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

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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

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.”

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

Source: https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html
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.”

K-12 Schools: COVID-19 Policies
Public Sector Mask Requirements

WA: Gov. Inslee EO & DOH require masking for all staff/students

IL: Gov. Pritzker EO requires masking in schools

VA: Gov. Northam requires masking in schools with few exceptions
Public Sector Mask Recommendations

CO: Gov. recommendation to mask; school districts decide

MO: State guidance leaves masking to local school boards

GA: No state mandate; school districts decide
Public Sector Mask Barriers

AZ: Recent law prohibits public school mask mandates

TX: Gov. Abbott EO prohibits school mask mandates

FL: Gov. DeSantis EO prohibits school district mask mandates
Requirements Face Challenges

Teacher sues to stop Phoenix school district’s mask mandate
Argument: Mandate contrary to state law

Lawsuit Seeks to Strike School Mask Mandate
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
Barriers Face Challenges

DeSantis order barring masks in schools faces first legal challenges
Argument: ADA, other disability protections & laws prevent order

Judge blocks Arkansas from enforcing ban on school mask mandate
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
Emerging Legal Issues

- Breadth of Executive Powers
- ADA, Other Disability Protections
- State Constitutional Provisions
- State Law Limitations
- Other Public Health Powers
Vaccination
Broad Public-Sector Interventions

- 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.

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

**Supporting**

- IL¹
  - Directing health department to promote vaccination (1)
- MI²
  - New reporting requirements (1)
- IL,¹ TX³
  - New requirements for students (2)

**Opposing**

- AL, AZ, AR, FL, IN, OK, TN, UT⁴
  - Prohibition on requiring COVID vaccine (8)
- AZ, MT, OH, UT⁴
  - Prohibition on requiring vaccines with EUA (4)
- MT, OH
  - Prohibition of "vaccination status discrimination" (2)
- KY, OK, TN
  - Making exemption forms more accessible (3)

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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)
- **Prohibition on requiring COVID vaccine** (15 states)
- **Prohibition on requiring COVID vaccine until full FDA approval** (5 states)
- **Creation or expansion of religious and/or philosophical exemptions** (16 states)
- **Creation of reporting requirements** (5 states)
- **Creation of reporting requirements** (5 states)
- **Expansion of exemptions in emergencies** (4 states)
- **Allowing adolescents to consent to required vaccinations** (4 states)
- **Creation or expansion of parent education/information requirements** (4 states)
- **Elimination of philosophical and/or religious exemptions** (5 states)
Legal Innovations & Challenges
DOJ’s Office of Legal Counsel

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).

Source: https://www.justice.gov/olc/file/1415446/download
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.

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!

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