

Back to School: Overview of Legal Challenges to Mask and Vaccine Requirements

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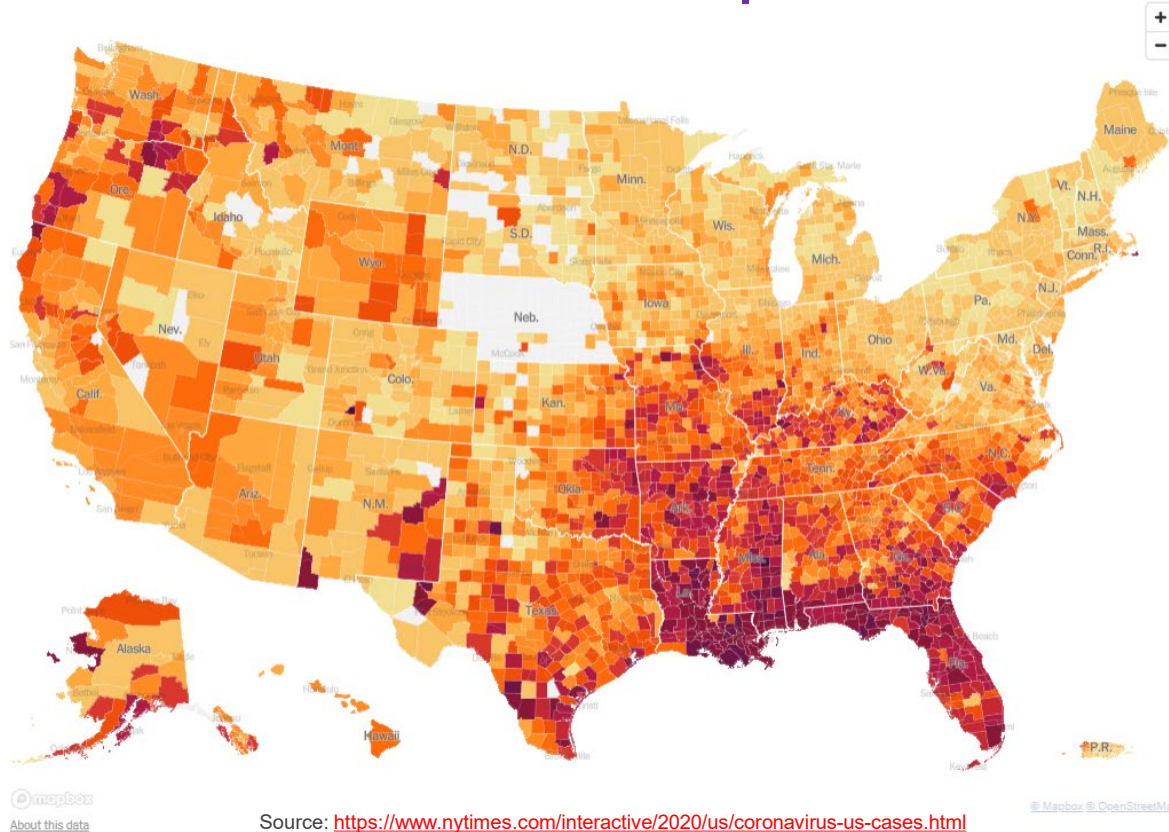
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COVID-19 Confirmed Cases & Deaths

Global Cases 207.2 million | Deaths: 4.3 million

U.S. Cases 36.7 million | Deaths: 621,228

U.S. Stats 17.7% all cases | 14% all deaths

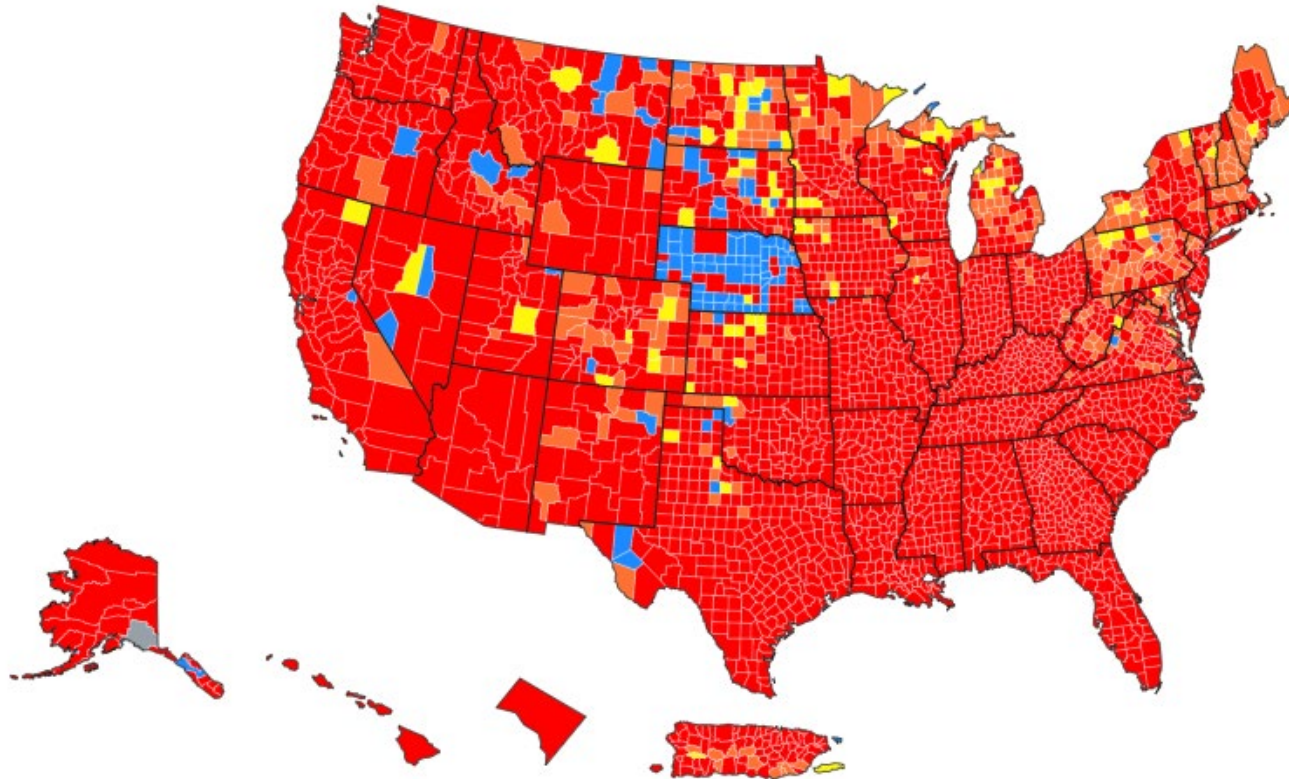


Source: <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

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CDC Recommendations

As of July 27, 2021, CDC recommends that fully vaccinated people “wear a mask in public indoor settings if they are in an area of substantial or high transmission.”



● High ● Substantial ● Moderate ● Low ● No Data

Source: <https://covid.cdc.gov/covid-data-tracker/#county-view>

Current 7-days is Sun Aug 08 2021 - Sat Aug 14 2021 for case rate and Fri Aug 06 2021 - Thu Aug 12 2021 for percent positivity. The percent change in counties at each level of transmission is the absolute change compared to the previous 7-day period.

CDC School Recommendations

As of **July 27, 2021, CDC recommends** “universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status.”

Key Takeaways

- Students benefit from in-person learning, and safely returning to in-person instruction in the fall 2021 is a priority.
- Vaccination is the leading public health prevention strategy to end the COVID-19 pandemic. Promoting vaccination can help schools safely return to in-person learning as well as extracurricular activities and sports.
- Due to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.
- In addition to universal indoor masking, CDC recommends schools maintain at least 3 feet of physical distance between students within classrooms to reduce transmission risk. When it is not possible to maintain a physical distance of at least 3 feet, such as when schools cannot fully re-open while maintaining these distances, it is especially important to layer multiple other prevention strategies, such as screening testing.
- Screening testing, ventilation, handwashing and respiratory etiquette, staying home when sick and getting tested, contact tracing in combination with quarantine and isolation, and cleaning and disinfection are also important layers of prevention to keep schools safe.
- Students, teachers, and staff should stay home when they have signs of any infectious illness and be referred to their healthcare provider for testing and care.
- Many schools serve children under the age of 12 who are not eligible for vaccination at this time. Therefore, this guidance emphasizes implementing layered prevention strategies (e.g., using multiple prevention strategies together consistently) to protect students, teachers, staff, visitors, and other members of their households and support in-person learning.
- Localities should monitor community transmission, vaccination coverage, screening testing, and occurrence of outbreaks to guide decisions on the level of layered prevention strategies (e.g., physical distancing, screening testing).

School Transmission

“Most studies that have shown success in limiting transmission in schools have required that staff only or staff and students wear masks as one of the school’s prevention strategies. Inconsistent mask use may have contributed to school-based outbreaks.”

Source: https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html

1,000 Kids in Mississippi Test Positive for COVID-19 After School Reopens

Thousands more are in quarantine after schools reopened in the state as the delta variant surges.

[Source](#)

School openings so far reveal science is right -- masking works

[Source](#)

Kansas reports 3 active school COVID clusters as students and teachers return to class amid surge

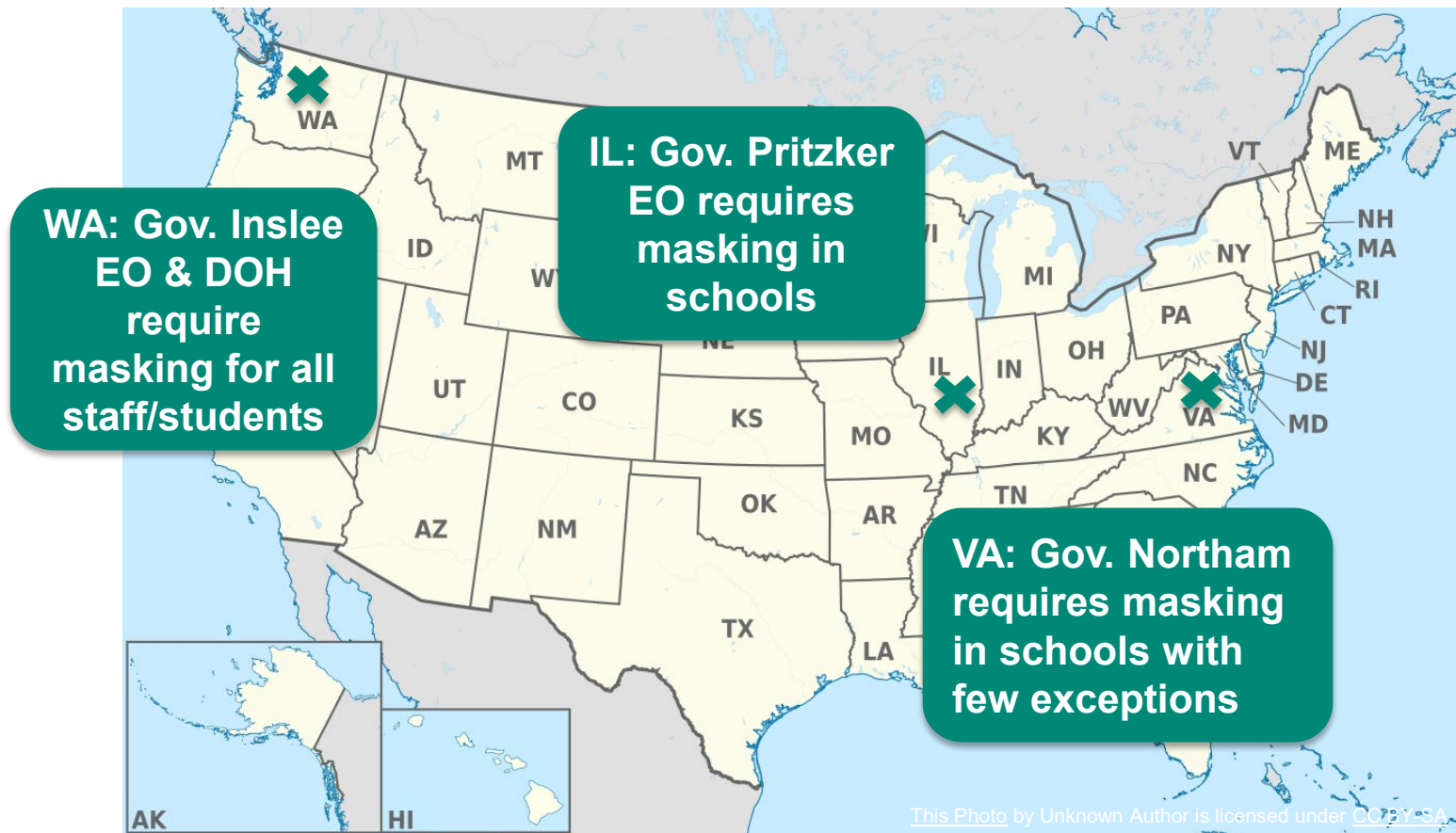
[Source](#)

Atlanta-area elementary students move to virtual learning after COVID-19 outbreak

[Source](#)

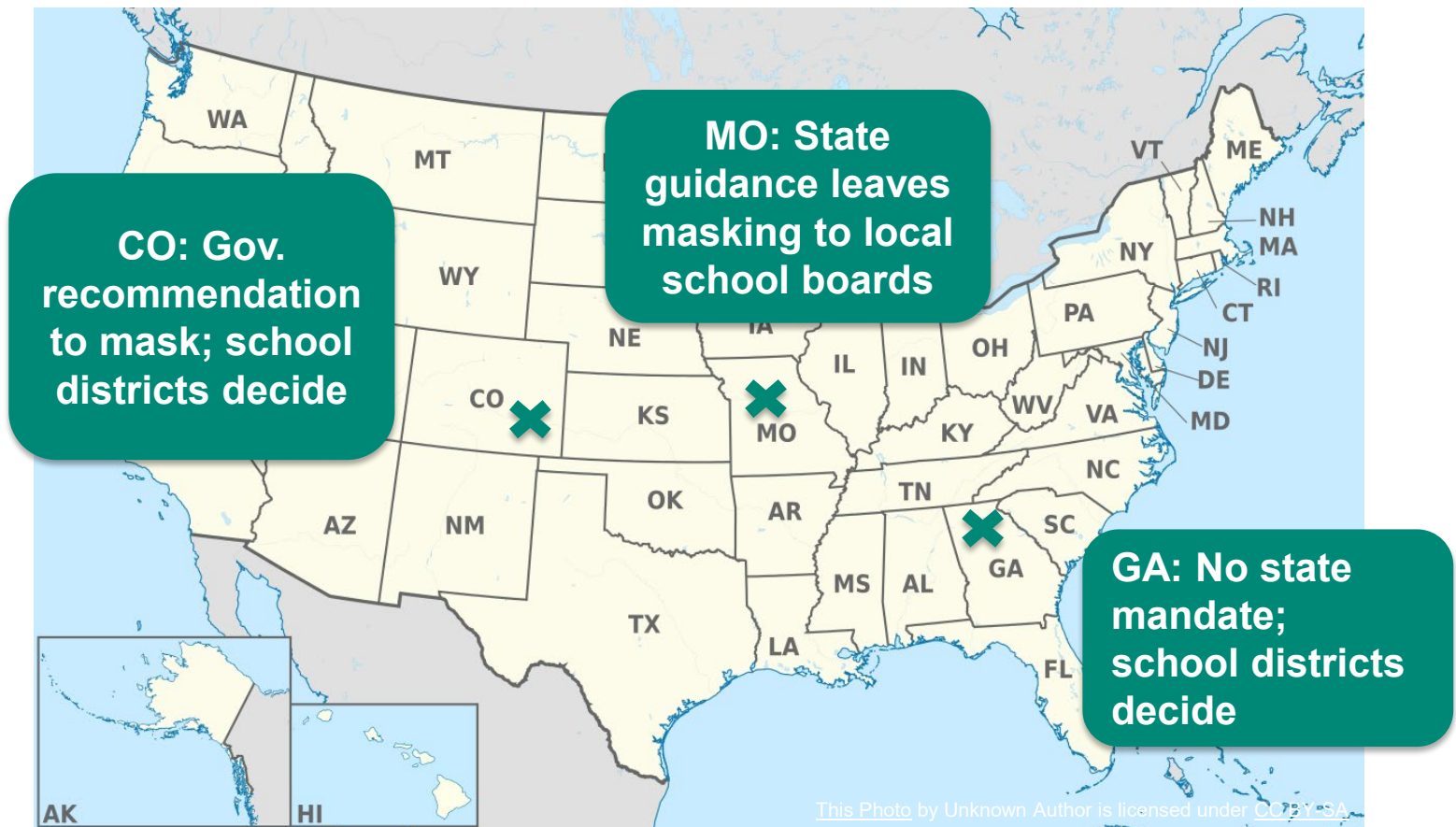
K-12 Schools: COVID-19 Policies

Public Sector Mask Requirements

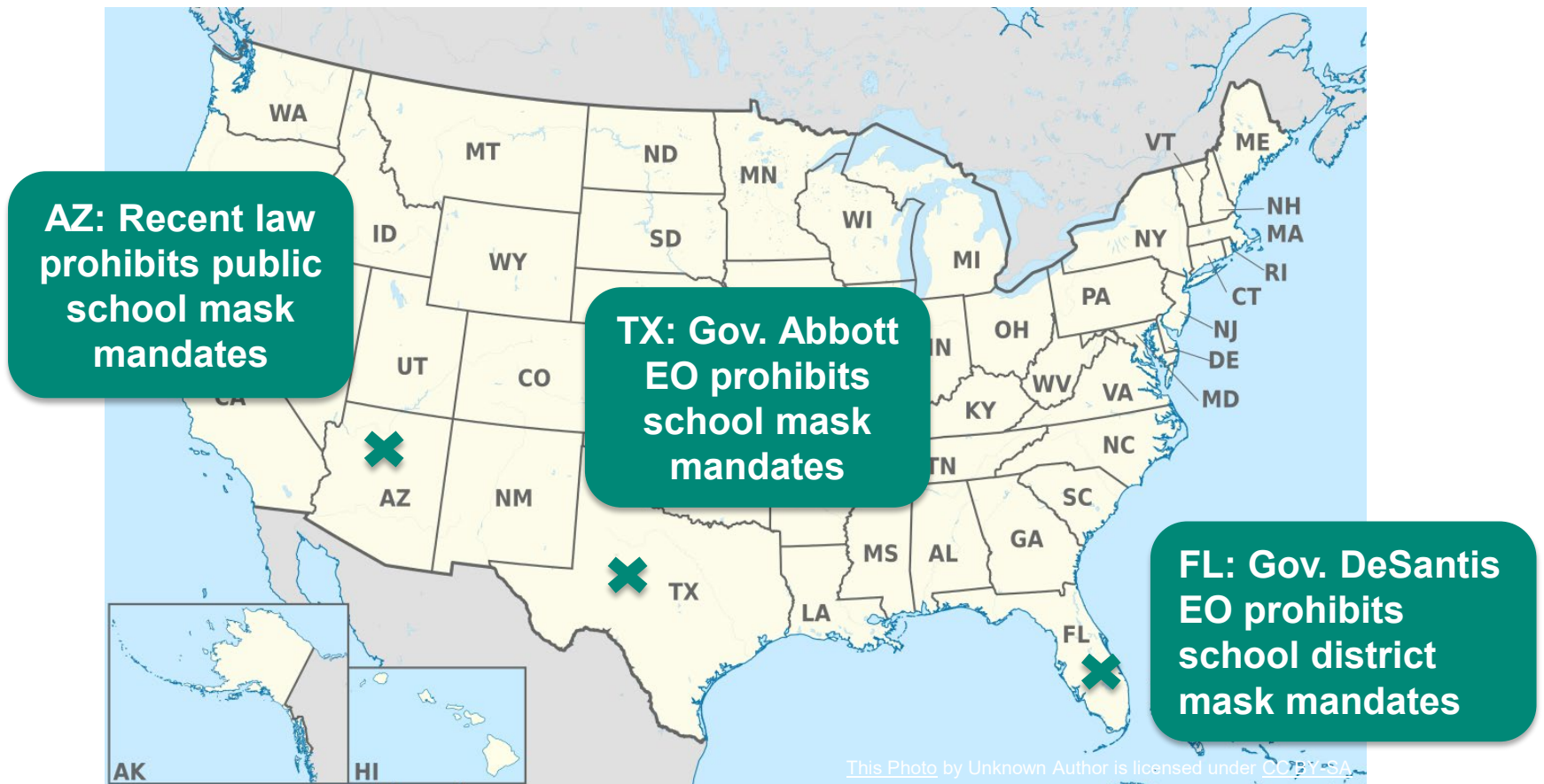


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Public Sector Mask Recommendations



Public Sector Mask Barriers



Requirements Face Challenges

Teacher sues to stop Phoenix school district's mask mandate

Argument: Mandate contrary to state law

[Source](#)

Lawsuit Seeks to Strike School Mask Mandate

[Source](#)

Argument: Executive overreach

O.C. Board of Education to sue Gov. Newsom over K-12 school mask mandate

Argument: Actions violate constitutional and statutory law

[Source](#)

Barriers Face Challenges

DeSantis order barring masks in schools faces first legal challenges [Source](#)

Argument: ADA, other disability protections & laws prevent order

Judge blocks Arkansas from enforcing ban on school mask mandate [Source](#)

Reasoning: Equal Protection, Separation of Powers

The Texas State Supreme Court upholds governor's mask mandate ban, for now.

Reasoning: Temporary stay pending further arguments

[Source](#)

Emerging Legal Issues



Vaccination

Broad Public-Sector Interventions

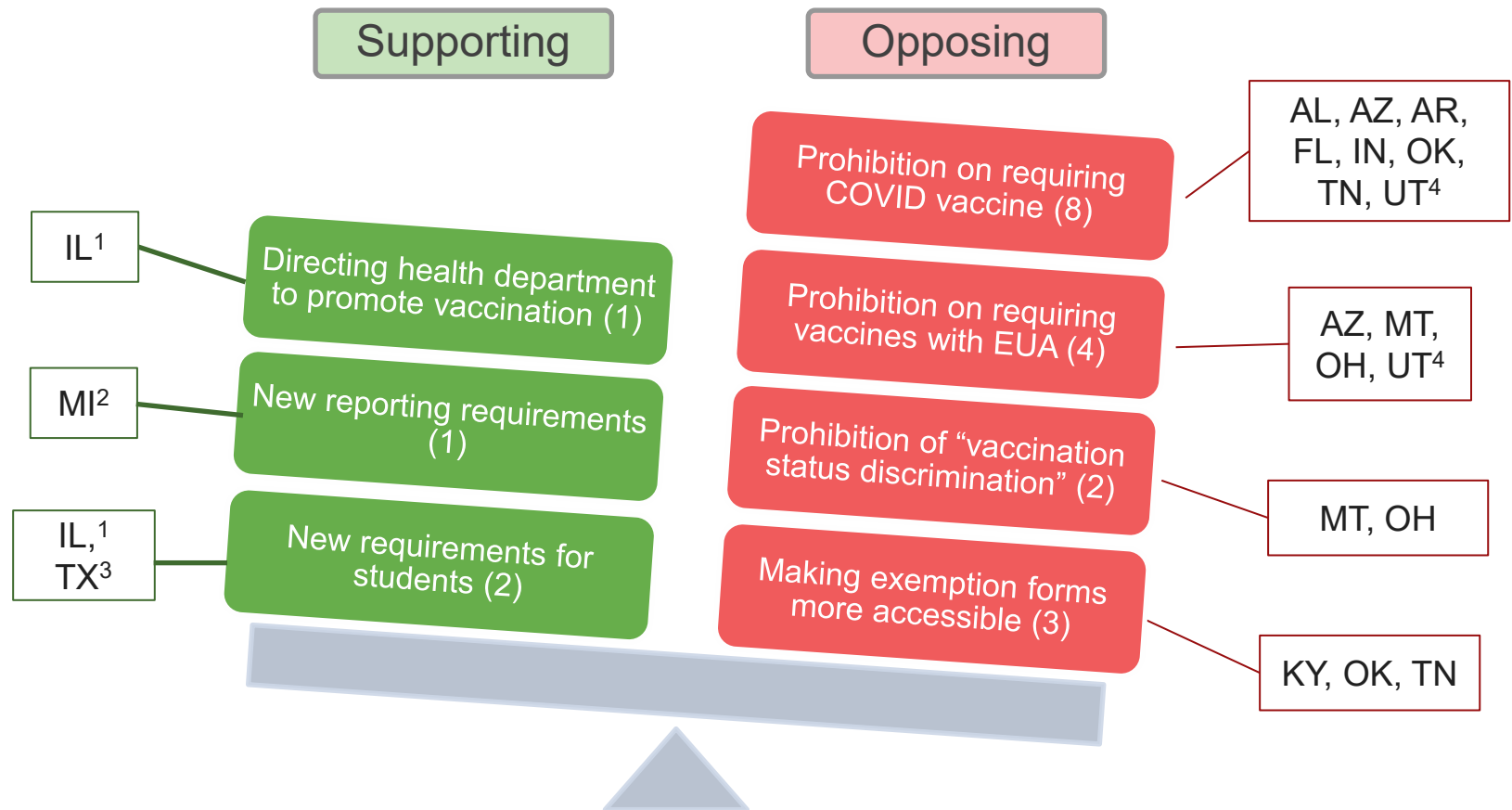


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- On August 11, 2021, California Governor Gavin Newsom announced that California teachers and school staff would be required to undergo either COVID-19 vaccination or weekly COVID-19 testing.

Source: Laura Meckler, *California Becomes First State to Require Coronavirus Vaccine or Testing for Teachers and School Staff*, WASH. POST (Aug. 11, 2021), <https://www.washingtonpost.com/education/2021/08/11/california-teacher-covid-vaccine-require/>.

Most Bills Enacted in 2021 Will Limit Childhood Vaccination Efforts, Especially for COVID



1. Requires the HiB vaccine for childcare enrollees but allows exemptions; directs IL DHS and DPH to try to increase preventable disease through vaccines. 2. Creates reporting requirements for K-12 schools. 3. Requires non-public school children participating in interscholastic activities to adhere to state vaccine requirements. 4. "Prohibits government entities (which, as defined in a separate statute, includes colleges and school districts) from requiring an "emergency COVID-19 vaccine."

Universities and Colleges: COVID-19 Policies

States Have Considered Many Types of Vaccine Bills in the Most Recent Legislative Session

These were the most common proposals:

Prohibition on any vaccine requirements (18 states)

Elimination of philosophical and/or religious exemptions (5 states)

Creation of reporting requirements (5 states)

Creation or expansion of parent education/information requirements (4 states)

Prohibition on requiring COVID vaccine until full FDA approval (5 states)

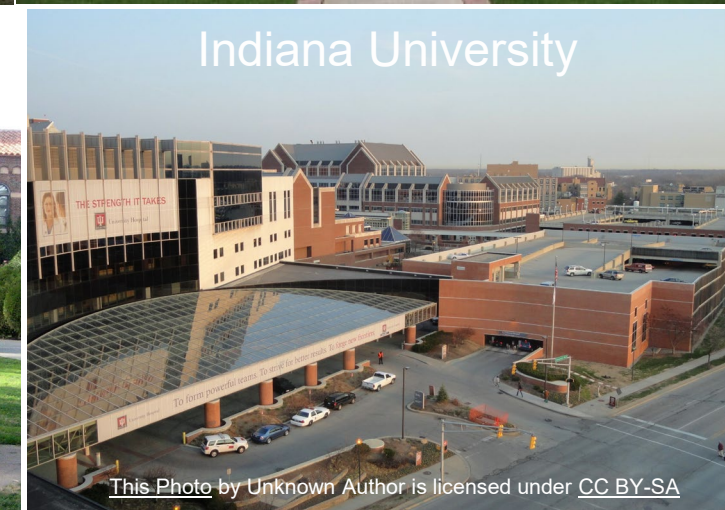
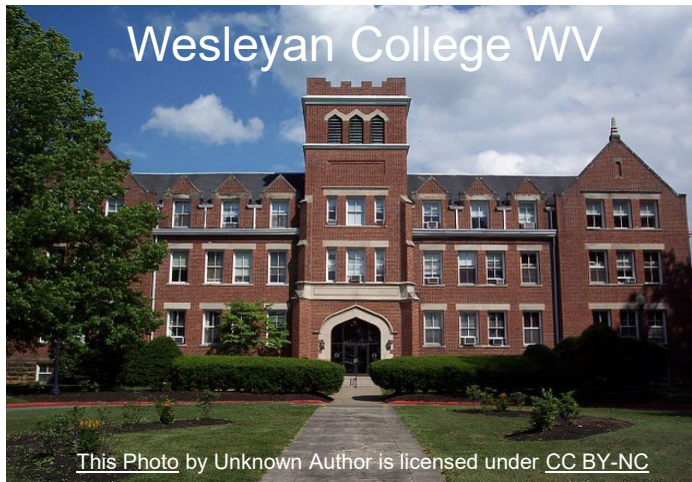
Allowing adolescents to consent to required vaccinations (4 states)

Expansion of exemptions in emergencies (4 states)

Prohibition on requiring COVID vaccine (15 states)

Creation or expansion of religious and/or philosophical exemptions (16 states)

Legal Innovations & Challenges



DOJ's Office of Legal Counsel

(Slip Opinion)

Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization

Section 564(e)(1)(A)(ii)(III) of the Food, Drug, and Cosmetic Act concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.

July 6, 2021

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

Section 564 of the Food, Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. § 360bbb-3,¹ authorizes the Food and Drug Administration (“FDA”) to issue an “emergency use authorization” (“EUA”) for a medical product, such as a vaccine, under certain emergency circumstances. This authorization permits the product to be introduced into interstate commerce and administered to individuals even when FDA has not approved the product for more general distribution pursuant to its standard review process. Section 564 directs FDA—“to the extent practicable” given the emergency circumstances and “as the [agency] finds necessary or appropriate to protect the public health”—to impose “[a]ppropriate” conditions on each EUA. FDCA § 564(e)(1)(A). Some of these conditions are designed to ensure that recipients of the product “are informed” of certain things, including “the option to accept or refuse administration of the product.” *Id.* § 564(e)(1)(A)(ii)(III).



THE UNITED STATES
DEPARTMENT of JUSTICE

45 Op. O.L.C. __ (July 6, 2021)

(“Pfizer Fact Sheet”). In recent months, many public and private entities have announced that they will require individuals to be vaccinated against COVID-19—for instance, in order to attend school or events in person, or to return to work or be hired into a new job. We will refer to such policies as “vaccination requirements,” though we note that these policies typically are conditions on employment, education, receipt of services, and the like rather than more direct legal requirements.²

In light of these developments, you have asked whether the “option to accept or refuse” condition in section 564 prohibits entities from imposing such vaccination requirements while the only available vaccines for COVID-19 remain subject to EUAs. We conclude, consistent with FDA’s interpretation, that it does not. This language in section 564 specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements.³

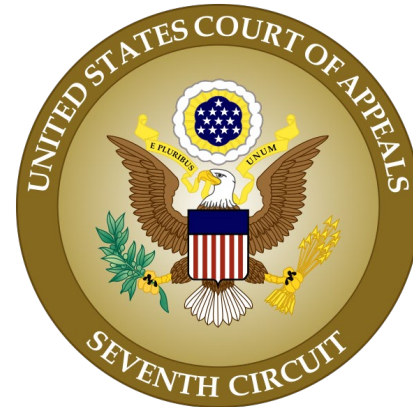
Source:

<https://www.justice.gov/olc/file/1415446/download>

***Klaassen et al. v. The Trustees of Indiana University*, No. 1:21-CV-00238-DRL-SLC (N.D. Ind. July 18, 2021); *Klaassen et al. v. The Trustees of Indiana University*, No. 21-2326 (7th Cir. Aug. 2, 2021); *Klaassen et al. v. The Trustees of Indiana University*, No. 21A15 (U.S. Aug. 12, 2021) (denying injunctive relief).**

District Court rejected students' 14th Amendment-based arguments against the University vaccination mandate.

Students argued the mandate infringed 14th Amendment right to bodily autonomy and 1st Amendment right to free exercise of religion; court applied rational basis review and upheld the mandate.



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The 7th Circuit on August 2nd refused to grant an injunction pending appeal; the court found **no fundamental right to refuse vaccination**, agreeing with the lower court.

Questions, Thoughts, Comments?

Thank you!

