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## Employment Law Quarterly Update Newsletter

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John M. Semmens, Editor

### **THE BIDEN ADMINISTRATION'S NEW ORDERS AND STANDARDS REGARDING COVID-19 WORKPLACE PROTOCOLS**

**By Bruce F. Fain and Matthew A. Baldassin**

As of today, more than [45% of Americans](#) remain unvaccinated against COVID-19. In response to that relatively low vaccination rate, President Joe Biden has directed additional federal action to address the pandemic. This article is intended to update employers on the Biden Administration's recent announcement of legal changes intended to combat COVID-19. It generally outlines recent developments in OSHA standards, and addresses how those changes in federal law may affect employers. Because this area of employment law is unprecedented, and changing so rapidly, employers should continue to closely monitor developments in state and federal law regarding COVID-19.

#### **The June 2021 Healthcare Emergency Temporary Standard**

In January 2021, President Biden issued an [Executive Order](#) increasing protections for healthcare and other essential workers from the effects of COVID-19. The President specifically noted the impact the virus was having on healthcare workers. His Executive Order directed the Occupational Safety and Health Administration ("OSHA") to: (i) identify changes necessary to protect employees; (ii) launch a program to enforce standards to protect workers from COVID-specific risks and potential retaliation; and (iii) consider whether a new Emergency Temporary Standard ("ETS") was necessary to accomplish those objectives.

OSHA subsequently issued an [ETS](#) on June 21, 2021 (the "June ETS"), as well as a [Fact Sheet](#) and [FAQ](#) regarding the June ETS. OSHA also issued [general guidance](#) on mitigating COVID impacts in non-healthcare workplaces.

Because healthcare workers regularly are exposed to COVID-19, the June ETS specifically addressed employers who provide “healthcare services” and others that are considered non-healthcare providers. Employers who provide “healthcare services” are subject to the June ETS. According to the ETS, the term “healthcare services” includes services provided in most healthcare settings, including hospitals, nursing homes, assisted living facilities, ambulatory care facilities, etc. The June ETS also addressed “healthcare support services,” or other work essential to the provision of healthcare services. That included positions involving patient intake, food services, and maintenance and housekeeping services. It included exceptions for more traditional care settings where employees are fully vaccinated and screened and where non-employees with suspected or confirmed COVID cases are precluded from entry.

One fundamental requirement of the June ETS was that healthcare employers with 10 or more employees must take various proactive measures, including conducting a “workplace-specific hazard assessment to identify potential workplace hazards related to COVID-19” and “develop[ing] and implement[ing] a COVID-19 Plan for each workplace.” That Plan must include, among other things, a workplace-specific hazard assessment, screening and removal of employees who tested positive or had a suspected exposure, COVID-specific safety training, provision of personal protective equipment, and continuous monitoring of the Plan’s effectiveness. Healthcare employers are also required to give employees reasonable time and paid leave to obtain a vaccination and recover from any side effects related to exposure.

### **President Biden’s September 9 Announcements**

On September 9, 2021, President Biden gave a [speech](#) acknowledging the rise in COVID-19 cases due primarily to the Delta variant. President Biden also outlined his “[Path Out Of The Pandemic](#),” which presents a six-prong approach addressing: economic recovery; additional protections for the vaccinated; school operation; increased testing and masking requirements; and improving care for those infected with COVID-19.

A key emphasis of the President’s strategy, and one receiving a lot of attention from employers, is a proposed OSHA vaccine ETS (the “Vaccine ETS”) for certain Americans. Although President’s Biden’s Vaccine ETS has not yet been published, it likely will apply only to employers with more than 100 employees. To comply with the Vaccine ETS, these employers must: (i) “ensure their workforce is fully vaccinated”; or (ii) “require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.” OSHA reportedly intends to fine employers who violate the Vaccine ETS up to \$14,000 per violation.

The Biden Administration estimates the Vaccine ETS will impact approximately 80 million workers in the United States. The Vaccine ETS likely also will require employers to pay for their employees’ COVID-19 vaccination, and to provide paid time off for employees to obtain and recover from COVID-19 vaccinations. It is unclear whether employers also will be required to pay for unvaccinated employees’ COVID-19 tests, or to provide paid time off for unvaccinated employees to take their weekly COVID-19 tests. Employers should closely monitor for any developments regarding the Vaccine ETS, including OSHA’s publication of the final Vaccine ETS.

Six months lapsed between the President’s January 2021 Executive Order and the June ETS referenced above. Though the proposed Vaccine ETS likely will be published and implemented more quickly, OSHA will still be conscientious in drafting it. The ETS process does not involve normal notice and comment procedures (a process which can and does typically take years), but it is still subject to challenge in the Federal Courts of Appeals. In order to withstand such challenges, OSHA will need to ensure it develops a sufficient record to support that the ETS addresses a “grave danger from exposure” and that the ETS is “necessary to protect employees . . . .” OSHA has not confronted a major challenge to an ETS since 1983 (regarding asbestos) and is certain to be deliberate in developing this one. Already, attorneys general from 24 states have announced they will [challenge](#) the legality of the Vaccine ETS.

## Executive Order Impacting Federal Employees

On September 9, 2021, President Biden also announced he would sign an Executive Order [mandating](#) the vaccination of all executive branch federal employees and requiring federal agencies to develop vaccination programs. The President also has signed an [Executive Order](#) requiring vaccination protocols for contractors and subcontractors hired by the United States government. The protocols are to be released no later than September 24, 2021 and will likely require mandatory vaccination. These requirements and protocols are expected to be made a part of federal contracts beginning on October 15, 2021. Failure to comply will most likely result in termination of federal contracts and possible debarment, so covered entities should examine these [requirements](#) closely.

## Vaccine ETS' Potential Conflict with Montana's House Bill 702

One hot-button issue related to mandatory vaccination in Montana is the potential conflict between the Vaccine ETS and the recently-enacted HB 702. Montana law prohibits mandatory vaccination and discrimination based on "vaccination status," and courts may find it conflicts with the impending federal mandates. Early indications foretell a pointed discussion regarding federal preemption of the statute, assuming the Vaccine ETS withstands challenges predicated upon the OSH Act. The United States Supreme Court has previously approved a broad preemptive effect of the OSH Act and standards, so a compelling argument can be made that HB 702 is preempted. Even so, the final language and support for the Vaccine ETS will be key in making such a determination. Montana employers should closely follow these developments.

### **For Employers with Additional Questions**

Compliance with federal law is a fact-specific inquiry, and many of the Biden Administration's proposals have not been published as formal administrative rules. Accordingly, employers should seek up-to-date legal advice from counsel concerning their unique circumstances.

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with federal laws related to COVID-19. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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## Montana Department of Labor & Industry Issues Guidance for Employers on HB 702

**By: Mark R. Feddes**

Following Montana's enactment of [House Bill 702](#), a law prohibiting discrimination based on an individual's vaccination status or possession of an immunity passport, the Montana Department of Labor & Industry ("DOLI") recently issued [guidance](#) to assist employers, public accommodations, governmental entities, and individuals on complying with the new law. DOLI also has published additional guidance on HB 702 specific to [health care providers](#) and drafted by the Montana Department of Public Health and Human Services ("DPHHS"). Montana employers and businesses should take note of DOLI guidance on HB 702. Courts typically give deference to agency interpretations of statutes, although they are not always required to do so.

### **I. Frequently Asked Questions.**

The following analysis is based on DOLI guidance on a number of frequently asked questions regarding HB 702:

- **Where does HB 702 apply?** HB 702 generally prohibits discrimination in Montana based on vaccination status or possession of an immunity passport by a person, governmental entity,

employer, or public accommodation.

- **What is a “public accommodation”?** “Public accommodation” has a broad definition under Montana law. A “public accommodation” means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. See Mont. Code Ann. § 49-2-101(20)(a). Without listing the numerous examples, public accommodations include all public amusement and business establishments. In contrast, “public accommodation” does not include an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. Any lodge of a recognized national fraternal organization is considered by its nature distinctly private.
- **Does HB 702 only apply to vaccination status or an immunity passport regarding COVID-19 vaccines?** No. HB 702 applies to all vaccines and is not limited to COVID-19 vaccines.
- **Can a person, governmental entity, public accommodation, or employer ask about your vaccination status or ask you to produce an immunity passport?** Yes. Nothing in the language of HB 702 prohibits a person, governmental entity, public accommodation, or employer from asking about an individual’s vaccination status or whether they have an immunity passport. However, if asked, a person is not required to respond and may not be discriminated against for failing to respond.
- **Can a person, governmental entity, public accommodation, or employer offer an incentive for persons to get vaccinated?** Yes. Nothing in HB 702 prohibits a person, governmental entity, public accommodation, or employer from offering incentives to persons to voluntarily become vaccinated as long as the nature of the incentive is not discriminatory (not so substantial as to be coercive). For example, an incentive in the form of a small gift, such as a water bottle or gift card worth less than \$25, generally is not considered discriminatory.
- **Can a person, governmental entity, public accommodation, or employer require everyone on their premises or during the course of employment to wear a mask?** Yes. Nothing in HB 702 prohibits a person, governmental entity, public accommodation, or employer from requiring everyone on their premises or during the course of employment to wear masks, regardless of vaccination status, as long as there is a provision for accommodations for persons based on sincerely held religious beliefs or disability.
- **Can a person, governmental entity, public accommodation, or employer ask or suggest you wear a mask if either you choose not to share your vaccination status or if you share that you are not vaccinated?** Yes. Nothing in HB 702 prohibits a person, governmental entity, or public accommodation from asking or suggesting you wear a mask.
- **Can a person, governmental entity, public accommodation, or employer require you to wear a mask on their premises or during the course of employment if you either choose not to share your vaccination status or if you share that you are not vaccinated?** It depends. The law prohibits a person, governmental entity, public accommodation, or employer from requiring you to wear a mask on their premises or during the course of employment if you choose not to share your vaccination status or share that you are not vaccinated; however, the law includes exceptions for health care facilities, licensed nursing homes, long-term care facilities, and assisted living facilities. These facilities may require you to wear a mask in certain situations. See below for more information about health care facilities, licensed nursing homes, long-term care facilities, and assisted living facilities.
- **What is considered a “health care facility” under this law?** This law applies a broad definition of health care facility. A “health care facility” or “facility” means all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual. See Mont. Code Ann. § 50-5-101(26). The term includes chemical dependency facilities, critical access hospitals, eating

disorder centers, end-stage renal dialysis facilities, home health agencies, home infusion therapy agencies, hospices, hospitals, infirmaries, long-term care facilities, intermediate care facilities for the developmentally disabled, medical assistance facilities, mental health centers, outpatient centers for primary care, outpatient centers for surgical services, rehabilitation facilities, residential care facilities, and residential treatment facilities. *Id.* The term does not include offices of private physicians, dentists, or other physical or mental health care workers regulated under Title 37, including licensed addiction counselors. *Id.*

- **Can a health care facility require all employees, patients, visitors, or other persons on their premises to wear a mask?** Nothing in HB 702 prohibits a health care facility from requiring everyone to wear masks, regardless of vaccination status, including employees, patients, visitors, and other persons on their premises, as long as there is a provision for accommodations for persons based on sincerely held religious beliefs or disability.
- **I work at a health care facility. Can my employer require me to wear a mask?** It depends. HB 702 allows a health care facility to ask employees about vaccination status. If an employee chooses not to provide their vaccination status, the health care facility may assume the employee is not vaccinated. If a health care facility determines or assumes that an employee is not vaccinated, then the law permits the health care facility to implement “reasonable accommodation measures for employees, patients, visitors, and other persons who are not vaccinated or not immune to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases.” The reasonable accommodation measures imposed by a health care facility to protect safety and health may include a face mask requirement for all employees, patients, visitors, and other persons who are not vaccinated or non-immune or who are assumed to be not vaccinated or non-immune.
- **What are the consequences for violating HB 702?** HB 702 states that violations of these provisions are “an unlawful discriminatory practice,” and the legislation will be codified in the Montana Human Rights Act (“MHRA”). The legislation contains no specific or unique remedy provision for violations of the MHRA, so an alleged violation of this legislation will follow the same path as any complaint of discrimination in Montana. Remedies upon a finding of discrimination include equitable affirmative relief, any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against, and reporting requirements on the manner of compliance.

## II. Guidance Specific to Medical Care Providers.

DOLI’s website on HB 702 includes guidance specific to medical care providers drafted by DPHHS. HB 702 exempts licensed nursing homes, long-term care facilities, and assisted living facilities from the law’s nondiscrimination provisions when compliance with the law would “result in a violation of regulations or guidance issued by the centers for medicare and medicaid services or the centers for disease control and prevention.” The DPHHS guidance addresses the scope of what constitutes “regulations or guidance” issued by the CMS and CDC.

Current CMS guidance related to COVID-19 vaccination is found within the CMS Quality, Safety & Oversight Group memorandum issued on May 11, 2021 to state survey agency directors (“[QSO-21-19-NH](#)”) and the interim final rules that are the subject of the memorandum entitled Medicare and Medicaid Programs; COVID-19 Vaccine Requirements for Long-Term Care (“LTC”) Facilities and Intermediate Care Facilities for Individuals With Intellectual Disabilities (“ICFs-IID”) Residents, Clients, and Staff, 86 FR 26306 (“[Interim Final Rules](#)”).

Under the Interim Final Rules, every LTC and ICF-IID must have a vaccination program that meets the educational and information needs of each resident, resident representative, client, parent (if the client is a minor) or legal guardian, and staff member. The Interim Final Rules also require LTC and ICF-IID facilities to offer residents and staff vaccinations against COVID-19 when vaccine supplies are available. Facilities must also maintain records as to the provision of educational information,



and appropriate medical records for each resident that are complete and accurately documented, including any refusal of a vaccine and the stated reason for the refusal.

Notably, the Interim Final Rules currently in effect do not require these facilities to ensure that residents and staff members are vaccinated. However, on August 19, 2021, President Joe Biden announced his administration will require nursing home staff to be vaccinated against COVID-19 as a condition to receiving federal Medicare and Medicaid funding. The new [mandate](#), in the form of a forthcoming regulation to be issued by CMS, could take effect as soon as next month.

### For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with HB 702. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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