

## MANDATES IN THE COVID ERA<sup>i</sup>

Covid is a prolonged pandemic, going from Delta to Omicron to the newest subvariant Ba-2 (with limited information of its severity). At the time this article was written, early March, more than 955,000 people have died in the U.S. and approximately 65% of the US population is vaccinated for all ages according to the March 5<sup>th</sup> edition of the NY Times.

This article addresses both public and private Covid mandates for (1) inoculations, (2) masking, and (3) contact tracing.

The predicate to vaccinate against Covid is to immunize the population. The general consensus is that the vaccines<sup>ii</sup> are at least 85 % effective in reducing deaths from Covid-19. Masks are effective in preventing the spread of Covid-19.

Studies suggest that three doses of a Covid vaccine or even just two are enough to protect most people from serious illness and death for long periods.

“We’re starting to see now diminishing returns on the number of additional doses,” said John Wherry, director of the Institute for immunology at the University of Pennsylvania. Federal health officials have said they are not planning to recommend a fourth dose anytime soon.

“The Omicron variant can dodge antibodies — immune molecules that prevent the virus from infecting cells — produced after two doses of a Covid vaccine. But a third shot of the vaccines made by Pfizer-BioNTech or by Moderna prompts the body to make a much wider variety of antibodies, which would be difficult for any variant of the virus to evade, according to the most recent study, posted online.”<sup>iii</sup>

Studies suggest the antibodies produced by vaccines should be able to protect people from new variants, even those that differ significantly from the original version of the virus.<sup>iv</sup>

The question of the personal responsibility in being vaccinated and using masks is abridged by mandatory Covid inoculation, required masking and other health related precautions established by federal, state, local governments, school districts and private employers.

## FEDERAL MANDATES

The federal government initially attempted to impose vaccination requirements and mask mandates based (1) on statutes such as Occupational Safety and Health Act (OSHA) (2) federal aided entities based upon their receipt and use of federal aid, and (3) the government’s ability to regulate interstate commerce.

OSHA ensures safe workplaces for the nation’s workforce with administrative regulations addressing best practices to prevent work injuries from falls, fires, machines, toxic chemicals and infectious diseases.

Two significant cases reached the Supreme Court, one involving government mandates for private employers of more than 100 employees covered by OSHA and the second for health care workers employed in facilities receiving federal funding. The decision in the case involving employers<sup>v</sup> held that a statute on workplace hazards did not justify a mandate that would have required more than 80 million workers to be vaccinated against the coronavirus or to wear masks and be tested weekly. It also stressed

the novelty and sweep of the mandate issued by OSHA, holding that Congress had not authorized OSHA to act in that manner, describing the agency's response as "a blunt instrument".

However, the justices may have opened the door for a more comprehensive rule that will better protect the nation's workers, and it is one that OSHA could have issued but did not. Obviously one more specific that would have required vaccination or masking where was a showing of danger.

The Court's decision may display some glaring misunderstandings of the laws governing OSHA's responsibilities. There is no question that the Covid-19 pandemic should fit the criteria for the dangerous working conditions OSHA was created to address, and that some workers, because of the nature of their jobs, face a higher risk of becoming ill with Covid-19 than the general public. That being said, the Court considered the literal language of the OSHA regulation rather than expanding it. Nevertheless, the justices, in the court's majority opinion, did acknowledge that Covid-19 actually is a hazard in high-risk workplaces. The Court said,

"We do not doubt, for example, that OSHA could regulate researchers who work with the Covid-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting Covid-19 that all face."

Thus, there may be a majority of at least six justices who would consider a more narrowly focused risk-based rule, which would base protections on the level of risk that workers experience. The acknowledgment that there are situations where OSHA can regulate Covid-19 exposure presents a path forward for OSHA to do what Congress instructed the agency to do when workers face a new, grave danger: issue an emergency standard requiring employers to control the hazard so that their workers don't get sick.

OSHA has already written a rule that is very close to meeting these criteria. A day after his inauguration, President Biden issued an Executive Order<sup>vi</sup> directing OSHA to consider issuing an emergency temporary standard that would protect all American workers from Covid-19. OSHA did develop a risk-based standard,<sup>vii</sup> but the standard that was ultimately issued was a narrower standard covering only health care workers.<sup>viii</sup> (It was withdrawn in February).

When OSHA issued the standard for health care workers in high-risk workplaces, the number of vaccinated Americans was rising and infection numbers were falling. The White House may have hoped that the country would be able to simply vaccinate its way out of the pandemic. However, when the surge of the Delta variant, combined with growing anti-vaccine fervor threatened to dash those hopes, the Biden administration doubled down on vaccines, including the vaccinate-or-test mandate that the Supreme Court in part struck down.

The Supreme Court ruling covered two dozen states that had been the subject of federal injunctions that prohibited the Centers for Medicare & Medicaid Services from imposing a mandate. The requirement affected about 10 million workers at approximately 76,000 health care facilities, including hospitals and long-term care facilities.

OSHA's path forward to protecting workers from Covid-19 is clear. First, the agency should take the previous OSHA standard, update the data, and make necessary changes to ensure it fits the Court's recommendation that it be risk-based and reissue it. The standard should cover all workers in higher risk jobs, not only those employed by large employers. Second, OSHA should rescind its withdrawal of the

standard for health care workers or immediately issue a new one. Keeping health care workers safe who care for the sick, including Covid patients should remain a priority.

While Omicron may be “milder” than previous variants, Covid-19 still presents a serious risk to workers. Confirmed infections among nursing home staff are at the highest levels since the spring of 2020. There also should be preparation for the next variant. The mandate that may be issued would ultimately cover some 10.4 million healthcare workers.

Interestingly, since the Supreme Court resumed hearing oral arguments in person, the lawyers appearing before them, and reporters in the chamber have been required to test negative and be masked, except when speaking. Justices who are not comfortable with those protocols or with the mask-less behavior of their brethren have the flexibility to work remotely.<sup>ix</sup>

## STATE & LOCAL MANDATES

### Vaccinations<sup>x</sup>

Mandatory vaccinations by state law (for Smallpox) have been upheld by the U.S. Supreme Court since 1905 in *Jacobson v. Massachusetts*<sup>xi</sup>. Thus, the issue of Covid vaccination by state law is a settled law that has not really been challenged for more than a century. In an aside in the Supreme Court decision cited above on the OSHA mandate, Justice Gorsuch wrote in his concurring opinion,

“There is no question that state and local authorities possess considerable power to regulate public health.”

Although the Supreme Court blocked the Biden administration from enforcing a federal vaccine or testing mandate for large employers as previously described, it has rejected numerous challenges to local and state government requirements as states have the inherent authority to mandate vaccinations.<sup>xii</sup>

On February 11<sup>th</sup>, the Supreme Court denied an emergency request that it consider an appeal by a group of New York City teachers seeking to block a vaccine mandate over what they alleged was a discriminatory religious exemption policy. The decision, issued by Justice Sotomayor, was the latest in a series of legal defeats by opponents of New York’s vaccine requirement for municipal workers and it came the same day as the deadline for such workers to get vaccinated or face dismissal. The plaintiffs argued that the city’s vaccination requirement amounted to religious discrimination because it unfairly denied applications and did not offer exemptions for employees with unorthodox religious beliefs.<sup>xiii</sup>

In December, the Supreme Court refused to block New York’s vaccine mandate for health care workers who said they had religious objections. A similar case in Maine ended the same way in October.

New York City ultimately fired 1,430 city workers for failing to comply with its vaccine mandate, a figure that represented less than 1 percent of the city’s work force, but likely the nation’s largest mass termination of municipal employees in response to a Covid vaccine mandate.

While 21 states and the District of Columbia have already mandated vaccinations for health care workers, six states, Texas, Montana, Arkansas, Indiana, Tennessee, and Georgia enacted bans that prohibited some employers from requiring vaccines.<sup>xiv</sup> Eighteen states had no requirement for health care workers, while

five, including Utah, Arizona and Michigan, exempted health care organizations from bans on vaccine requirements.<sup>xv</sup>

As previously mentioned, the Supreme Court ruling covered two dozen states that had been the subject of federal injunctions that prohibited the Centers for Medicare & Medicaid Services from imposing a mandate.

Federal laws ordinarily displace, or “pre-empt,” contrary state and local ones, and in allowing the mandates for health care workers, the Supreme Court at least implicitly ruled that it overrode state laws banning vaccination requirements at facilities participating in the Medicaid and Medicare programs.<sup>xvi</sup> The acceptance of federal Medicare/Medicaid funds for patient care subjected the health care facilities to the mandates.

The specter of potentially losing federal funding if they do not comply has persuaded some hospital chains to require vaccinations for workers who did not qualify for a medical or religious exemption. HCA Healthcare, which employs about 275,000 workers and said more than 90 percent of its workers were vaccinated or had qualified for an exemption, released a statement,

“If we do not comply with the CMS mandate, we could compromise our ability to serve our communities and provide care to patients under the Medicare and Medicaid programs,”

In New Hampshire the state legislature has seen bills to stop any COVID-19 vaccine requirements as a prerequisite to attend school or day care. Separate legislation has also been filed to add the COVID-19 vaccine to the state's list of required childhood vaccinations. No such requirement exists currently, and the bill faces an uphill battle in the Republican-controlled Legislature.

### **Masking**

Masking has been mandated by the federal government in healthcare facilities, on interstate transportation, buses, trains, and planes since February 1, 2021.

The Transportation Security Administration (TSA) has extended the face mask requirement for all transportation networks, including public transportation, through April 18, 2022. TSA’s initial face mask requirement went into effect on February 1, 2021, with an initial expiration date of May 11, 2021. It was first extended through September 13, 2021, and then to March 18, 2022.<sup>xvii</sup> While this announcement extends the date of enforcement, all other aspects of the remain unchanged, including exemptions and civil penalties ([www.transit.dot.gov/TransitMaskUp](http://www.transit.dot.gov/TransitMaskUp)).

Other masking mandate have been required by various states and localities, often by executive order on an emergency temporary basis as in New Hampshire.<sup>xviii</sup> There has been extensive controversy about both the advisability and the validity of the use of executive orders for both mandates and efforts to undercut or eliminate health related mandates.

For those entities that revoke or end mask mandates, caution might be advised as on January 14, 2022, the Biden administration threatened to claw back more than \$170 million in federal stimulus aid allotted to Arizona, after the state announced it would use the cash in a way that discouraged schools from requiring students to wear masks. A demand arrived in a letter from the Treasury Department, which told aides to Arizona’s Republican Governor, Ducey, that Arizona has 60 days to reprogram the funding in a way that befits its original intent, as an investment to combat the spread of the Covid or there will be a legal action

to recover the funds.<sup>xix</sup> Republican governors in several states have been trying to use the money for unauthorized purposes, such as cutting taxes or enacting immigration policies that are unrelated to the pandemic. Those states included AZ, SD, MT, FL.<sup>xx</sup> As an example, a \$163 million Arizona program using federal covid relief money provides up to \$1,800 in additional funding per pupil in public and charter schools. However, these schools must be “following all state laws” and open for in-person instruction. Schools that required masks would not be eligible under AZ law. A separate \$10 Million program could be in jeopardy for funds voucher worth up to \$7,000 to help poor families leave districts that require face coverings or impose other Covid-related “constraints.”

In the letter, the Treasury Department said that if Arizona does not cease or change the programs within 60 days, it would start a process to recoup the money that is being misused. It also said that it could hold back the second installment of relief money that Arizona is scheduled to receive this year. Arizona has so far received about \$2.1 billion of the \$4.2 billion that it was awarded through the \$1.9 trillion relief package.<sup>xxi</sup>

Arizona’s attorney general, Mark Brnovich, sent Treasury Secretary Janet L. Yellen a letter suggesting that the state was preparing to take its concerns to court amid what he believed was “blatant federal encroachment.” The lawsuit<sup>xxii</sup> filed in U.S. District Court, argues that the Treasury Department is abusing its discretion to set conditions on how states spend the pandemic aid. It accuses the Treasury Department of acting “arbitrarily and capriciously” in determining that stopping the spread of the coronavirus is a condition for using the relief funds. And it alleges that the Treasury Department does not have the expertise to make public health pronouncements.

Congress approved the state and local relief funds as part of the American Rescue Plan. Republicans opposed the law, but across the country they have been using the money to fill state coffers and to try to enact conservative policies. The law gave the Treasury Department broad discretion to make rules governing how the money is spent and ensure that it is not being misused. The Treasury Department defended its decision to restrict the use of the relief funds. “Treasury believes the rule is correct and allowed by the statute and Constitution,” Dayanara Ramirez, a Treasury spokeswoman, said in a statement. Several Republican-led states have already sued the Biden administration over a provision in the law that says states cannot use relief funds to subsidize tax cuts, claiming that the restriction is a violation of state sovereignty. Mr. Ducey made a similar argument about attempts to stop his education programs.

“Unconstitutional overreach by one branch of government over another’s directive should not and cannot get in the way of that.”

The results of such litigation are difficult to predict.

In New Hampshire legislation to limit the power of local governments to deal with public health emergencies has been introduced to limit school district masking requirements. On party-line votes, New Hampshire Republicans sent a pair of bills to the House floor that would automatically sunset locally instituted public health measures after 10 days unless they are approved through what the legislation open-endedly refers to as the

"sanction or confirmation of any other authority."

Rep. Tom Dolan, R-Londonderry said, "I think that many local officials know that when they make decisions very quickly, they often make mistakes so, the 10 days give us a

buffer." House Bill 1268 aims to limit the powers of local elected officials, while House Bill 1272 targets town or city health officers.

### **Private Mandates**

For private employers and labor unions Article, Section 10 of the Constitution provides for freedom to contract that allows willing contractors to impose requirements that would include mandatory inoculation and masking.<sup>xxiii</sup> The right of private employers to impose rules and requirements on their employees is a predicate of the employer/employee relationship. Employees are free agents to quit their employment if they dislike or do not want to follow employer rules and requirements. Likewise, the right of a union to enter into a collective bargaining agreement and agree in a contract with an employer to impose mandates has been a right since the enactment of the National Labor Relations Act for employers in interstate commerce. Further, state labor relations acts in many states provide similar rights.

As previously discussed, federal, state and local governments can enact laws that regulate employment including mandates, subject to certain limitations. Whether masking or immunization can be required by the federal, state and local governments was previously discussed, but except for limitations imposed by such governments, private employers are free to impose their own rules and requirements including mandates.

With the Biden administration's attempt to impose a national standard in flux, companies must navigate a thicket of local rules as they try to return employees to the workplace.

As the coronavirus increasingly appears to be a semi-permanent resident, businesses are feeling the pressure to reopen and re-establish some semblance of normalcy. That means figuring out what their safety precautions should look like, especially if employer operations span states with drastically different pandemic rules.

The Walt Disney Company suspended its national vaccine mandate for Florida employees because of state regulations, even as it kept requirements for workers in its home state of California. A restaurant owner in Austin, TX said he requested vaccines of his customers, but couldn't check their proof of vaccination under state law.

Hewlett Packard has set up a crisis management team that meets twice weekly to evaluate Covid conditions and local laws in the 17 states where it operates, including Texas, to assess the company's ability to reopen offices and mandate vaccines or testing.

Last fall, with the economy picking up, a number of large national companies instituted vaccine mandates in the hopes of keeping workers healthy and on the job. A November poll of 543 companies from Willis Towers Watson found that 57 percent required or planned to require vaccines, though one-third said they would do so only if the Biden administration's rule took effect. The Omicron surge mobilized more companies to consider precautions.

The Texas Legislature passed a law in May saying institutions subject to any kind of government licensing — meaning all restaurants and bars — cannot require their customers to show proof of vaccination. Businesses that ask for proof of vaccination can face stiff penalties, including the loss of a liquor license.

Making a vaccine passport illegal appears political. The Texas and Florida laws have forced national companies that operate in the states to carve out exceptions to corporate policies.

Other businesses have pushed back on Florida's red tape. Norwegian Cruise lines successfully sued Florida's surgeon general accusing the state of preventing it from "safely and soundly" resuming trips by barring customers to be vaccinated.<sup>xxiv</sup>

Some large national employers are maintaining their vaccine mandates in Texas and Florida by applying them only to people entering their offices. Whether that approach keeps companies out of the cross hairs of state officials could be tested when more workers are required to return to the office.

For example, Vanguard, which requires its U.S. workers to be vaccinated to enter its offices, will extend that same requirement to the Dallas office it plans to open this year. The private equity firm Blackstone, which is requiring vaccines and boosters for U.S. workers to enter its offices, is enforcing that policy in Florida.

The oil giant BP, whose 3,500 Houston office employees are working remotely, is requiring employees to be vaccinated or tested twice weekly and wear masks once they start going back in person.<sup>xxv</sup>

Almost two years after the director of the Centers for Disease Control and Prevention (CDC) called for 100,000 contact tracers to contain the coronavirus, the CDC on March 2nd stated that it no longer recommends universal case investigation and contact tracing. Instead, it encourages health departments to focus those practices on high-risk settings. Finally, on March 2<sup>nd</sup>, President Biden in his State of the Union address introduced a new pandemic strategy from a crisis response to managing the virus.<sup>xxvi</sup> The CDC will be issuing new guidelines shortly.

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<sup>ii</sup> Moderna, Pfizer and Johnson & Johnson

<sup>iii</sup> Cold Spring Harbor Laboratory, <https://www.biorxiv.org/content/10.1101/2022.02.14.480394v1>

<sup>iv</sup> NY Times, February 22, 2022

<sup>v</sup> National Association of Independent Business, et al, v. US. Department of Labor (OSHA), 595 U. S. \_\_\_\_ (2022) Nos. 21A244 & 21A247.

<sup>vi</sup> January 21, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/>

<sup>vii</sup> Occupational Safety and Health Administration, 29 CFR Parts 1910, 1915, 1917, 1918, 1926, 1928 [Docket No. OSHA-2020-0004], RIN 1218-AD36

<sup>viii</sup> <https://www.osha.gov/coronavirus/ets>

<sup>ix</sup> 1/14/2022 NY Times; Commentary by Ruth Marcus on Justice Gorsuch, 1/7/2022, Washinton Post, <https://www.washingtonpost.com/opinions/2022/01/07/where-was-justice-neil-gorsuchs-mask/>

<sup>x</sup> See: Governmental Executive Authority and Privacy in the Covid Era, a series of articles by Eric Taussig in the 2/21, 3/21 and 4/21 NH Bar News on enforcement of quarantines, contact tracing and vaccination history mandates

<sup>xi</sup> *Jacobson v Massachusetts*, 197 U.S. 11 (1905), Re. smallpox vaccination

<sup>xii</sup> *Id.*

<sup>xiii</sup> *Keil, et al. v. City of New York, et al.*, \_\_U.S.\_\_ (2022) No 2A 398

<sup>xiv</sup> There is some question as to whether a state can preclude a private entity from contracting with its employees a "reverse" health related prohibition instead of a requirement in the Covide context.

<sup>xv</sup> National Academy For State Health Policy, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>

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<sup>xvi</sup> *Biden, et al. v. Missouri, et al.*, 595 U. S. \_\_\_\_, (2022) Nos. 21A240 and 21A241.

<sup>xvii</sup> <https://www.tsa.gov/news/press/releases/2021/08/20/tsa-extends-face-mask-requirement-through-march-18-2022>

<sup>xviii</sup> NH Executive Order 2020-04, <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-04.pdf>

<sup>xix</sup> Washington Post, January 14, 2022

<sup>xx</sup> NY Times, December 21, 2021.

<sup>xxi</sup> NY Times, 1/5/2022.

<sup>xxii</sup> *Duecy v. Yellen, et al*, No. 2:22-cv-00112-JZB \_\_F. Supp 2nd (D.AZ, 1/21/22)

<sup>xxiii</sup> *Ogden v Saunders*, 25 U.S. 13 (1827) holding that the clause only applies to retroactive impairments of existing contracts. By the end of the 19<sup>th</sup> century, a Supreme Court minority recognized a right to pursue an occupation without unreasonable government interference in the *Slaughter-house cases*, 167 U.S. 678 (1888), the concept that liberty protected by the due-process clause for employment relationships. By the 1930's the Supreme Court allowed for full freedom to contract by willing parties.

<sup>xxiv</sup> Wall Street Journal, 2/7/2022

<sup>xxv</sup> *Id.*

<sup>xxvi</sup> NY Times 3/2/22