily used for the delivery of in-person health care services to people." Operators of health care settings must "verify the vaccination status of every employee, volunteer or contractor who works in the health care setting whether or not the person is licensed or provide health or long-term care services."

ILLINOIS

Governor JB Pritzker by executive order required all healthcare and school workers in the state to be vaccinated, along with state employees of veterans homes, prisons and other "congregate facilities." Multiple times he opted to push back deadlines, as the administration negotiates agreements with several unions representing state workers. Vaccination rates have improved in the affected state departments, but still remain far from the levels achieved, for instance, in Washington state. Meanwhile, Chicago Mayor Lori Lightfoot also has imposed a vaccine mandate for city workers, prompting an ongoing legal and political fight as the police union has aggressively opposed the mayor, with some union leaders even encouraging members to defy the requirement to report vaccination status.

NEW YORK STATE

Then-Governor Andrew Cuomo announced a mandate requiring all public and privately employed workers at hospitals and nursing homes statewide to be vaccinated or lose their jobs. In the final week leading up to the September deadline, approximately 55,000 got their vaccines. According to the new governor, Kathy Hochul, the vaccination rates of state healthcare workers are promising, with 92% of hospital staff, 92% of nursing home staff and 89% of adult care facility staff inoculated with at least one vaccine dose. Still, the mandate also took a toll on the healthcare workforce, as approximately 34,000 noncomplying workers were placed on leave or fired, reducing the workforce by 3.5%. Governor Hochul plans to expand the vaccine requirement into the human service and mental healthcare settings.

BACKGROUND / TIMELINE

- 1777** During the Revolutionary War, General George Washington mandated inoculation of all soldiers against the smallpox disease, which was ravaging the troops and had killed about a third of those it infected. Washington's decision is one of the more significant moments of the war, as the debilitating disease largely disappeared from the ranks.
- 1809** Massachusetts became the first state to institute a vaccine mandate, authorizing local boards of health to require smallpox vaccinations for those over age 21.
- 1905** A case made it to the Supreme Court (*Jacobson v. Massachusetts*), in which a Cambridge, Mass. man defied a city ordinance requiring smallpox vaccinations during an outbreak, and refused to pay the \$5 fine. Jacobson claimed that the vaccine was dangerous and that otherwise "healthy and law-abiding" people posed a minimal danger to the community. The court disagreed, and this case continues to set the precedent for vaccine mandates.
- 1922** Citing the *Jacobson* case, the Supreme Court upheld an ordinance in San Antonio, Texas, requiring proof of smallpox vaccination for schoolchildren in public or private schools. The court sided with the city in a unanimous decision, finding that the ordinance reflected the broad discretion needed by authorities to protect public health. State laws requiring smallpox vaccinations for schoolchildren were common.
- 1940s** During World War II, the U.S. military made vaccinations mandatory for a host of diseases, such as typhoid, yellow fever and tetanus, in addition to the flu.
- 1963** The measles vaccine is developed, and cases of the highly contagious virus dropped dramatically once states began to mandate shots for schoolchildren.
- 1980** As successful vaccines continued to be developed against childhood diseases, including measles, polio, mumps and chickenpox, all 50 states have now passed laws mandating vaccinations for children to attend public schools.