A top-down view of a desk with a laptop, glasses, a pen, and a mouse. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The mouse is partially visible at the top left.

Work**Smarts** Half-Day Seminar

**Religious Exemptions for COVID-19
Vaccines: Are you Providing a Reasonable
Accommodation or Relying on a Hail Mary?**

Casey Murray and Charlotte McEwen

 Spencer**Fane**[®]

Agenda:

- Brief overview of the current state of the law regarding vaccine mandates
- The prohibition on religious discrimination and the “reasonable accommodation” requirement
- Special focus on COVID-19 vaccine mandates and other COVID-related issues



Where Are We Now?

OSHA's ETS Vaccine Mandate

- The U.S. Supreme Court halted implementation of OSHA's Emergency Temporary Standard ("ETS"), which would require employers with 100 or more employees to mandate COVID-19 vaccination and testing
 - Holding: OSHA likely lacked authority to impose the rule, as OSHA is authorized to regulate *workplace* safety issues, and COVID-19 is a public health issue
- **Dissent:** OSHA is required to issue an emergency temporary standard if:
(A) employees are exposed to grave danger from exposure to toxic or physically harmful substances, and (B) such emergency standard is necessary to protect employees from such danger.

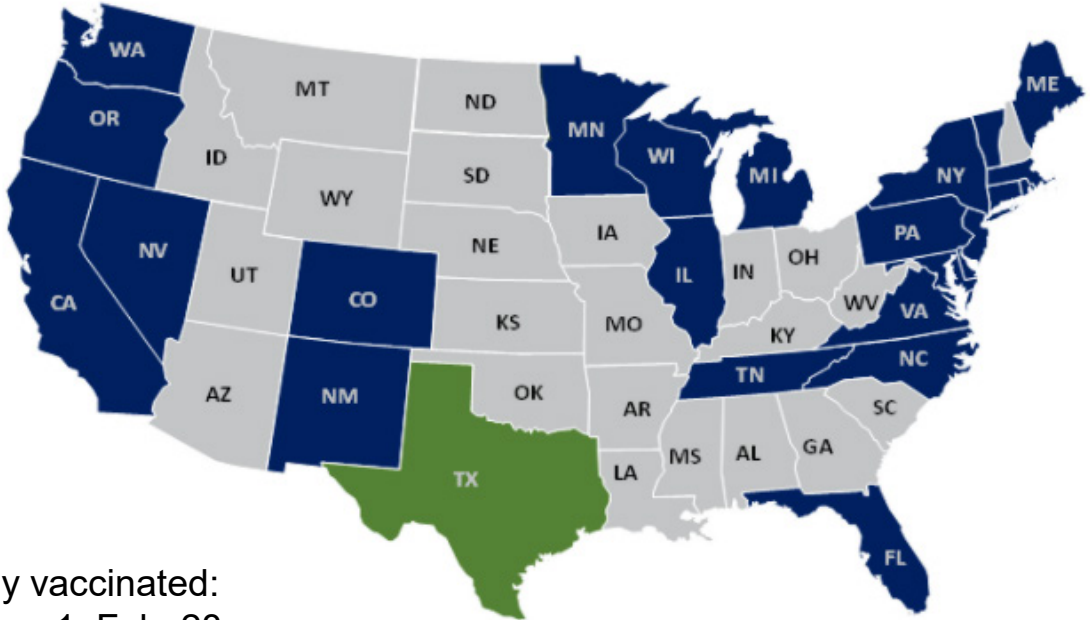
CMS Vaccine Mandate

- The U.S. Supreme Court upheld CMS's vaccine requirement for healthcare workers.
- Unlike the OSHA ETS, the CMS rule falls within the authorities that Congress has conferred upon that agency.
- The staff vaccination requirements apply to Medicare- and Medicaid-certified provider and supplier types that are regulated under the Medicare and Medicaid health and safety standards known as Conditions of Participation, Conditions for Coverage, or Requirements.

Group One

Group Two

Texas



- VT
- NH
- MA
- CT
- RI
- NJ
- MD
- DE
- DC

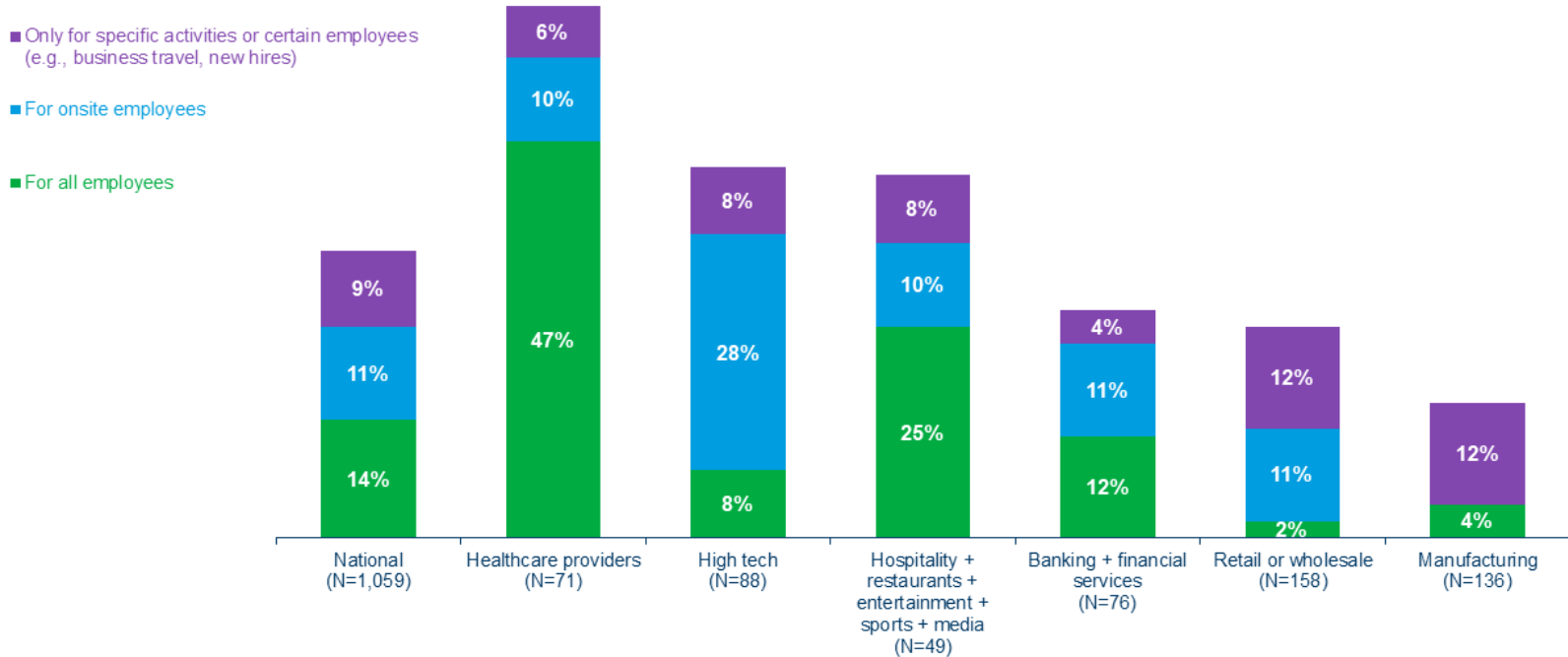
Fully vaccinated:
Group 1: Feb. 28
Group 2: March 15
Texas: March 21

McGUIREWOODS

Current Status

- Healthcare facilities subject to the CMS mandate must ensure their workforce is fully vaccinated.
- OSHA's vaccine requirement has been struck down. But, OSHA continues to signal that it will use its powers to seek broad enforcement of COVID-related safety standards in the workplace.
 - So stay tuned!
- State and localities may have vaccine requirements

Employers that have already implemented a vaccination mandate, by industry

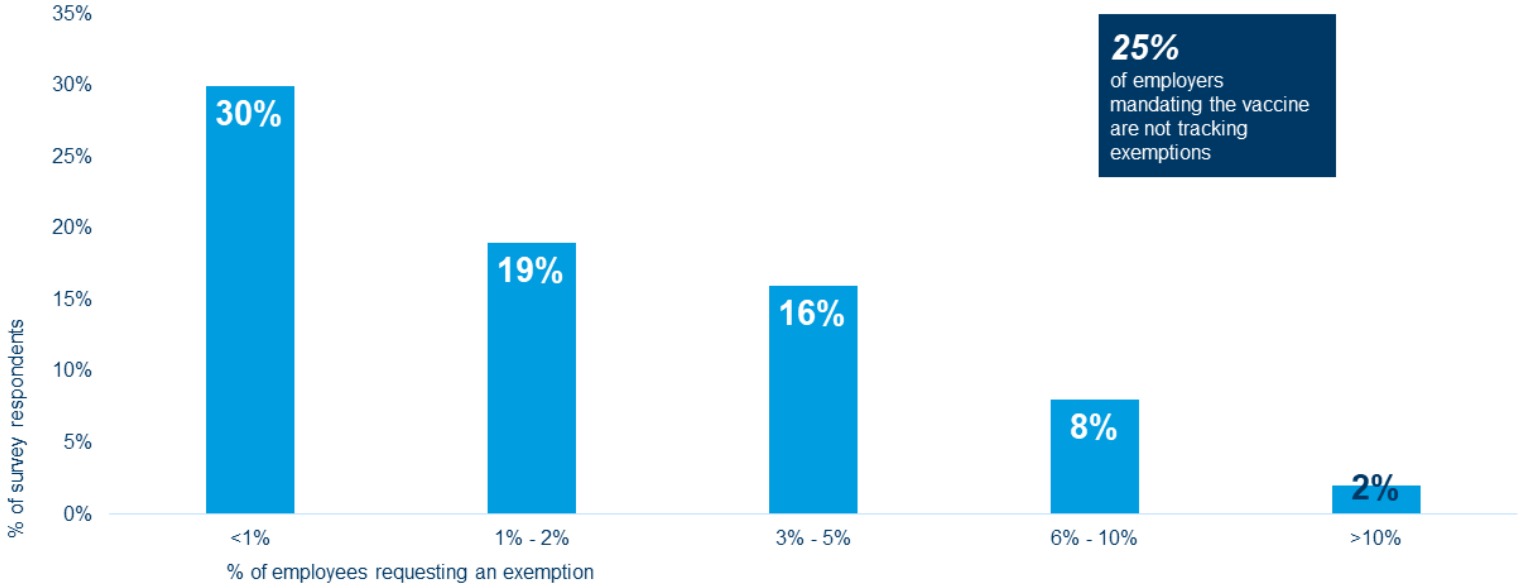


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Pulse Survey: US Vaccine Mandate Business Impact, October 4-13 2021

Employers receiving requests for medical or religious exemptions to their vaccination mandate

Based on respondents with mandates in place



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N=352
Pulse Survey: US Vaccine Mandate Business Impact, October 4-13 2021



“1 in 10 Americans say the COVID-19 vaccine conflicts with their religious beliefs.”

- *NPR, 1 in 10 Americans say the COVID-19 vaccine conflicts with their religious beliefs (December 9, 2021)*



Religious Discrimination

Religious Discrimination

- Unfair or unequal treatment of a person because of their religious beliefs or practices
- Prohibited by employers (with 15+ employees) under federal law (Title VII)
- Prohibited in most states under state laws that closely mirror Title VII

Religious Discrimination

Two kinds of discrimination:

- Intentionally treating someone differently because of their religious beliefs or practices
 - Refusing to hire someone because of their religion, harassing an employee because of the religious beliefs, etc.
- Unintentionally treating a group of people differently because of a protected characteristic
 - Prohibition on wearing hats in the workplace, requiring employees to work on Sundays, **a vaccine mandate**

Reasonable Accommodations

- Employers must reasonably accommodate employees' sincerely held religious beliefs, practices, or observances unless providing the accommodation would cause an undue hardship.
- Employees *must* notify their employer if they seek a religious exemption, but “magic words” are not necessary.
- If there is more than one reasonable accommodation that would resolve the conflict, the employer may choose which accommodation to offer.
- Examples:
 - Dress code accommodation
 - Flexible scheduling
 - Allowing employee to use a quiet place for prayer

According to the EEOC:

- “Employer-employee **cooperation** and **flexibility** are key to the search for a reasonable accommodation.”



What is a Religious Belief?

- Applies to *religious beliefs*, regardless of whether the religious beliefs or practices in question are common or non-traditional, and regardless of whether they are recognized by any organized religion.
 - Test: whether the beliefs are, in the individual’s “own scheme of things, religious.” Belief in God or gods is not necessary; nontheistic beliefs can also be religious for purposes of the Title VII exemption as long as they “occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons.
- Does *not* extend to personal preferences, political beliefs, etc.

Retaliation

- Employees and job applicants are protected from punishment / retaliation for asserting their right to be free from religious discrimination.
- Unlawful to discriminate against someone who has engaged in “protected activity”:
 - Opposed an unlawful employment practice
 - Filed an EEOC charge
 - Testified, assisted, or participated in an investigation, proceeding, or Title VII hearing
- Retaliation occurs when an employer takes an adverse action because an applicant or employee asserts rights protected by Title VII.

COVID-19 Vaccine Mandates

- Title VII does not require employers to provide an exception to the vaccination requirement as a religious accommodation unless:
 - 1) the employee's belief, practice, or observance is religious in nature;
 - 2) the belief conflicts with the vaccination requirement;
 - 3) the belief is sincerely held; and
 - 4) the employee does not seek an accommodation that imposes an undue hardship.

Employers should evaluate religious accommodation requests on an individual basis to determine whether these four factors are satisfied.

Request for Information

- Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information.
- An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation.

EEOC Religious Accommodation Request Form

- The EEOC has released a sample form for employers to inquire into employees' religious accommodation requests
- The form requests information on the nature of the religious accommodation request to help employers analyze whether an accommodation may be warranted
- Employers should develop a similar form to provide to employees who request a religious accommodation

RELIGIOUS ACCOMMODATION REQUEST FORM

Applicant's or Employee's Name:

Date of Request:

Email Address:

Telephone Number:

Employee's Position:

Duty Location:

- 1) Please identify the EEOC requirement, policy, or practice that conflicts with your sincerely held religious observance, practice, or belief (hereinafter "religious beliefs").

- 2) Please describe the nature of your sincerely held religious beliefs or religious practice or observance that conflict with the EEOC requirement, policy, or practice identified above.

- 3) What is the accommodation or modification that you are requesting?

- 4) List any alternative accommodations that also would eliminate the conflict between the EEOC requirement, policy, or practice and your sincerely held religious beliefs.

Requester Signature:

Date:

COVID-19 Vaccine Common Objections

- “My body is the temple of the Holy Spirit of God and putting foreign toxins in my body is dishonoring to God.”
- “I believe human life begins at conception and the vaccines were developed using aborted fetal tissue.”

Valid Religious Objection?

It is unethical and unconstitutional for a business or government agency to force someone to take a vaccine that is unproven, dangerous and not fully tested.

The Moderna COVID 19 vaccine has not been approved or licensed by the FDA (I don't trust anything that has been "FDA approved which is why I do not mess with 99% of anything FDA approved)

Valid Religious Objection?

Now we are faced with “vaxed” and “unvaxed” hatred and division across the globe. People are afraid to tell others their “vax status” for fear of retribution whether they have a truly held belief of the danger of these shots or if their doctor advised them not to take it. This has become a new wave of hate crime and a reason for people to bully others, because they have been convinced if someone didn’t get “vaxed”, they must be selfish and hateful of those who have died. There is never any mention of vaccine injury and death in our communities, but it happens daily and continues to.

I’ll end with this. Jesus Christ is not only my Lord and Saviour, but He is also my healer. He has provided a plethora of natural remedies I have been using since 2017 when doctors officially failed me.

Valid Religious Objection?

In summary by placing the COVID-19 vaccine within my body, I will defile the temple of God and the Holy Ghost, which God gave to me. Any such violation of this will make me defiled or complicit in specific sin, such as murder, under his holy word, making me set for destruction and hell. Furthermore, I believe I am saved by Jesus Christ's blood and that my blood can not be tainted for his salvation to occur.

Valid Religious Objection?

I believe covid-19 vaccine is the mark of the beast revelation 13:18
Mark of the Beast so that no one can buy or sell unless he has the mark

“Sincerely Held” Belief?

- The employee’s religious belief must be “sincerely held.”
- If an employee asserts a *religious belief* that conflicts with the vaccine requirement, we recommend assuming that it is a sincerely held belief unless compelling evidence dictates otherwise.
- Factors that might undermine an employee’s credibility include:
 - The employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance);
 - The accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
 - The timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
 - The employer otherwise has reason to believe the accommodation is not sought for religious reasons.

Reasonable Accommodation or Undue Burden?

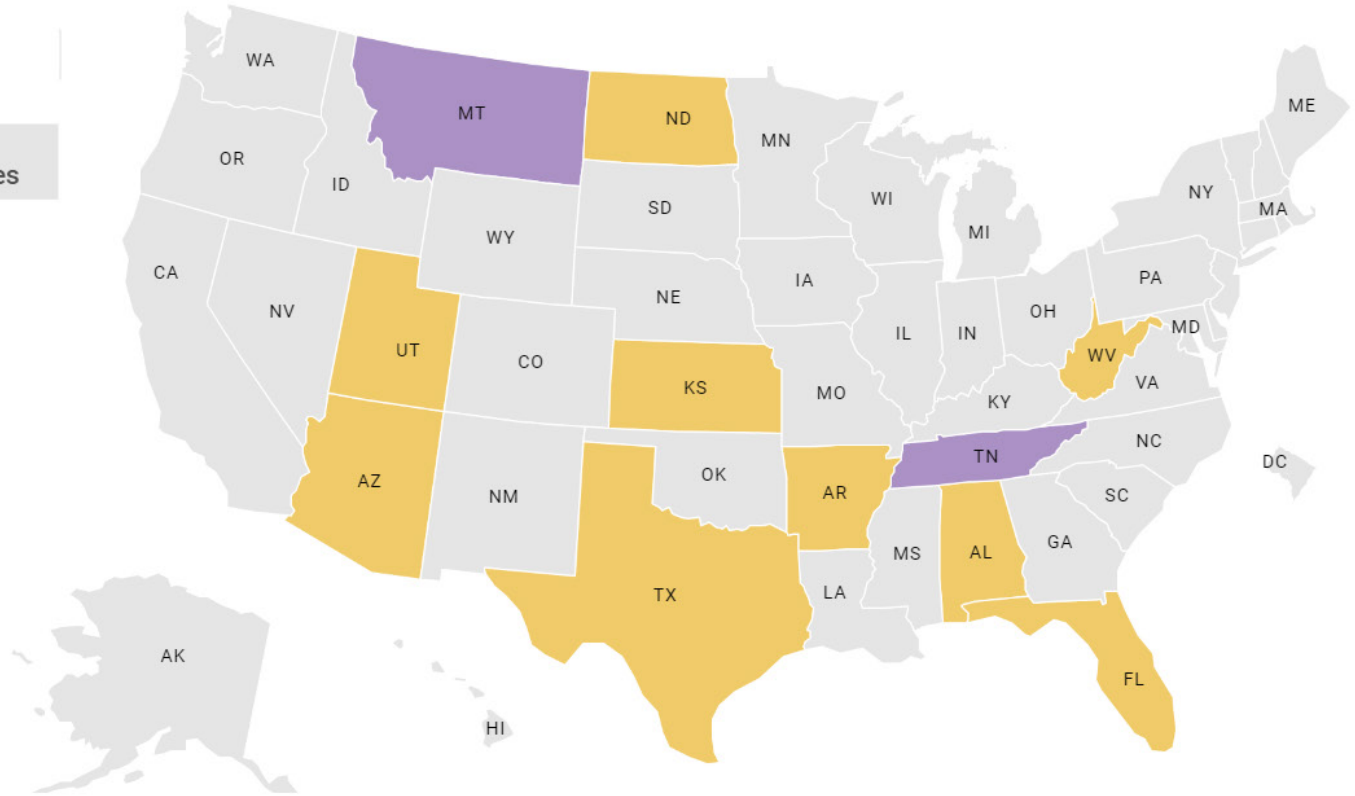
- Courts have found undue hardship where, for example, the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.
- Fact-specific inquiry:
 - Can the risk to employees be minimized?
 - Remote work
 - Mask requirement
 - Social distancing
 - Change in job duties
 - Is the workplace high-density?
 - What percentage of the workforce is vaccinated/ a vulnerable population?
 - What is the rate of infection in your community?
 - Extent of employee contact with non-employees?



State-Specific Considerations

Action	# of States
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- Mandates Are Banned 2
- Exemptions Are Required for Vaccine Mandates 9



State-Specific Considerations

- A number of states have adopted laws/regulations addressing COVID-19 vaccine mandates and accommodations for religious reasons
- **Alabama:** Requiring that employers give employees a form to request an exemption, liberally construe an employee's eligibility for an exemption in favor of the employee, allow employees to appeal the decision that they are not exempt
- **Kansas:** requires employers that implement COVID-19 vaccine requirements to exempt any employee who submits a waiver stating that the requirement would violate the employee's sincerely held religious beliefs, including theistic and non-theistic moral and ethical beliefs.
- **Texas:** prohibits entities from requiring COVID-19 vaccines who objects for “any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”



Mask Mandates

COVID-19 Mask Mandates

- “A mask requirement obscures God’s image and contravenes His design for mankind.”
- “A mask requirement forces me to participate in communicating a lie.”
- “A mask requirement forces me to promote an ungodly message of fear.”



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Top Tips

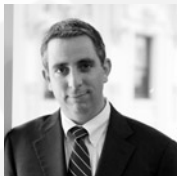
Top Tips

- Identify what laws your organization may be subject to relating to vaccine and mask mandates and accommodations
 - Federal, state, and local levels
- Identify your risk tolerance and weigh the pros and cons of a vaccine mandate—keeping employees safe, lawsuits, employees quitting, etc.
- If you adopt a vaccine mandate:
 - Individually analyze each accommodation/ exemption request
 - I.e. Is the request based on a sincerely held religious belief?
 - Analyze whether an exemption is reasonable or an undue burden
 - Can you keep employees reasonably safe?
- Document the process.



Questions?

Thank You



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