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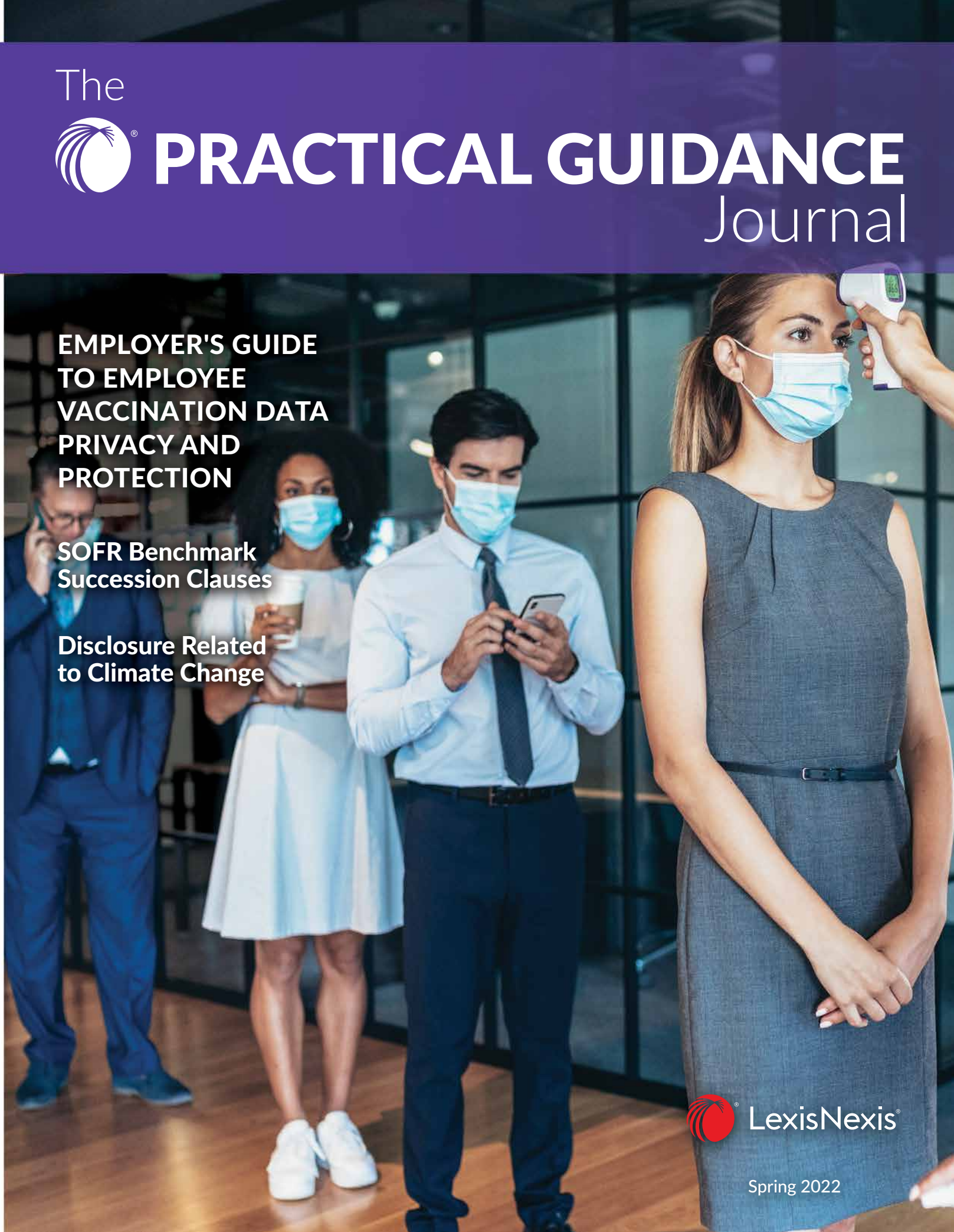

EMPLOYER'S GUIDE TO EMPLOYEE VACCINATION DATA PRIVACY AND PROTECTION

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Guidance for Employers on **Vaccination and Testing Rules**

This article addresses the COVID-19 vaccine and testing rules promulgated by the Biden Administration. It is an excerpt from the practice note **Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response**.

PRACTICAL GUIDANCE SUBSCRIBERS MAY VIEW THE full guidance, which answers health and safety related return-to-work questions for employers, and includes information on wage and hour issues, telecommuting guidance, traveling employees, labor-management relations, and summarizes recent related legislation.

Vaccination Requirements under the Biden Administration for Federal Contractors and Subcontractors

On September 9, 2021, President Biden issued Executive Order 14042,[1] after which the Safer Workplace Task Force issued its COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Guidance).[2] However, on November 30, 2021, a federal district court blocked the COVID-19 vaccine mandate for federal contractors from taking effect in Kentucky, Ohio, and Tennessee.[3] On December 7, 2021, a federal judge issued a nationwide injunction blocking the COVID-19 vaccine mandate for federal contractors from going into effect, ruling the Biden administration had likely exceeded its procurement authority.[4]

The Guidance required covered federal contractors and subcontractors to ensure that by December 8, 2021, their covered employees were fully vaccinated for COVID-19.

Exceptions are limited to valid requests for medical or religious exemptions. Federal contractors and subcontractors also are required to make sure that employees and visitors adhere to masking and social distancing rules.

1. *See* 3 C.F.R. Executive Order 14042. 2. https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf. 3. Commonwealth v. Biden, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021). 4. *See* Ga. v. Biden, 2021 U.S. Dist. LEXIS 234032 (S.D. Ga. Dec. 7, 2021).

The Guidance does not apply to contracts existing prior to October 15, 2021, though it does apply when options are exercised or extensions are granted. Contract solicitations between October 15 and November 14, 2021, must include Guidance requirements. Contracts awarded after November 14, 2021, must include the requirements set out in the Guidance. Contracts and subcontracts of $250,000 or less are excluded as are contracts for the provision of products, among others.

The definition of a covered contractor is a broad one, including those with employees who work in connection with a covered contract or at a covered contractor's workplace. An entire workplace location may be covered even if the contractor or subcontractor only occupies a portion of the facility.

All non-exempt employees had to be vaccinated by December 8, 2021. In addition, all employees and others on contractor or subcontractor premises must comply with the CDC's masking and social distancing guidance. Fully vaccinated individuals are not required to socially distance. Employers may avoid the masking and social distancing mandates by being located in a moderate or low transmission rate location for two successive weeks. However, even in locations of moderate or low transmission rates, everyone on premises in close contexts (e.g., open floor plan spaces) must wear masks. Exceptions apply in several contexts, including when eating or drinking, in closed offices with floor to ceiling walls, or when employees have difficulty breathing. Contractors and subcontractors are required to designate one or more employees as Designated COVID-19 Coordinators to manage compliance.

OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS)

On November 4, 2021, OSHA issued its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) effective the next day.[5]

KEY UPDATE: On January 13, 2022, a six-justice majority of the United States Supreme Court ruled that OSHA's ETS exceeded its statutory authority and therefore stayed the implementation of the ETS finding that the Secretary of Labor, who oversees OSHA, lacked the authority to issue the ETS.[6] Quoting from a 2021 opinion of the Court, it reasoned that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Noting that the OSHA mandate affecting employers with more than 100 employees (except those subject to other mandates such as federal government employees and those subject to the Centers for Medicare & Medicaid Services (CMS) mandate issued by the Secretary of Human Services applicable to facilities that receive Medicaid and Medicare funding) would impact approximately 84 million Americans, the majority concluded that when Congress enacted the Occupational Safety and Health Act in 1970, it did not clearly express that OSHA could issue an ETS of that magnitude. While it recognized that OSHA may regulate "occupation-specific risks," the Court noted that it had never previously adopted a "broad public health regulation of this kind."

Three members of the majority (Justices Gorsuch, Thomas, and Alito), in a concurring opinion, offered that the major questions doctrine lent further support to the majority's ruling. In other words, those three justices expressed the view that in a matter of the magnitude of the OSHA vaccination and testing emergency mandate, not only must Congress speak definitively, but, if it does not, the matter is left to state and local governments to determine.

The dissenters (Justices Sotomayor, Breyer, and Kagan) feverishly pointed to the toll COVID-19 had leveled on the country, contending that the ETS "perfectly fits the language of the applicable statutory provision" and that the Court should defer to the agency's deep-seated wisdom. It pointed to the "legal standard governing a request for relief pending appellate review" (i.e., that the "applicant must show (1) that 'their claims are likely to prevail,' (2) 'that denying them relief would lead to irreparable injury,' and (3) 'that denying them relief would not harm the public interest'"), suggesting that in this instance the public interest is paramount.

Now the OSHA ETS is stayed pending a ruling on the merits on an appeal from the U.S. Court of Appeals for the Sixth Circuit and a possible writ of certiorari on the merits of the case to the Supreme Court to review again. Even if the matter continues to be litigated, it is unlikely that the decision on the merits will be any different than the January 13, 2022, Supreme Court decision to stay the OSHA ETS. Certainly the merits will not be reached in the near future, and a more narrow ETS along the lines the majority suggested it would permit is unlikely to surface soon, if at all, meaning for the unforeseen future, most large employers will not need to concern themselves with OSHA's ETS.

Below is a review of the caselaw on the OSHA vaccination or testing ETS prior to the Supreme Court's decision.

On the effective date of the OSHA ETS, the U.S. Court of Appeals for the Fifth Circuit issued a stay, grinding the ETS to a halt at least within the jurisdiction of that circuit in Mississippi, Louisiana, Texas, and the Canal Zone.[7] On November 12, 2021, the Fifth Circuit issued an order staying enforcement

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5. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). **6.** Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022). **7.** BST Holdings v. OSHA, 2021 U.S. App. LEXIS 33117 (5th Cir. Nov. 5, 2021).

and implementation of OSHA's ETS pending further judicial review.[8] At the time, proceedings in all but one of the U.S. Courts of Appeals raised similar issues. Shortly after the Fifth Circuit's action, all of those various cases were consolidated in the U.S. Court of Appeals for the Sixth Circuit. On December 17, 2021, a three-judge panel of the Sixth Circuit, in a 2-1 decision, vacated the Fifth Circuit's hold on the mandate.[9] OSHA then promptly gave companies until January 10 to comply with the Biden Administration's COVID-19 vaccinate-or-test rule and until February 9 before issuing citations for violating the regulation's testing requirement. According to the Labor Department's statement that followed the Sixth Circuit appeals court decision reviving the measure, the enforcement grace period hinges on employers "exercising reasonable, good faith efforts to come into compliance with the standard."

On December 20, 2021, the Supreme Court received appeals asking it to freeze the Sixth Circuit's decision or to bypass the normal appeals process and immediately hear arguments on the case.

Coverage

If upheld by the courts, the ETS would apply to employers with 100 or more employees at any time after November 5, 2021. All employees, including seasonal and temporary ones, count. Workplaces covered by the federal contractor vaccination mandate[10] or the June 2021 ETS for healthcare providers[11] generally are exempt from the ETS, but only at covered worksites. Exclusions otherwise are narrow: workplaces where there are no other co-workers or customers, employees who work remotely, or employees who work exclusively outdoors.

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8. *See* BST Holdings v. OSHA, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021) ("It is further ordered that OSHA take no steps to implement or enforce the Mandate until further court order."). **9.** Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165), 2021 U.S. App. LEXIS 37349 (6th Cir. Dec. 17, 2021). **10.** *See* COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. **11.** COVID-19 Healthcare ETS.

> Employers must provide up to four hours of paid time off per vaccination dosage and reasonable paid leave to recover from vaccination side effects. Paid time off does not apply to non-working hours during which an employee chooses to be vaccinated.

Requirements

If effective, covered employers are required to adopt a policy that mandates vaccinations for all employees except those granted a religious belief or disability exemption. Alternatively, employers may pronounce a policy permitting anyone not vaccinated by January 4, 2022, to provide proof of regular testing for COVID-19. The ETS permits employers to apply either policy option to different locations. OSHA has posted policy templates on its ETS webpage.[12]

The ETS also requires confidential recordkeeping of proofs of vaccination and an employee roster with each employee's vaccination status. An employee who has lost his or her vaccination card may satisfy the proof requirement with an attestation including mandatory representations.

Employers must provide up to four hours of paid time off per vaccination dosage and reasonable paid leave to recover from vaccination side effects. Paid time off does not apply to non-working hours during which an employee chooses to be vaccinated. OSHA presumes two days is reasonable. Employers may require employees to utilize sick leave or paid time off (PTO) if they have a PTO policy.

If an employer elects to allow testing, employees who attend the worksite at least once in a seven-day period must be tested once every seven days. Employees who report less frequently must be tested within seven days prior to returning to the workplace. Self-administered tests are unacceptable unless observed by the employer or a telehealth provider. The ETS does not require employers to pay for testing, but some states (e.g., California and Illinois) do.

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12. COVID-19 Vaccination and Testing ETS.

Unvaccinated employees are required to mask unless alone in a closed room, while eating or drinking, or for identification purposes.

Employers are required to advise employees, *inter alia*, about the ETS, the policies and procedures to implement it, protections against retaliation, and information about criminal penalties for providing false information. Employers also are required to report to OSHA COVID-19 hospital admissions within 24 hours of becoming aware of them and fatalities within eight hours.

The ETS preempts conflicting state laws.

CMS Emergency Regulations

The CMS released emergency regulations on November 4, 2021, requiring covered healthcare facilities to establish a policy ensuring staff had received the first dose of a two-dose vaccine or a one-dose vaccine prior to providing any care, treatment, or other services by December 5, 2021. All staff had to be fully vaccinated by January 4, 2022. There are exemptions based on recognized medical conditions or religious beliefs, observances, or practice.[13]

KEY UPDATE: On January 13, 2022, a majority of five justices of the U.S. Supreme Court upheld CMS's emergency regulations, finding that there was ample authority for it to issue the emergency regulation, essentially clearing the way for it to apply nationwide.[14] Unlike in the Court's determination that the OSHA ETS applicable to most U.S. employers of 100 or more employees was invalid, the majority in this case found that statutory enactment of the Medicare and Medicaid programs provided ample context for the CMS's vaccination mandate issuance. It went on to emphasize that the Secretary of Health and Human Services' edict was nor arbitrary or capricious and that he was not required to have conferred with the states beforehand.

The dissenters (Justices Thomas, Gorsuch, Alito, and Barrett), in two opinions, contended that the statutory authority upon which the majority relied was not sufficiently specific and because the CMS's mandate was an interim rule, the government was compelled to follow the ordinary notice and comment procedure "before placing binding rules on millions of people . . . ."

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13. *See* 86 Fed. Reg. 61,555 (Nov. 5, 2021).

Related Content

For additional information and analysis on developments on this issue, see

THE FEDERAL ROW OF VACCINATION AND TESTING IN THE WORKPLACE STATE LAW SURVEY

For an overview of materials on COVID-19 covered in many practice area offerings in Practical Guidance, see

CORONAVIRUS (COVID-19) RESOURCE KIT

For guidance as to whether an employer may require its workforce to be vaccinated for COVID-19 and whether employees can properly avoid being vaccinated, see

COVID-19 VACCINATION: KEY EMPLOYMENT LAW ISSUES

For a checklist that highlights key considerations for private employers to prepare for and respond to COVID-19, influenza, and other future pandemic outbreaks, see

PANDEMIC FLU/INFLUENZA/CORONAVIRUS (COVID-19) PREVENTION, RESPONSE, AND RETURN TO WORK CHECKLIST (BEST PRACTICES FOR EMPLOYERS)

For a COVID-19 testing policy that governs employee testing and the consequences of a positive test result, see

COVID-19 TESTING POLICY

For employer policies requiring or strongly encouraging employees to obtain the COVID-19 vaccine so as to minimize transmission of the virus in the workplace, see

CORONAVIRUS (COVID-19) VACCINE POLICY (MANDATORY) and **CORONAVIRUS (COVID-19) VACCINE POLICY (NON-MANDATORY)**

For a collection of federal, state, and major local employment laws addressing the COVID-19 pandemic, see

CORONAVIRUS (COVID-19) FEDERAL AND STATE EMPLOYMENT LAW TRACKER

Unlike the vaccine and testing ETS issued by OSHA, the CMS mandate remains the law of the land. Accordingly, all entities that receive Medicare and Medicaid funding now must comply. It remains to be seen when CMS will require the first dose of a two-dose vaccine or a one-dose vaccine to be administered and the date by which all staff must be fully vaccinated.

Below is a review of the caselaw on the CMS mandate prior to the Supreme Court's decision.

On November 29, 2021, a federal court in the Eastern District of Missouri blocked CMS from enforcing the mandate in 10 states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.[15] However, on December 15, 2021, the U.S. Court of Appeals for the Fifth Circuit[16] stayed a nationwide injunction put into place by the Western District of Louisiana[17] on Nov. 30, 2021. Although 14 states were parties to the case, the district court had applied its injunction as to any state not a party to the lawsuit that had not been enjoined by the Eastern District of Missouri's Nov. 29 decision. The Fifth Circuit's ruling trimmed the injunction to those 14 states. Thus, the prohibition on enforcement of the CMS vaccine mandate remains in effect in Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio. The CMS vaccine mandate is also still enjoined for the time being in the 10 states litigating in the Eastern District of Missouri: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

Practical Guidance subscribers may access the full practice note, Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response, for additional guidance.

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14. Biden v. Missouri, 142 S. Ct. 647 (2022). 15. Missouri v. Biden, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021). 16. Louisiana v. Becerra, 2021 U.S. App. LEXIS 37035 (5th Cir. Dec. 15, 2021). 17. Louisiana v. Becerra, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021).

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Employer's Guide to Employee Vaccination Data Privacy and Protection

This article will explore the privacy concerns created when implementing a mandatory vaccine policy and collecting vaccination status information from employees and others.

Introduction

The return-to-work race is well underway. While many employees grapple with their level of tolerance for a hybrid or full in-person workplace model, employers are seeking ways to entice employees back to the workplace safely. Some employers are electing a vaccination-only workforce, whether required by government mandates or not. Others are endeavoring to manage a mixed workforce of vaccinated and unvaccinated workers.

As noted above, one of the most common questions U.S. employers are pondering at the present time (beyond physical solutions for reducing the spread of COVID-19) is whether an employer can, should, or must implement a mandatory vaccine policy for returning employees. For the most part, mandatory vaccine policies are permissible and, many would argue, necessary to reduce the spread of COVID-19 in the workplace; however, implementation of a mandatory vaccine policy creates myriad considerations, including those around privacy and data security.

For example, once you ask an employee about their vaccination status, should (or must) the company then request proof of vaccination? Should the company request the same information from visitors, such as clients, customers, and vendors? If an employer collects vaccination records, what does the company do with the data collected? How does the company store the data? What safeguards does the company need to have in place to protect the data? Can the company share this data to make customers, visitors, and potential recruits to the business more comfortable about the safety of its work environment?

Employment Law Considerations for Mandatory Vaccine Policies

Equal Employment Opportunity Commission (EEOC) Guidance and the Americans with Disabilities Act (ADA)

Under the ADA,[1] as amended by the Americans with Disabilities Amendments Act[2], covered employers may not make disability-related inquiries or require employees to get a medical examination unless the inquiry or examination is "job-related and consistent with business necessity."[3] On March 17, 2020, the EEOC released *What you Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws*.[4] This guidance addresses several topics, including return to the workplace and vaccinations, stating that federal Equal Employment Opportunity laws do not prevent an employer from requiring that all employees that physically enter the workplace be vaccinated against COVID-19.[5] The ADA, however, restricts when and how much medical information an employer may obtain from employees. Further, the guidance makes clear that simply requesting proof of vaccination from an employee is not a disability-related inquiry under the ADA.[6] Consequently, absent any state or local law providing otherwise, an employer may permissibly request or require production of documentation that validate employees' vaccination status.

As for non-employees who seek to enter an employer's premises, several legal obligations and restrictions could be implicated. First, with respect to individuals such as vendors, contractors, and consultants, certain of the employment-related protections discussed below may be applicable to such individuals, depending on the state or city in question. Further, some states have passed bans on businesses from requiring proof of vaccination (e.g., vaccine passport bans), which preclude businesses from denying access or services to customers who are not vaccinated. So, depending on the nature of an employer's business, while requesting proof of vaccination, in and of itself, may not violate employee privacy or disability-related laws, employers may be limited in their ability to maintain a vaccinated-only workplace or to take action based on the individual's vaccine status.

Privacy, Employee Overshare, and Asking One Question Too Many

Any inquiry beyond a request for production of documents verifying vaccination status may run afoul of the ADA's rules about disability-related inquiries, turning a lawful request for proof of vaccination into a disability-related inquiry, which could, depending on when it is asked, be unlawful. For example, an inquiry into why an employee has not received a COVID-19 vaccine may elicit information about the employee's health or medical condition and cannot be asked prior to an offer of employment.

Likewise, employers may wish to limit the type of employee-provided documentation they will accept as proof of vaccination status. Documentation that the employer plans to rely on, keep, and potentially use, ideally should not contain any additional information that speaks to the employee's health or medical conditions. Consequently, as we begin to consider the data privacy issues at play, the manner and form in which a company solicits this data becomes a central focus.

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1. 42 U.S.C.S. § 12101 et seq. **2.** Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008). **3.** *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 et seq.; Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 et seq. **4.** *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws. Accessed, (Oct. 14, 2021) (hereinafter, EEOC Guidance), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. **5.** EEOC Guidance, supra note 4; *see also* 29 C.F.R. pt. 1630 et seq.; 29 C.F.R. pt. 1614 et seq. **6.** EEOC Guidance, supra note 4.

Considerations for Receipt and Storage of Proof of Vaccination Status

A company should be mindful of the type of information and the source from which it requests an employee provide documentation in support of their vaccination status. For example, requesting a copy of an employee's vaccination card may trigger a heightened data-privacy and document-retention requirement as a health-related employment record. However, requesting lab results from a medical provider may trigger the requirement for a valid Health Insurance Portability and Accountability Act[7] (HIPAA) authorization. In its guidance on vaccination, the EEOC takes the position that although a request for vaccination status is not a medical examination or disability-related inquiry under the ADA, any documents reflecting employee vaccination status are considered confidential medical records and should be maintained separately from personnel records pursuant to the ADA.[8]

Method of Vaccine Record Collection

An employer may collect paper copies of vaccination records and store medical information related to COVID-19 in existing medical files (separate from the personnel file). Where an employer requests or receives a copy of a vaccination record via electronic mail (email), other considerations come into play, such as the security of the company's email server and the risk of a potential data breach. Beyond this, questions regarding who will have access to the email records, where the email records will be stored (as well as any supporting metadata), if the email records will be printed and converted to a paper file, and the company's data-retention policy will also come into play. For example, a California employer is required to maintain medical records separately from the employee personnel file. Under Cal/OSHA Emergency Temporary Standards (ETS), an employer is not compelled to use any specific method of documenting their employees' vaccination status.[9] However, the method used should ensure that the information is kept confidential. Some acceptable options include requesting employees provide a copy of their vaccine card or an image of their vaccine card or health care document showing vaccination status, and a copy is maintained by the employer. An alternative is for an employee to sign an attestation or for the employer to maintain a record of which employees self-attested. With respect to how long vaccination

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7. Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996) (codified, as amended, in scattered sections of 18, 26, 29 and 42 U.S.C.S.). **8.** *See* EEOC Guidance, supra note 4. **9.** *See* California Department of Industrial Relations (DIR), COVID-19 Emergency Temporary Standards Frequently Asked Questions (hereinafter "ETS FAQs"), available at https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#vaccines.

records must be maintained, there is some ambiguity under the Cal/OSHA ETS as to whether vaccine record collection triggers the length of employment plus 30-year retention period placed upon employers for employee medical records or if the records can be maintained for a shorter period of time.[10] Whether California employers under the Cal/OSHA ETS have to maintain vaccination records for 30 years after termination of employment or for some shorter length of time, an employer should not use their email system as their method for storing vaccination records, given the vulnerabilities to phishing attacks and other mistakes that are made sending, receiving, and deleting emails.

If electronic storage is used, files should be secure and separate, with limited access available and need-to-know principles in place. Consideration must be given to whether the company will rely on physical data centers for data storage or a cloud platform, and in which jurisdictions the information may be transferred or stored. In both scenarios, location of the data center or the cloud, involvement of third-party companies to service said storage method, and whether that third party is a controller or processor of data will dictate what notice of data processing or use, disclosure of data breach, waiver, and/or employee consent the company must obtain. It may further dictate specific language addressing duty-of-care obligation within the respective vendor agreements for employee sensitive data. Finally, an inquiry into whether there are country, federal, state, or other local laws applicable that may impose a stricter data privacy structure must also occur.

Applicability of HIPAA to Employer Vaccine Record Collection

Generally, the HIPAA Privacy Rule does not regulate what information an employer can request from employees and does not apply to employers or employment records. HIPAA only applies to entities that qualify as HIPAA-covered entities—healthcare providers, health plans, and healthcare clearinghouses.[11] Even if an employer is a covered entity, HIPAA still does not apply to health information contained "in employment records held by a covered entity in its role as an employer."[12] While HIPAA may apply to health information employers acquire in their capacities as covered entities, it does not apply to health information they acquire in their roles as employers.

Privacy law principles still come into play, because even though HIPAA does not apply to health-related employment records, employers still have other legal obligations to protect the confidentiality of employee health information in their possession.

The HIPAA Privacy Rule does come into play if an employer requests that employees provide proof of vaccination through the disclosure of medical records from their healthcare providers. The Privacy Rule requires covered entities responding to a request to disclose an individual's protected health information (e.g., information about whether the individual has received a vaccine, such as a COVID-19 vaccine; the individual's medical history or demographic information) to a third party to obtain authorization from the individual prior to making the disclosure.

Reliance on International SMART Health Card and Locality Verifier Applications

As an alternative to storage of electronic or paper files, an employer can verify an employee's vaccination status by asking to see a vaccination digital passport. While universal technology has yet to be adopted, the SMART Health Card framework developed by the Vaccine Credential Initiative (VCI) is already in use by several states, universities, and corporations.[13] The VCI framework boasts that it is based on international standards and open technologies that are interoperable across countries and regions, transparency, privacy that protects the health data of an individual, and a design compatible with stringent privacy regulations.[14] Notably, the technology can present a QR code that can be displayed digitally on a smart phone or can be downloaded and printed in paper form (no smart phone required). When the employee pulls the QR code up, only the individual's name, date of birth, and vaccination information is shared. This code is also digitally signed to ensure that the card was issued from a verified location to prevent forgery. Employees can also use their SMART Health Card credential to obtain access to other venues, since it has been integrated into other apps, like the Excelsior App, the LA Wallet, and VaccineCheck, to name a few. Consequently, an employer could scan the QR code, verify an employee's vaccination status and avoid the storage, privacy, and potential liability issues for maintaining employee vaccination data.

Relying on the VCI technology, Apple recently announced that it is adding verifiable COVID-19 vaccination cards to the Apple Wallet as part of a future iPhone software update.[15] The feature will take advantage of the VCI international SMART Health Cards standard to produce proof of vaccination, sign it with a private key, and create a public key to verify individual information. The portability of the SMART Health technology for safe return to work is promising. However, in certain jurisdictions, where requiring verification and the technologies to track vaccination status have been banned, an employer would not be permitted to share the list of vaccinated employees who are working onsite with the state or local public health authorities as evidence that the worksite is in compliance with local law.

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10. *See* ETS FAQs, supra note 8. ("Stating vaccination records created by the employer under the emergency standards need to be maintained for the length of time necessary to establish compliance with the regulation, including during any Cal/OSHA investigation or appeal of a citation. In order to encourage documentation using vaccination records, Cal/OSHA has determined that it would not effectuate the purposes of the Labor Code to subject such records to the thirty (30) year record retention requirements that apply to some medical records"); *see also* Cal. Code Regs. tit. 8, § 3204(c)(5)(D). **11.** *See* 45 C.F.R. § 160.103; *see also* U.S. Dep't of Health and Human Services, HIPAA Covered Entities and Business Associates available at https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html. **12.** 45 C.F.R. § 160.103. **13.** Tom Frieden, I Ran the CDC Here's How to Prove that Americans are Vaccinated, Sept. 21, 2021, available at https://www.nytimes.com/2021/09/21/opinion/cdc-coronavirus-vaccine.html. **14.** Vaccine Credential Initiative, The VCI Charter, available at https://vci.org/about. **15.** John Fingas, Apple Wallet is Getting Verifiable COVID-19 Vaccination Cards, Sept. 21, 2021, available at https://techcrunch.com/2021/09/21/apple-wallet-is-getting-verifiable-covid-19-vaccination-cards/.

> … businesses are within their rights to require that anyone wishing to enter their premises provide proof of vaccination. That includes employees, contractors, consultants, vendors, or customers/patrons.

Collecting and Maintaining Vaccination Information from Contractors, Consultants, Vendors, and Customers/Patrons

On September 9, 2021, President Joseph Biden issued Executive Order No. 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors,* raising awareness of the subject and complexity of the role that contractors play in keeping workplaces and employees safe from exposure to COVID-19.[16] The Executive Order directed executive departments and federal agencies to require federal contractors to implement COVID-19 safety protocols, including mandatory vaccination policies through clauses in FAR contracts and contract-like instruments. Under the Executive Order and guidance published by Office of Management and Budget,[17] all covered contractors are required to review the documentation of covered contractor employees to prove vaccination status. Contractors can rely on immunization records of a hospital or pharmacy; COVID-19 Vaccination Record Cards; medical records documenting vaccination; immunization records from a public health or state immunization system; or other official documentation verifying vaccination containing information on the vaccine, date of administration, and the name of the healthcare professional/clinic site administering the vaccine, as proof of vaccination. However, an attestation of vaccination or proof of prior COVID-19 infection and antibody testing do not qualify as sufficient proof. Vaccination status can be verified electronically, digitally, or with a scanned copy. While contractors are required to verify proof of vaccination, there is no requirement for contractors to maintain such proof of vaccination.

As noted above, businesses are within their rights to require that anyone wishing to enter their premises provide proof of vaccination. That includes employees, contractors, consultants, vendors, or customers/patrons. If a business decides to impose such a restriction on their contractors, consultants, or vendors, the parties may need to review and renegotiate their contracts to include that only workforce members of a contractor, consultant, or vendor who have been vaccinated are allowed to work on site. Absent an express term in an agreement to the contrary, the respective employers would likely be the responsible party to collect and maintain the vaccination records. With respect to customers or patrons, businesses may require proof of vaccination upon entry and turn away anyone who has not been vaccinated. The CDC still recommends that vaccinated individuals should take precautions (e.g., testing and masking indoors) if they have had close contact with someone who tests positive for COVID-19. Therefore, depending on the venue and any state or local requirements, a business that is collecting proof of vaccination may want to consider whether to retain proof of vaccination beyond the date of collection in case they become aware of any breakthrough cases of COVID-19.[18]

Maintaining Confidentiality of Vaccination Information, State Specific Considerations, and Future Data Use

Maintaining Confidentiality

Paper or electronic documentation concerning an employee's vaccination status provided by an employee will constitute confidential medical information under both the ADA and state-specific regulations such as the California Confidentiality of Medical Information Act (CMIA).[19] As previously mentioned, employers are still subject to the confidentiality requirements of both the ADA and the CMIA even if they are not considered covered entities within the meaning of HIPAA. Both statutes impose strict statutory obligations related to the protection and preservation of confidential medical information.

Under the ADA, employers must keep confidential medical information in a file that is separate and distinct from the employee's personnel records. When collecting a new kind of sensitive health information, best practice is for a business to conduct a review of its privacy and retention policies regarding storage and use of such medical information to ensure compliance with those existing policies. Use of security measures such as password protection, encryption, and limiting access to the separately stored file to those employees or third parties who need to have access to the information are a starting point for protecting this sensitive employee health data.

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16. Briefing Room, The White House, Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, (Sept. 9, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/. **17.** Jason Miller, Office of Management and Budget, New Guidance on COVID-19 Workplace Safety for Federal Contractors, (Sept. 24, 2021), available at https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/. **18.** *See* Guidance, Centers for Disease Control (CDC), When You've Been Fully Vaccinated How to Protect Yourself and Others (updated Oct. 15, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated_archived.html. **19.** Cal. Civ. Code §§ 56-56.16.

California's Heightened Data Privacy Requirements: California Consumer Protection Act (CCPA), California Privacy Rights Act (CPRA), CMIA

The CMIA is more stringent than HIPAA in imposing more rigorous confidentiality obligations, requiring that employers "establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of [employees' confidential medical] information." These procedures may include instructions to handlers of the confidential medical information and implementation of security safeguards. Furthermore, upon receipt of a vaccination health record, the employer cannot further disclose that employee health information to another third party (e.g., a public health authority) unless the employer receives written authorization from the employee to further disclose that information.[20]

As a general rule, employers who operate in California may collect certain health information from job applicants and employees. That said, in order to fully analyze whether or not an employer must take an additional step to obtain employee consent, a review of the notice that employees receive under the CCPA[21] during onboarding is required. The notice described in the CCPA and its regulations[22] requires employers to provide applicants and employees who are residents of California with a notice, at the time that any data collection takes place, that includes:

- A list of the categories of personal information that will be collected. Examples of the categories of information that an employer maintains about employees may include:
  - New applicant/onboarding information (e.g., resumes, employee applications, background checks, IRS Forms W-4 (withholding), etc.) collected
  - Payroll/financial information (may include employee bank account numbers for direct deposit) collected
  - Health/health-related information: vaccination records, drug test results, documents requesting sick leave, FMLA leave, maternity/paternity leave collected
- Online activity on employer-furnished equipment (browsing history, search history, and information regarding the employee's interaction with an internet website or application)
- The business reason for which the information is being collected
- Information on how to opt out of the sale of personal information (if information is being sold)
- Information on how to find the company's complete privacy notice

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20. The Confidentiality of Medical Information Act (CMIA) sets forth certain requirements for an employee authorization to be considered valid. Pursuant to the CMIA, the authorization must satisfy each of the following requirements: It must be handwritten by the employee, or else typed in at least 14-point font; be clearly separate from any other language on the page and executed by a signature that serves only to execute the authorization; be signed and dated by the employee; state the limitations, if any, on the types of medical information to be disclosed; state the names or functions of both the person(s) authorized to make disclosures and the persons or entities authorized to receive disclosures of the medical information; state a specific date after which the employer may no longer disclose the medical information; state the limitations, if any, on the use of the information; and advise the employee that he or she may receive a copy of the authorization. **21.** Cal. Civ. Code § 1798.100 et seq. **22.** See Cal. Code Regs. Tit. 11 § 999.305(b).

After January 1, 2023, the CPRA[23] will expand the information required in a notice of collection to include:

- Whether that information is sold or shared
- The length of time that the business intends to retain each category of personal information

Unless the employer expects to disclose the vaccination records, a clear notice provided to employees with the elements enumerated above should be sufficient to collect and retain vaccination records. If the notice includes information about the potential for the employer to further disclose the vaccination records to third parties (e.g., local, state, or federal public health authorities), the notice should be affirmed either with a wet signature or electronically in a manner that complies with the California Uniform Electronic Transactions Act (UETA)[24] and the Electronic Signatures in Global and National Commerce Act.[25] There was some ambiguity as to whether the California UETA applied to medical records. However, that ambiguity was resolved when the California Health and Safety Code related to Medical Records was recently amended to authorize a health care provider to honor a request to disclose a patient record.[26]

Other State Privacy Considerations

Several states have recently enacted data security and privacy laws that impose notice and records retention requirements as methods to protect the vaccination records that employers are maintaining.

Two states highlight the slight variance in state law which can make an employer's approaches nuanced—particularly where a company operates and has employees in multiple locations.

Connecticut

Connecticut's data privacy law tracks closely with the requirements imposed by HIPAA. However, with respect to an employer's responsibility to maintain employee medical records, Connecticut General Statutes require employers to maintain any medical records for at least three years following the termination of employment and that the medical records must be kept in a separate file that is not part of any personnel file.[27] In contrast to the CMIA, Connecticut law allows personal health information to be disclosed without a patient's consent to certain state agencies and other entities in certain circumstances.[28]

Oregon

Under Oregon's Protected Health Information law,[29] patients have the right to expect that their medical records will be safeguarded from unlawful disclosure. However, the law does not provide broader protections to employee health information like the CMIA. The Oregon Consumer Identity Theft Protection Act, however, provides protection for personally identifiable information and medical information in an employer's possession, requiring businesses in Oregon to implement and maintain certain security safeguards to protect personal information and to report data breaches of personal information.[30]

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23. Cal. Civ. Code § 1798.100 et seq. **24.** Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.1 et seq. **25.** Pub. L. No. 106-229, 114 Stat. 464 (June 30, 2000). **26.** The amendment became effective January 1, 2021. See California Department of Public Health, Vaccine Records Guidelines and Standards (Aug. 25, 2021), available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Vaccine-Record-Guidelines-Standards.aspx. **27.** Conn. Gen. Stats., Ch. 563, § 31-128a. **28.** Katherine Dwyer & Brandon Seguro, OLR Research Report, Personal Health Information Disclosure, available at https://www.cga.ct.gov/2016/rpt/2016-R-0050.htm. **29.** See Protected Health Information, Or. Rev. Stat. Ann. §§ 192.553 through 192.581. **30.** Oregon Identity Theft Protection Act, Or. Rev. Stat. Ann. § 646A.600. Oregon Administrative Rule – Identity Theft, Or. Admin. R. 441-646-0010 through 0040.

Related Content

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Virginia, Colorado, and Oklahoma are all states that also recently enacted data-privacy laws; however, unlike the CCPA, each of these laws carved out employees and employment records from their reach. The Virginia Consumer Data Privacy Act (VCDPA) is similar to the CCPA, in that HIPAA-covered entities and their business associates are exempt from the new Virginia law. However, the VCDPA excludes employment information from the definition of consumer information and even though the definition of consumer includes Virginia residents, it expressly excludes "any person acting in a commercial or employment context." The Colorado Privacy Act (CPA) also does not grant the new law's data privacy rights to all Colorado residents; the CPA expressly exempts individuals acting in the commercial or employment context, including job applicants. Finally, similar to Virginia, the Oklahoma Computer Data Privacy Act defines consumer as Oklahoma residents, but does not include an employee or contractor of a business acting in their role as an employee or contractor.

Consequently, employers should be nimble and prepared to revise their policies to reflect the changing data privacy landscape. Notably, there are currently more than 20 states that maintain data breach notification laws, requiring that employers stay on top of changes to the privacy law and report when there has been an unauthorized disclosure of personal medication information.[31]

Conclusion

The regulatory landscape regarding COVID-19, return to work, and the collection of vaccination records is evolving. As more employers adopt mandatory vaccine policies, and technology becomes available for the universal management of vaccine data, employers must become familiar with the changing regulatory obligations related to the privacy and use of vaccination records. Ensuring that companies implement policies that are sufficiently transparent; provide proper notice regarding how vaccination information will be used, with whom it will be shared, and for how long it will be maintained; and that security safeguards are in place to protect any sensitive information, will serve as the framework for navigating compliant collection and maintenance of such data as employees return to the in-person work environment.

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31. The U.S. Senate Committee on Commerce, Science and Transportation recently launched privacy hearings aimed at enhancing the enforcement authority for the Federal Trade Commission (FTC) and enacting comprehensive federal privacy legislation with strong consumer rights. A national privacy law or agency rulemaking at the FTC aimed at protecting consumer data (like confidential medical/vaccine records) could go into effect at some point in the future.