

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

CATHERINE DARLING, *et al*,

Case No. 3:21-cv-1787

Plaintiffs,

v.

SACRED HEART HEALTH SYSTEM,
INC., a Florida nonprofit corporation, ST.
VINCENT'S HEALTH SYSTEM, INC., a
Florida nonprofit corporation, ST.
VINCENT'S MEDICAL CENTER-CLAY
COUNTY, INC., a Florida nonprofit
corporation, ST. VINCENT'S
AMBULATORY CARE, INC., a Florida
nonprofit corporation, ST. VINCENT'S
MEDICAL CENTER, INC., a Florida
nonprofit corporation, ST. LUKE'S-ST.
VINCENT'S HEALTHCARE, INC., a
Florida nonprofit corporation, and
ASCENSION HEALTH ALLIANCE, a
Missouri non-profit corporation,

Defendants.

/

**PLAINTIFFS' REPLY IN SUPPORT OF
EMERGENCY MOTION FOR A TEMPORARY
RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**



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Other Authorities

Ascension, “For safety of communities, Ascension to require COVID-19 vaccination for associates,” *available at*:
<https://www.ascension.org/News/News-Articles/2021/07/27/15/59/Ascension-to-Require-COVID-19-Vaccination>.7

CNN Health, “UK becomes first to authorize Merck and Ridgeback Biotherapeutics' antiviral molnupiravir to treat mild-to-moderate Covid-19,” *available at*: <https://www.cnn.com/2021/11/04/health/uk-authorizes-merck-antiviral-molnupiravir-covid/index.html>.....39

Florida Dep’t of Health, “COVID-19 Weekly Situation Report: State Overview”(Published Oct. 29, 2021), *available at*:
http://www11.doh.state.fl.us/comm/_partners/covid19_report_archive/covid19-data/covid19_data_latest.pdf.....23

Medical News Today, “COVID-19: Antidepressant [Fluvamoxamine] cuts risk of hospitalization, death by 32%,” *available at*:
<https://www.medicalnewstoday.com/articles/covid-19-antidepressant-cuts-risk-of-hospitalization-death-by-32#High-risk-of-severe-disease>; and Capitol Beat, “Florida getting results with monoclonal antibody treatments for COVID-19,” *available at*: <http://capitol-beat.org/2021/09/florida-getting-results-with-monoclonal-antibody-treatments-for-covid-19/>39

The White House, “Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies” (Nov. 4, 2021), *available at*:
<https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies>.32

The White House, “Path Out of the Pandemic,” *available at*:
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The White House, “WHITE HOUSE REPORT: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy,” *available at*: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Vaccination-Requirements-Report.pdf>.....29



MEMORANDUM OF LAW

Introduction

For the first time in history, through a rapid succession of policies, prescriptions, and pressure, the federal government has manufactured a universal mandatory precondition for employment of persons in private healthcare industries: whether or not a person has received a Covid-19 injection. The federal government itself could not constitutionally condition employment on whether a person agrees to be injected with a drug. But can the federal government coerce private actors like the Defendants into doing what it plainly may not? The answer must be, “no.”

In its Memorandum in Opposition [Doc. 14] (the “Opposition”), Ascension says that it “implemented its vaccination policy to protect its employees and patients,” and Stephanie Ryan avers in her Declaration, [Doc. 14-1], that “the policy is intended to safeguard and protect the patients, associates, and visitors of the Hospitals[.]” But that was not what Ascension said on its website when it originally announced the policy, and the distinction is critical:¹

**For safety of communities, Ascension to
require COVID-19 vaccination for
associates**

July 27, 2021

SHARE WITH



¹ Ascension, “For safety of communities, Ascension to require COVID-19 vaccination for associates,” *available at*: <https://www.ascension.org/News/News-Articles/2021/07/27/15/59/Ascension-to-Require-COVID-19-Vaccination>.



In July, when it announced the mandatory vaccination of its associates, Ascension claimed it was primarily “for safety of communities,” not individuals. The Defendants are now trying to revise history, to obscure the policy’s public-facing federal objective. The government started pressuring private firms like the Defendants to implement its vaccine mandates as early as January 2021.

In *Does 1-3 v. Mills*, 595 U.S. --- (2021) (Gorsuch, J., dissenting), Justice Gorsuch rejected subsuming individual interests to the needs of the collective:

At some great height, after all, almost any state action might be said to touch on public health and safety and measuring a highly particularized and individual interest in the exercise of a civil right directly against these rarified values inevitably makes the individual interest appear the less significant. **This Court's precedents do not support such a lopsided inquiry.**

Id. (internal cites, quotes, and ellipses omitted, emphasis added). *See also Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992) (Florida’s constitution seeks “to achieve the primary goal of individual freedom and autonomy”).

Never in history has the federal government, through a variety of executive tactics, regulations, and orders, attempted to dictate either particularized medical treatments or conditions for when people can be employed. The fact that the government has wangled and coerced the Defendants into agreeing with its policy cannot protect the policy from constitutional scrutiny. Otherwise, the Constitution is meaningless, a piece of paper that can simply be evaded by indirect federal action.



Ironically, nearly every bit of evidence, law, and argument offered by the Defendants in their Opposition supports the painfully obvious conclusion that they are state actors and must be subject to constitutional scrutiny. Beyond that, the federal government itself has broadly advertised its designs to coerce private actors like the Defendants into implementing a uniform, national, employment-based, vaccine mandate.

When is a Hospital a State Actor?

The Defendants have offered a basket of cases which they say show that other courts have already considered the Plaintiffs' state actor arguments and rejected them. This premise — incorrect in any event — is undermined by state actor law itself, which provides that each case must be evaluated on its own merits.

The state actor question requires an intensive “facts and circumstances” analysis unique to each case. “To fashion and apply a precise formula for recognition of state responsibility ... is an impossible task which This Court has never attempted. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (cleaned up, cites omitted); *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 922 (11th Cir. 1982) (“the Supreme Court has refused to fashion a precise formula for ascertaining state action”).



It is not always easy to tell when the state is acting through a private entity. “The question whether certain conduct is attributable to a private person or is tantamount to state action is frequently difficult to ascertain, especially where the hand of the government is clear, but its path toward contact with the individual clouded by the action of a private individual.” *Jeffries*, 678 F.2d at 922 (quotes omitted).

Principles of equity — **fairness** — tie the various state actor decisions together. *See, e.g., id.* at 923 (“The relevant inquiry is whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be **fairly** treated as that of the State itself,” emphasis added); *Carlin Commc’n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1358 (11th Cir. 1986) (same).

The Supreme Court frequently references the central test of whether it would be **fair** to attribute state action to a private party:

Our cases have identified a host of facts that can bear on the **fairness** of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of “coercive power,” when the State provides “significant encouragement, either overt or covert,” [] when a private actor operates as a “willful participant in joint activity with the State or its agents, [or] when it has been delegated a public function by the State[.]

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n, 531 U.S. 288, 296 (2001) (cleaned up, internal cites omitted, emphasis added); *Rendell-Baker v. Kohn*,



457 U.S. 830, 838 (1982) (“The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights **fairly** attributable to the State?”, quotes omitted, emphasis added); *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992) (same).

There is no bright-line rule for *how* to find that it would be **fair** to attribute state action to a private party. *See, e.g., Frazier v. Bd. of Trustees of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1283–84 (5th Cir. 1985), *amended*, 777 F.2d 329 (5th Cir. 1985) (describing the state actor analysis as “protean,” a “paragon of uncertainty,” an “impossible task,” and noting “no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catchphrase”). Conclusions reached by courts in other hospital cases on other facts are irrelevant to the instant case. *Id.* (“Imbued with an identity all its own, every state action inquiry partakes only slightly of the factual stuff of other cases”).

Whether state action exists depends on the facts of each individual case. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (“the necessarily fact-bound inquiry that confronts the Court”); *Burton*, 365 U.S. at 722 (“Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”).



Factors that courts often scrutinize in state actor cases include facilitation, encouragement, authorization, subsidization, oversight, benefit to the state, and limitations to prior freedom of decision-making. “The private citizen's conduct may be attributable to the state where the government affirmatively facilitates, encourages, or authorizes the objectionable practice.” *Jeffries*, 678 F.2d at 923-24 (“This contractual relationship benefits the state as well,” emphasis added).

“When a specific governmental function is carried out by heavily subsidized private firms whose freedom of decision-making has ... been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches.” *Id.* at 924–25 (cleaned up, cite omitted, emphasis added).

The federal government’s policies and overt and covert threats have substantially circumscribed the Defendants’ previous freedom and independent judgment over hiring employees. For the first time in history, the federal government has decreed a litmus test for the private employment of persons in healthcare industries: whether the person has received a Covid-19 injection.

A private actor is a state actor whenever the state delegates a traditional government function or where the private actor is a **willful participant** in joint activity with the state:



[A] private party may be characterized as a state actor ... where a private actor is a **willful participant** in joint activity with the State or its agents[.]

Wickersham v. City of Columbia, 481 F.3d 591, 597 (8th Cir. 2007) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 (1970)) (quotes omitted, emphasis added); *West v. Atkins*, 487 U.S. 42, 56–57 (1988) (private physician contracted to provide healthcare services to prison inmates was state actor.)

Critically, the policy of requiring hospitals to help vaccinate employees does not advance the purposes of CMS. Employees are not patients. No reimbursements are tied to employee vaccination. The CMS reimbursement system is just a disconnected tool to coerce the Defendants into furthering its policy objectives. CMS is a public insurer. It has never been in the business of “protecting patients” from employees.

By dictating which *kinds* of persons the hospitals may employ, the federal government is involving itself in the management of the hospitals, at least to the extent that it is creating employment policies and interfering with the decision of who can be employed — vaccinated or unvaccinated.

Entanglement with Employment Decisions is State Action

The Supreme Court has suggested that, where the government regulates an employer’s decisions over which employees to discharge, the policy may fairly be



attributed to state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982) (“[h]ere the decisions to discharge the petitioners were not compelled or even influenced by any state regulation ... the various regulators showed relatively little interest in the school's personnel matters,” emphasis added); *Nail v. Cmty. Action Agency of Calhoun County*, 805 F.2d 1500, 1501–02 (11th Cir. 1986) (“However, none of the specific personnel decisions are controlled by state or federal regulations,” emphasis added).

Here, intensely specific personnel decisions are determined with furious interest by federal regulators: no unvaccinated persons may be employed by the Defendants. Specifically, the federal government conditions employment on vaccination for Covid-19.

The Vaccine Mandate is a Traditional Public Function

The Defendants argue repeatedly that their vaccination policy is not an exclusively government function because they have historically required employees to take influenza vaccines. The Defendants misstate Plaintiffs’ argument. The Covid-19 vaccine policy is different, because it is part and parcel of a broad public-health initiative coordinated by the federal government. Defendants’ policy aligns with the federal government’s policy to achieve “community health,” as explicitly admitted on Defendants’ website.



The health of the community is a **public health** function. And “fire prevention, police protection, sanitation, **public health**, and parks and recreation are **traditional functions or activities of States** and their political subdivisions.” *Ackinclose v. Palm Beach Cty., Fla.*, 845 F.2d 931, 937 (11th Cir. 1988) (emphasis added). But even if the function were not a public health function, and only a traditionally private function, the Court could still find that the Defendants are state actors under the public function test because of the Vaccine Mandate’s **context**:

[A]lthough the provision of medical services is a function traditionally performed by private individuals, the **context** in which respondent performs these services for the State (quite apart from the source of remuneration) distinguishes the relationship ... from the ordinary [employer-employee] relationship ... If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity.

West, 487 U.S. at 42, n. 15 (internal quotes, cites omitted, emphasis added) (“we conclude that respondent’s delivery of medical treatment to West was state action fairly attributable to the State”); *Fabrikant v. French*, 691 F.3d 193, 208 (2d Cir. 2012) (“The spaying and neutering of the dogs ... constituted state action because they were part of the state function of animal control”).

The Defendants have attempted to wrap their historical influenza policy around their unconstitutional Vaccine Mandate to smuggle it into constitutionally approved territory. That is why the Plaintiffs have asked the Court to also enjoin the



influenza policy. Previously, the Defendants have liberally granted exemptions to the influenza policy. But in 2021, they have taken a radically different approach, especially since announcing the Vaccine Mandate.

This is not a minor side issue. The Defendants’ influenza policy has never been tested for its own constitutionality, and might very well be unlawful absent the liberal policy of exemptions historically provided to employees. The Defendants’ reliance on their historic influenza policy — which is not the same as the 2021 influenza policy — is misplaced.

***Jacobson v. Massachusetts* Supports the Plaintiffs**

The Defendants repeatedly argue that the 1905 Supreme Court case of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) authorizes its “vaccinate or terminate” policy under the aegis of an “emergent” twenty-month pandemic. The Defendants overlook the fact that the State of Florida ended its state of emergency several months ago. But it doesn’t matter anyway — *Jacobson* supports the Plaintiffs’ case, not the Defendants’ case. *Jacobson* held that quarantines and mandatory vaccinations are governed by *state* law and state police power — and that rule cannot be preempted by statute, but only by the federal Constitution:

[T]his court ... has distinctly recognized the authority **of a state** to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its



territory and which do not by their necessary operation affect the people of other states.

It is equally true that **the state may invest** local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished **is within the discretion of the state**, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.

Jacobson, 197 U.S. at 25 (emphasis added). In *Jacobson*, the Supreme Court looked to the Massachusetts constitution for authority supporting the minor fine in that case. Massachusetts had a much different constitution than Florida does, one that supports the Defendants’ stated “community” goal:

In the Constitution of Massachusetts adopted in 1780 it was laid down as **a fundamental principle** of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, **that all shall be governed by certain laws for ‘the common good,’** and that government is instituted ‘for the common good, for the protection, safety, prosperity, and happiness of the people, and **not for the profit, honor, or private interests of any one man**, family, or class of men.’ The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts.

Id. at 27 (emphasis added).

Jacobson teaches that the Court must look to the Florida constitution for the authority to “vaccinate or terminate.” But Florida’s constitution is completely different than Massachusetts’. Florida’s constitution seeks “to achieve the primary



goal of individual freedom and autonomy.” *Traylor*, 596 So. 2d at 963. The Right to Privacy, Fla. Const. Art. I § 23, preserves for Floridians what was surrendered by citizens of Massachusetts: an individual liberty interest.

Furthermore, since Defendants acknowledge that *Jacobson* is controlling law, all the federal cases they cited from foreign jurisdictions applying different state laws are irrelevant to the analysis in this case.

Defendants’ Injunction Cases are Not On Point or Useful

The Opposition cites a string of recent cases involving Covid vaccines and injunctions, arguing that the cases negate the Plaintiffs’ claims in this case. The Defendants’ cases are not on point or are impertinent. But even more importantly they undercut the Defendants’ claims. The crop of cases cited by the Defendants blooming around the country showcase the hand of the federal government. Defendants claim they are working in a vacuum. Their many cited cases prove this is false.

Several of the Defendants’ cases were not even decided on the merits. The Defendants cite *Buckley v. The N.Y. and Presbyterian Hosp.*, 2021 U.S. Dist. LEXIS 181135 (S.D.N.Y. Sept. 21, 2021), summarizing the case as “denying temporary restraining order for hospital vaccination mandate.” This is misleading. The one-page order dismissing the case describes a pro-se litigant who failed to pay the filing fee. The case is not helpful here. Also not decided on the merits was *Wade v.*



Univ. of Conn. Bd. of Trustees, 2021 WL 3616035 (D. Conn. Aug. 16, 2021), where the court found the plaintiffs' claims moot because they had either received an exemption to the policy or had failed to request one. *Id.* at *9.

Next, the Opposition cites *George v. Kankakee Cmty. Coll.*, 2014 WL 6434152, at *4 (C.D. Ill. Nov. 17, 2014), which is easily distinguished because the plaintiff did not claim a violation of constitutional bodily autonomy, nor did the court apply Florida law.² Defendants' next case, *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, 2021 WL 4504245 (S.D. Ohio Sept. 30, 2021), was also not decided on the merits. There, the court noted that "Plaintiffs have not established that any of their claims are likely to succeed. They haven't even tried. In their motion, Plaintiffs correctly cite the legal standard for injunctive relief, but they never connect the standard to any specific factual allegations from their complaint." *Id.* at *3.

In *Beckerich v. St. Elizabeth Med. Ctr.*, 2021 WL 4398027, at *3 (E.D. Ky. Sept. 24, 2021), the plaintiff did raise the state actor issue, but the court noted that they attempted to prove the defendant was a state actor only through "Plaintiffs' counsel's statements during oral argument that a hospital can become a 'quasi-state actor' by how much government funding it receives[.]" *Id.* at *3. The case primarily revolved around a claim brought under the Americans with Disabilities Act (ADA),

² The plaintiff did assert violation of his right to privacy, but it appears to have been related to private medical information and not bodily autonomy.



which the court noted was described by plaintiffs as “their strongest claim.” *Id.* This case does not involve any ADA claims.

Slightly more interesting is *Bridges v. Houston Methodist Hosp.*, 2021 WL 2399994 (S.D. Tex. June 12, 2021), which Defendants repeatedly cite. But, unlike the instant case, *Houston Methodist* involved a plaintiff who challenged the vaccines as “experimental and dangerous,” argued that she “refused to be a human guinea pig” and that the vaccine mandate “violated the Nuremberg Code.” *Id.* at *1. The Defendants cite the case for its holding that the plaintiffs had an adequate remedy at law in the form of money damages. This conclusion is wrong as a matter of law in Florida and the Eleventh Circuit, as further discussed below.

Getting closer to the target was *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021). This case did involve a constitutional challenge to a government entity’s vaccine mandate, which broadly allowed exemptions. Denying injunctive relief, the court cited *Jacobson v. Mass.*, 197 U.S. 11 (1905), for a holding that since “a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2.” As discussed *infra*, *Jacobson* requires application of state law to a vaccine mandate. Although the court did not reference any state law, presumably Indiana law, like Massachusetts law, authorized the policy in that case. The defendants also



cited *Klaassen* for the proposition that the threat of termination of an educational opportunity is not coercive. But that is not the law in the Eleventh Circuit.³

Unlike here, in *Harris v. Univ. of Mass.*, 2021 WL 3848012 (D. Mass. Aug. 27, 2021), the plaintiffs “fail[ed] to identify a fundamental right protected by the Due Process Clause, and because of that, they fail[ed] to show that the Vaccine Policy is not rationally related to a legitimate government end.” Because they did not dispute that the vaccines prevented infection, plaintiffs were unable to even challenge the policy on rational basis review. *Id.* at *6. Finally, the court relied on *Jacobson* — in Massachusetts — to establish that the policy was constitutionally sound. It did not analyze the claims under Florida law, or consider the undisputed fact that the vaccines do not prevent transmission of the virus.

In *Valdez v. Grisham*, 2021 WL 4145746 (D.N.M. Sept. 13, 2021), plaintiffs’ constitutional claims relied on a “bill of attainder” theory that contractual rights were violated — unlike here. The court applied *Jacobson* to find a lack of any constitutional issue, presumably applying New Mexico law (albeit uncited) — not Florida law.

Finally, in *America’s Frontline Doctors v. Wilcox*, 2021 WL 4546923 (C.D. Cal. July 30, 2021), the plaintiffs challenged the university president’s policy as it

³ Plaintiffs cited *Am. Fed’n of State, County & Mun. Employees Council 79 v. Rick Scott*, 717 F.3d 851, 874 (11th Cir. 2013) for this proposition in their Memorandum of Law [Doc. 4].



applied to persons with natural immunities to Covid-19. There, citing *Jacobson*, and presumably applying California law, the court noted that plaintiffs made “no showing that the interest at issue here (bodily autonomy or informed consent) is fundamental under the Constitution so as to require greater scrutiny. Thus, the Court applies rational basis.” By contrast, the Plaintiffs’ claims in this case *have* identified fundamental rights founded in Florida law as well as under federal law.

Notably, none of the Defendants’ cases are in the Eleventh Circuit.

While the Opposition does not completely foreclose that any other courts have approved injunctive relief over Covid-19 vaccine mandates,⁴ it neglected to cite a recent Florida circuit court decision that is expressly on point. In *Friend, et al v. City of Gainesville*, the court correctly applied *Jacobson* to the municipality’s vaccine mandate, reviewed the policy under strict scrutiny, and granted a preliminary injunction. No. 1:2021-CA-2412 (Ala. Cty. Cir. Ct. September 22, 2021). A copy of the Court’s Order Granting Plaintiffs’ Petition for Temporary Injunction is attached hereto as **Exhibit A**.

In summary, all that the Defendants’ cases establish is that a lot of other hospitals and similar private actors around the county have adopted an identical

⁴ “Virtually every court that has taken up a challenge to require COVID-19 vaccinations ... has permitted private employers (and state employers) to require them.” Opposition, p. 2 (emphasis added).



policy, in the same timeframe, in the same manner, for the same reason. In other words, it is strong circumstantial evidence supporting a finding of state action here.

There is No Compelling State Interest at This Point

The Defendants argue that protecting “the community” is a compelling state interest. But they misunderstand constitutional law. The Constitution protects individuals, not communities.

Florida now has the 50th (out of the 50 states) lowest Covid transmission rate in the country. The Governor has set up walk-in monoclonal antibody treatment centers throughout the state at no cost to patients. Institutions like myfreedoctor.com provide free telemedicine for Covid patients which include prescriptions for low-cost treatments.⁵ None of these options were available six months ago. Therefore, much of the Defendants’ out-of-state case law from earlier in the pandemic is irrelevant.

In the last 7-day period, there were only 56 reported deaths involving Covid-19 in Florida — fewer than one per county per week.⁶ Even if there were another seasonal wave, it would occur in the third year of the elongated pandemic, with more treatments, more experience, and more natural immunity. Even if the threat were

⁵ <https://myfreedoctor.com>.

⁶ Florida Dep’t of Health, “COVID-19 Weekly Situation Report: State Overview” (Published Oct. 29, 2021), available at: http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/covid19-data/covid19_data_latest.pdf.



imminent, laying off large numbers of doctors and nurses during a healthcare crisis is the opposite of a compelling interest.

Finally, in *Does 1-3 v. Mills*, Justice Gorsuch seemed to reluctantly concede that “stemming the spread of COVID–19” was a compelling interest. 2021 WL at *3. That may be true. But the Defendants would still have the burden of proving that the use of the vaccines furthered that interest — which they cannot do, since the vaccines do not prevent transmission of the virus and cannot possibly “stem the spread.”

ARGUMENT

The Court should find on the undisputed facts that the Defendants are state actors, that the vaccines cannot “stem the spread” and are not rationally related to a legitimate government purpose, and the Vaccine Mandate is facially unconstitutional, does not use the least restrictive means, and must be enjoined.

The Undisputed Facts

The Vaccines

The first, and possibly most significant undisputed fact in this case is that the Covid-19 vaccines do not stop the spread of the virus. The vaccines are failing to provide any protective effect at all in some proportion of cases. Dec. of Dr. Neu, ¶ V.⁷ The efficacy of the vaccines drops rapidly after injection, failing to provide any

⁷ The Declaration of James R. Neuenschwander, M.D. [Doc. 2].



lasting protective effect at all. Id., ¶ VI. The vaccines do not prevent transmission. ¶ VIII. Asymptomatic *vaccinated* people appear to carry as high or higher levels of virus as do clinically ill unvaccinated people. Id. ¶ VII. For these reasons, vaccinated persons are more likely to spread the virus than unvaccinated persons. Id. ¶ The vaccines' effectiveness even at preventing clinical Covid-19 is declining with both time and the Delta variant. Id. ¶ VIII.

Therefore, the Defendants' Vaccine Mandate does not accomplish its goal. If the Defendants' goal is stopping the spread of virus in the hospitals, it is not rational. Even less rational would be replacing naturally immune workers with vaccinated workers who are more likely to spread the virus. The Defendants' stated objective is only a pretext for the real objective — complying with federal government coercion.

Next, it is undisputed that natural immunity provides durable and long-lasting protection from infection that is superior to vaccination. Id. ¶ IX. Naturally immune persons are no threat to the population and are 6-10 times less likely to get Covid than a vaccinated person. Id. Furthermore, natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines. Dec. Dr. Bhatt. ¶ 30.⁸ Many of the Plaintiffs have recovered from Covid-19 and have natural immunity. If the Defendants' goal is stopping the spread of virus

⁸ Declaration of Dr. Jay Bhattacharya [Doc. 18].



in the hospitals, it is not rational to require naturally immune people to take the vaccines and encounter a risk of adverse effects including death.

It is undisputed that the risk of adverse events from the Covid vaccines is twice as high as any other vaccine, and the side effects include death. Dec. Dr. Neu. ¶ IV. A typical year sees about 200 reports of vaccine deaths for all other vaccines combined. Id. Since 2020, there have been 17,000 reported deaths from Covid-19 vaccines alone. Id. The Covid-19 vaccines appear more dangerous than any other vaccine ever approved for public use. Id. The Defendants' policy is irrational because it does not use the least restrictive means, such as excluding naturally immune persons, ensuring prophylaxis are available, and limiting vaccination to persons who are vulnerable.

Hospital Economics

It is undisputed hospitals derive their revenues from treating individual patients, and there is no rational financial incentive for hospitals like the Defendants to engage in broad public health campaigns alongside government actors unless they are paid or coerced into doing so. Dec. of Dr. Bhatt. ¶ 18. 19. The Defendants' vaccine mandate policy creates economic dislocation by terminating the employment of large numbers of employees holding a significant amount of institutional knowledge that cannot easily be replaced. Id. ¶ 19.



Florida is in the midst of a shortage of nurses. *Id.* It is irrational for the Defendants to terminate the Plaintiffs because — absent coercion — it is against the Defendants’ financial interests. *Id.*

There is no valid private financial interest for a private hospital like the Defendants to cooperate in a public vaccination effort “to protect the community” unless that cooperation has been procured by the government, making the private actor into an agent of the government. *Id.* ¶ 44. Public vaccination has historically been the province of government. ¶ 45.

Clinical practice focuses on the health of individuals. Public health is committed to advancing health at the level of groups or populations. Dec. of Julie Ponesse ¶ I.1.⁹ In American bioethics, a patient’s autonomy is the highest priority. *Id.* ¶ I.2. Nonmaleficence (“first, do no harm”) is one of the four main principles of American bioethics. *Id.* Employment vaccine mandates are, by definition, coercive. In the absence of the threat of the loss of employment, the employee would not voluntarily choose vaccination. *Id.* ¶ I.4.

Covid-19 has an infection fatality rate (IFR) of 0.05% for a healthy person under 70 years of age, and most who are infected experience only minor symptoms. *Id.* ¶ I.5(i). Covid-19 is not a highly virulent pathogen, and therefore does not meet the epidemiological threshold for morbidity and mortality to justify mandating

⁹ Declaration of Julie Ponesse, PhD [Doc. 17].



vaccination for health care workers. Id. Covid-19 does not pose a significant threat of morbidity and mortality to most people. Id. ¶ I.6. Very safe, effective and approved early outpatient pharmaceutical treatment options (including but not limited to Ivermectin, fluvoxamine, and Quercetin) exist to treat Covid-19. Id. ¶ I.5(ii).

Finally, it is undisputed and indisputable that there are no long-term safety data regarding the Covid-19 vaccines. The long-term risks of taking the Covid-19 vaccines are anybody's guess.

Because the Covid-19 vaccines do not stop transmission, they must be regarded as akin to personal treatment and not a public health measure. Id. ¶ I.5(iii). Using prophylaxis in high-risk populations with ivermectin or monoclonal antibodies is far less restrictive (and more effective) than mandating vaccines on a population where the vast majority have little or no risk from the infection. Dec. Dr. Neu ¶ IX.

It is Fair to Attribute State Action to the Hospitals

The facts in this case fairly support attributing the federal government's actions to the Defendants.

In *Rayburn ex rel. Rayburn v. Hogue*, the Court noted that state action exists where the state “has had some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct[.]” 241 F.3d 1341, 1348 (11th Cir. 2001). In



its October 7, 2021 report on Vaccination Requirements, the White House said it began pulling “every lever” it could in January, 2020, to induce private actors into mandating vaccines:¹⁰

President Biden has been clear that vaccinations are the best tool in our fight against the COVID-19 pandemic. **Since January**, the Biden-Harris Administration has taken aggressive actions to make vaccinations free and convenient ... and deployed hundreds of millions of dollars in resources ... to encourage vaccinations ... These efforts have led to tremendous success. ... The strain on our hospital systems, our economy, and the risk to our children was too great not to use every tool available.

... it is clear that vaccination requirements result in millions more people getting vaccinated. ...

Over the past eight months, the Biden-Harris Administration has pulled every lever possible to get more shots in arms[.]

White House Vaccination Requirements, p. 3 (emphasis added). A copy of the *White House Vaccination Requirements* is attached hereto as **Exhibit B**.

Although Defendants claim that they independently came up with the idea to mandate Covid-19 vaccination for their staff in a vacuum in late July, the notion is preposterous and belied by commonly-available facts. In addition to the aforementioned report, the White House’s website clearly admits that the Administration began encouraging private mandates in July with a clear threat of

¹⁰ The White House, “WHITE HOUSE REPORT: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy,” *available at*: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Vaccination-Requirements-Report.pdf>.



coercion to follow shortly behind, with the express goal of making vaccine mandates “dominant in the workplace.”¹¹

The President announced vaccination requirements for the federal government **in July and called on the private sector to do more to encourage vaccination** as well. Since that time, employers ... in all 50 states have announced new vaccination requirements. **Since July, the share of job postings that require vaccination are up 90%.**

... The President’s plan will reduce the number of unvaccinated Americans by **using regulatory powers and other actions ... these requirements will become dominant in the workplace.**

The White House’s Covid Plan even uses the word “encourage” to describe its aggressive actions in July — “encouragement” was what the *Rayburn* court held was sufficient to establish state action. 241 F.3d at 1348. It was the White House’s stated goal to make the vaccine mandates “dominant in the workplace.” Defendants were always painfully aware of the “levers” and “regulatory powers and other actions” available to the federal government to coerce their compliance.¹²

Furthermore, the White House’s Vaccination Requirements report also says that **“Starting in July**, the President announced “a series of vaccination requirements including ... Requiring workers in health care settings that receive Medicare or Medicaid funding to be fully vaccinated.” *White House Vaccination*

¹¹ The White House, “Path Out of the Pandemic,” *available at*: <https://www.whitehouse.gov/covidplan>

¹² At the time of drafting, the White House has announced details of the new CMS rules governing the Defendants. It is not yet clear whether the Defendants will hew to the extended CMS deadlines or how the new CMS rules will affect the Plaintiffs’ claims.



Requirements, p. 7. In other words, the outlines of the pending regulatory requirements were announced to the public before the Defendants announced the Vaccine Mandate. It would be odd indeed if one of the country's largest hospital chains failed to notice the development. It is not credible that they didn't know.

It matters little that the Defendants favor the federal government's goal of ensuring that unvaccinated persons become unemployable in the healthcare industry. That just makes the Defendants "willful participants" in the government's activity — which is a separate basis for establishing that state action exists. *Brentwood*, 531 U.S. at 296. In other words, even if the Defendants' questionable claim were true, that they mandated the exact same policy as the government — absent federal government encouragement — it would only establish state action under the "willful participant" prong.

The Supreme Court has held that state action will be found where the government "significantly encourage[s]" the activity, whether the encouragement is "either overt or covert." *Id.* It is hard to imagine how much more "significant[ly]" and "overtly" the federal government could be "encouraging" the Defendants' Vaccine Mandate. Even if the encouragement were "covert" back in July, it would still count as state action.

The involvement of extensive CMS/Medicare regulations meet the requirements of the factors of "authorization," "oversight," and "subsidization."



Jeffries, 678 F.2d at 923. This is especially true because the regulations — first promised, now delivered — are completely unrelated to the mission of CMS. Employees are not patients. There is no Medicare reimbursement tied to vaccination of hospital employees. In other words, there is no rational connection between the vehicle — Medicare/Medicaid reimbursements — and the outcome — employee vaccinations.

Since the federal government provides the vaccines — its own property — at no cost, as well as ensuring that all healthcare providers are competitively similarly situated so they do not have to compete for employees, the factor of “facilitation” is also met. *Id.* In other words, if *only* the Defendants were mandating vaccines as a condition of employment, they would lose employees to other hospitals not mandating vaccines. The federal government can only insulate the Defendants from competitive pressures by leveling the playing field, facilitating the Vaccine Mandate.

This was no accident. In the White House’s November 4, 2021 Fact Sheet, the government explicitly admits that its policy was intended to “level the playing field:”¹³

New Vaccination Requirements for Health Care Workers:
CMS is requiring workers at health care facilities participating in Medicare or Medicaid to have received the necessary shots to be

¹³ The White House, “Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies” (Nov. 4, 2021), *available at*: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies>.



fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – by January 4th. ...Today’s action will ... create a level playing field across health care facilities[.]

And now we can see the nexus of inter-relationship or entwinement. The Defendants must rely on the federal government to bulldoze a “level playing field” that will protect them from competitive pressures over employees. Similarly, the state benefits from the Defendants’ policy, because it assists the federal government with achieving its publicly-stated objective of making the mandates “dominant in the workplace.” The two are entwined in a mutually-dependent arrangement to enable vaccine mandates.¹⁴

Finally, the federal government has never before conditioned employment at private hospitals like the Defendants on the receipt by an employee of a particular medical treatment. This policy substantially circumscribes the Defendants’ “freedom of decision-making.” *Id.* at 924-25.

There may never have been a clearer case where the publicly-available evidence shows such a close nexus between the state and the challenged private action such that “the action of the latter may be fairly treated as that of the State itself.” *Id.* at 923.

¹⁴ This is another place where the Defendants’ claim that they *want* to vaccinate all their employees works against them. If true, it only establishes that the Defendants are using the federal government’s “level playing field” to be “willing participants” in the government’s plan to make mandates “dominant in the workplace.”



Elements for Injunctive Relief

Irreparable Harm

Defendants argue that Plaintiffs have failed to show irreparable harm, because they have adequate alternative remedies in the form of monetary damages after they have been fired, even though Defendants implicitly concede that Plaintiffs will be unable to find other employment in the healthcare field. Still, Defendants' argument fails. Irreparable injury is presumed when the loss of constitutional rights is at issue. *Does 1-3*, 2021 WL at *4 ("This Court has long held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Gorsuch, J., *dissenting*, cleaned up, cites omitted).¹⁵

Public Interest

Plaintiffs already addressed the public interest prong in their Memorandum of Law, and the Defendants' Opposition did not respond to those arguments or law. Instead the Defendants string-cited their Covid-19 cases attempting to show that other courts found a public interest in denying injunctive relief. All these non-binding cases and their holdings suffer from one fundamental error: they are premised on the incorrect assumption that the vaccines stop transmission. Yet the

¹⁵ The Plaintiffs provided this Court with abundant case law supporting the element of irreparable harm and lack of an adequate remedy at law under both Title VII and constitutional privacy cases, as well as the preclusive effect of § 768.38, Florida Statutes, at section I(1) of their Memorandum of Law in Support of the Temporary Restraining Order [Doc. 5]. Defendants failed to address any of this law in their Opposition.



undisputed evidence in this case proves that vaccinated persons are as likely or even more likely to spread the virus. So even if the Defendants’ own rationale is valid — that stopping the spread is a public interest — it would be better served by issuing the injunction.

The Timing Issues are Red Herrings

The July 27 Announcement Date Doesn’t Disprove State Action

First, the Defendants make much of the timing of the announcement of the Vaccine Mandate policy contrasted with the official public CMS announcement a few weeks later. See the Declaration of Stephanie Ryan [Doc. 14-1]. Plaintiffs have already presented the Court with multiple admissions by the government of “encouragement” prior to the date of the Defendants’ announcement on July 27, 2021.

The Defendants’ implication is that Plaintiffs must produce some kind of “smoking gun” evidencing an explicit connection or communication between the federal government and the country’s second largest hospital chain. But the Eleventh Circuit has explicitly rejected such a requirement. *Bendiburg v. Dempsey*, 909 F.2d 463, 469 (11th Cir. 1990) (“the district court wrongfully required [plaintiff] to produce a ‘smoking gun’ when nothing more than an ‘understanding’ and ‘willful participation’ between private and state defendants is necessary to show the kind of joint action that will subject private parties to § 1983 liability”).



As discussed *infra*, “willing participation” shows state action. It does not matter whether the Defendants independently wished to force unwanted medical treatments on their employees under threat of termination. Their willing participation in a universal federal policy that can only work if they are protected by the government from competitive pressures, and which also benefits the state by furthering its political aims, is enough. By admitting that they are willing participants in the federal government’s objective, regardless of who thought of it first, the Defendants themselves have established state action.

The Defendants’ assertion that they were not coerced is also not dispositive:

[I]t avails the [Defendants] nothing to stress that the State neither coerced nor encouraged the actions complained of. “Coercion” and “encouragement” are like “entwinement” in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead.

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 303 (2001)

Nevertheless, the White House’s admission that it began “encouraging” private actors to further its policy in *July* is circumstantial evidence supporting a conclusion that Defendants knew or should have known about the policy at that time. Furthermore, the Declaration of Dr. Bhattacharya lays out substantial additional circumstantial evidence that the Defendants’ policy is economically irrational, standing alone, and he ultimately gives his expert opinion that the policy is more



likely than not the result of federal encouragement and coercion based on all the circumstantial evidence.

The Plaintiffs Did Not Unreasonably Delay in Filing

Defendants argue the Plaintiffs should have filed their complaint closer to the July policy announcement. What Defendants don't say is that their original policy assured the Plaintiffs that medical and religious exemptions would be honored. Once it became clear that Defendants were denying all exemption requests, the Plaintiffs acted promptly. In fact, it was only because of that prompt action that a handful of exemption requests have been recently approved.

The Plaintiffs Properly Pleaded Futility (Title VII, Fla. Civ. Rights Act)

The Defendants argue that Plaintiffs failed to exhaust their administrative remedies by first filing complaints with the EEOC and the Florida Commission on Human Relations, before bringing this suit. But Defendants failed to mention that, in paragraph 114 of their Complaint, the Plaintiffs pleaded futility:

114. Pursuing administrative remedies with the EEOC under Title VII or the Florida Commission on Human Relations under Florida's Civil Rights Act of 1992 would be futile, because neither statute provides discriminated employees with access to emergency injunctive relief.²⁵

²⁵ Injunctive relief is not one of the available forms of relief under the Florida Civil Rights Act's administrative remedies. And, Title VII only provides for injunctive relief in the context of a settlement agreement between the EEOC and an employer.

“[O]nly those remedies which provide a genuine opportunity for adequate relief need be exhausted.” *Porter v. Schweiker*, 692 F.2d 740, 743 (11th Cir. 1982).



Since neither the EEOC nor the Florida Commission on Human Relations can provide injunctive relief of the type sought in this case, Plaintiffs had no genuine opportunity for adequate relief and, thus, no obligation to undertake an exercise in futility. Defendants' Opposition did not contest the Plaintiffs' inability to obtain injunctive relief from the agencies or cite any case suggesting it is otherwise available.

The Declaration of Stephanie Ryan is Not Competent Evidence

Stephanie Ryan's Declaration lacks foundation to establish the business records exception and is clearly hearsay. It is not competent evidence of anything.

CONCLUSION

If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.

Does 1-3 v. Mills, 2021 WL 5027177, at *3 (2021) (Gorsuch, J., dissenting).

It's an odd thing. Most of the thrust of Defendants' Opposition — like much of the public dialog about Covid-19 — seems rooted in appeals to emotion, hand-waving about the need to protect vaguely-defined groups of unnamed and unidentifiable third parties — without reference to any legal duty, flag waving about communitarian ideals on behalf of “the public” — which apparently doesn't get a vote, and references to historic mortality rates without any explanation of how that tragic figure is related to the Defendants' current conduct.



We are no longer in the difficult early days of the pandemic when mortality rates were highest and there were no effective treatments available for Covid. In his Declaration, Dr. Marble — who has treated more Covid-19 patients than any other doctor in the U.S. — avers that a therapeutic protocol is 99.99% effective in successfully treating the disease.¹⁶ ¶ 12. That exceeds the most optimistic projections of the vaccines’ efficacy. ¶ 13. More safe and effective therapeutics are rolling out every day.¹⁷

But anyone reading the Defendants’ Opposition would be unable to tell that it was written in a world that has moved beyond the pandemic’s difficult days of 2020. The language and arguments of the Defendants’ Opposition are more appropriate for that harrowing period than today.

The generic references to the need to “protect” families, the public, and the community are equally puzzling. When have individual actors ever been able to stymie the law by referring generally to out-of-court parties to whom the in-court parties owe no legal duty? The Defendants seem to accept this maneuver as an

¹⁶ Declaration of Benjamin Marble, M.D. [Doc. 19].

¹⁷ See, e.g., CNN Health, “UK becomes first to authorize Merck and Ridgeback Biotherapeutics’ antiviral molnupiravir to treat mild-to-moderate Covid-19,” *available at*: <https://www.cnn.com/2021/11/04/health/uk-authorizes-merck-antiviral-molnupiravir-covid/index.html>; Medical News Today, “COVID-19: Antidepressant [Fluvoxamine] cuts risk of hospitalization, death by 32%,” *available at*: <https://www.medicalnewstoday.com/articles/covid-19-antidepressant-cuts-risk-of-hospitalization-death-by-32#High-risk-of-severe-disease>; and Capitol Beat, “Florida getting results with monoclonal antibody treatments for COVID-19,” *available at*: <http://capitolbeat.org/2021/09/florida-getting-results-with-monoclonal-antibody-treatments-for-covid-19/>.



established principle, without evidence, and without citation to any binding authority.

But “verdicts must, of course, be based upon solid evidence, not upon appeals to emotion.” *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975). Emotional arguments without factual support must not direct the outcome of legal cases. *See, e.g., Dir., Office of Workers' Comp. Programs, U.S. Dept. of Labor v. Gen. Dynamics Corp.*, 705 F.2d 562, 565–66 (1st Cir. 1983) (“The Director's fear that to reject his view ‘would ... likely [] lead to greater aggravation of [] disabling conditions or even death,’ we can only regard as emotional argument without factual support.”).

The evidence in this case shows that the Defendants are classic state actors, that their policy does not further a compelling interest much less meet a rational basis test, and that they are not using the least restrictive means of accomplishing the purpose in any case. They have trampled on the Defendants’ statutorily-protected religious freedoms.

The Plaintiffs beg this Court to enter an injunction preserving the status quo until the factual issues can be fully tried.

Dated this 5th day of November, 2021.





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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.1 (F), the word count of this Reply and incorporated Memorandum of Law is 7,857, excluding the case style, tables, signature block, and certificate of service.

/s/ Seldon J. Childers
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this day by electronic mail or U.S. Regular Pre-Paid Mail to the following:

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EXHIBIT A

**IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

DARRIS FRIEND, *et al.*,
Plaintiffs,

Case No. 01-2021-CA-2412

v.

CITY OF GAINESVILLE,

Defendant.

_____ /

**ORDER GRANTING PLAINTIFFS’
PETITION FOR TEMPORARY INJUNCTION**

THIS CAUSE came before the Court for hearing on September 20, 2021 on Plaintiffs’ *Complaint, Declaration, and Petition for Emergency Injunctive Relief* (the “Petition”), attended by the Plaintiffs and their counsel, and counsel for the City of Gainesville. The Court has reviewed the pleadings (the *City of Gainesville’s Response in Opposition to Petition for Emergency Injunctive Relief*, the *Plaintiffs’ Response to City of Gainesville’s Opposition to Plaintiffs’ Petition for Emergency Injunctive Relief*,) and case law submitted by the parties, has heard testimony from Plaintiff, Christine Damm, has heard the argument of counsel, and is duly advised in the premises. The Court finds and rules as follows:

1. The City of Gainesville (the “City”) has enacted a policy requiring its employees to be “fully vaccinated” for Covid-19 on or before October 30, 2021, or face progressive disciplinary action, up to and including termination of employment (the “Vaccine Mandate”).¹

2. At the Hearing, the Plaintiffs (who are City employees) argued that the Vaccine Mandate facially implicates their right to privacy under the Florida Constitution, Article I, § 23

¹ The City Commission voted to adopt the requirement for City employees to be vaccinated at its August 5, 2021 City Commission Meeting. City Manager Memorandum No. 210040, authored by Lee R. Feldman, City Manager, and dated August 12, 2021, formalizes the City’s directives and provides the details for implementing the City’s Vaccine Mandate. The Plaintiffs’ witness testified that the City had informed her, as an employee, that the policy’s deadline for vaccination or termination is October 30, 2021. The City’s counsel was unable to confirm or deny the deadline with certainty. The Court’s conclusions herein are the same, whatever the actual deadline.

and that because the right to privacy is implicated that this Court is required to review the City's policy under a strict scrutiny standard (i.e. to determine whether the policy serves a compelling government interest and utilizes the least restrictive means to serve that interest).

3. The City did not put on any evidence, at all, at the injunction hearing. Without any evidence, the Court is unable to consider whether the Vaccine Mandate serves a compelling interest through the least restrictive means, whether the Vaccine Mandate meets a strict scrutiny test, a rational basis test, or whether it meets any other standard. The City did not file any affidavits or declarations, did not submit any documentary evidence, and did not call any witnesses.

4. For the reasons set forth below, the Plaintiffs' Emergency Petition for Injunctive Relief is GRANTED.

Application of the Right to Privacy to the Vaccine Mandate

5. The United States Supreme Court has previously analyzed the constitutionality of a compelled vaccination law by reviewing the vaccination mandate in the context of the rights afforded citizens under the constitution of the individual state. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905). Therefore, this Court must review the City's Vaccine Mandate within the context of the protections contained within the Florida Constitution.

6. Florida's constitutional right to privacy is contained in Article I, § 23 of the Florida Constitution and provides, in part, as follows:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein . . .

7. The right to privacy guarantees provided to Florida citizens under the Florida Constitution are broader than the right to privacy guarantees provided to citizens under the U.S. Constitution. *Green v. Alachua County*, 2021 WL 2387983 at *3 (Fla. 1st DCA 2021).

8. Florida's right to privacy is contained in the Declaration of Rights of the Florida Constitution. A right explicitly contained in the Declaration of Rights of the Florida Constitution is considered a fundamental right. *State v. J.P.*, 907 So.2d 1101, 1109 (Fla. 2005). Because the right to privacy is a fundamental right in Florida, the government can only infringe upon that right if necessary to accomplish a compelling government interest, using the least restrictive means necessary to serve that interest (this test is commonly referred to as the "strict scrutiny" standard of review). *Id.*, see also *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *Green v. Alachua County*, 2021 WL 2387983 (Fla. 1st DCA 2021).

9. Therefore, this court must determine whether the City's Vaccine Mandate implicates Plaintiffs' fundamental right to privacy, such that the Vaccine Mandate should be reviewed under the strict scrutiny standard of review.

10. Florida law provides that citizens have the right to refuse unwanted medical treatments. *In re Guardianship of Browning*, 568 So.2d 4, 11 (Fla. 1990) (holding that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to relevant decisions concerning one's health").

11. Federal law holds that compelled physical intrusion into the human body is an invasion of bodily integrity that implicates significant, constitutionally protected privacy interests. *Missouri v. McNeely*, 569 U.S. 141, 143 (2013).

12. The City's Vaccine Mandate requires City employees to receive a complete dose of the COVID-19 vaccines. These vaccinations are administered through intramuscular

injection. The City's Vaccine Mandate requires a compulsory vaccination procedure that can reasonably be considered a form of medical treatment and/or a medical procedure, and thus, this mandate implicates the City employees' fundamental right to privacy.

13. If a challenged law *implicates* Florida's right to privacy, the burden shifts to the government to prove that the law furthers a compelling state interest in the least restrictive way—also known as the “strict scrutiny” standard. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1252-1253 (Fla. 2017); *see also, Green v. Alachua County*, 2021 WL 2387983 at *3.

14. This “strict scrutiny” standard applies equally to constitutional challenges in instances when the government seeks to enforce laws, and also, in instances when the government employer seeks to enforce workplace policies. *See City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995).

15. If the government fails to put on evidence of its compelling state interest, as the City failed to do here, the Court is not required to (and, in fact, cannot) make factual findings that the government has any compelling state interest. *Green*, 2021 WL 2387983 at *3 (“When the government fails to offer evidence to demonstrate a compelling state interest, the trial court then is absolved of having to make any finding to that effect”). In the instant case, the City failed to put on any evidence that the Vaccine Mandate serves a compelling state interest or that the Vaccine Mandate was the least restrictive means to accomplish that interest.

16. The City's Vaccine Mandate facially interferes with its employees' right to refuse unwanted medical treatments and/or procedures, implicates Plaintiffs' fundamental right to privacy, and is “presumptively unconstitutional.” *Gainesville Woman Care, LLC.*, 210 So. 3d at 1245; and *Green*, 2021 WL 2387983 at *5.

17. The City had an opportunity to present evidence that would show that this Vaccine Mandate was the least restrictive means to meet a compelling government interest. The City did not do that and, in fact, did not present any evidence, at all. Therefore, the Court is required to find that the City failed to meet its burden of proving that the Vaccine Mandate furthers a compelling state interest in the least restrictive way. *See Gainesville Woman Care*, 210 So. 3d at 1260-61; *Green*, 2021 WL 2387983 at *3.

Elements for an Injunction

18. The analysis for issuance of a temporary injunction based on a privacy challenge under Florida's constitution is entirely different from the ordinary four-element analysis for other temporary injunction proceedings. *Id.*; and *Green*, 2021 WL 2387983 at *2.

19. When a law is challenged on privacy grounds, the Court must first make a single, threshold *do novo* inquiry whether the challenged law invades an individual's right to privacy. *Green*, 2021 WL 2387983 at *2. This court has conducted that inquiry and has determined that the challenged policy invades and/or implicates the Plaintiffs' constitutionally protected right to privacy.

20. *Green* instructs, and this Court is bound to follow, that because the City failed to offer evidence demonstrating any compelling state interest that would justify the infringement on Plaintiffs' right to privacy, the remaining prongs of the injunction inquiry collapse into the first prong of likelihood of success on the merits, which is established by the threshold determination that the challenged law implicates a privacy right. *Green*, 2021 WL 2387983 at *3 (*citing Gainesville Woman Care*).

21. In other words, having determined that the City's Vaccine Mandate implicates Plaintiffs' privacy rights (and with no showing of a compelling interest demonstrated by the

City), this Court is required to presume that the Plaintiffs have adequately demonstrated the four elements required for this Court to order the requested injunctive relief: likelihood of success on the merits, lack of an adequate legal remedy, irreparable harm, and the public and private interests at stake. *Id.*

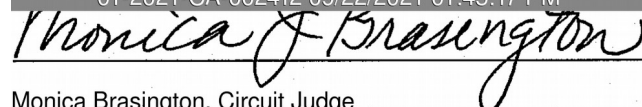
22. Therefore, the Court ENJOINS Defendant City of Gainesville, as follows:

- a. The City shall not enforce the Vaccine Mandate policy.
- b. The City shall not terminate or discipline any employee for failure to comply with the Vaccine Mandate.

23. The Court determines that, giving due regard for the public interest, no bond is required to be posted, pursuant to Rule 1.610(b).

24. This injunction will continue in force until further order of the Court.

DONE AND ORDERED in Chambers at the Alachua County Family & Civil Justice Center, Gainesville, Florida on Wednesday, September 22, 2021.

01-2021-CA-002412 09/22/2021 01:45:17 PM

Monica Brasington, Circuit Judge
01-2021-CA-002412 09/22/2021 01:45:17 PM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Wednesday, September 22, 2021.

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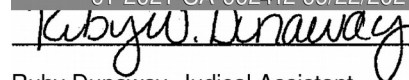
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A handwritten signature in black ink, appearing to read "Ruby W. Dunaway", is written over a horizontal line.

Ruby Dunaway, Judicial Assistant

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EXHIBIT B

WHITE HOUSE REPORT: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy

OCTOBER 7, 2021



THE WHITE HOUSE
WASHINGTON



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Executive Summary

President Biden has been clear that vaccinations are the best tool in our fight against the COVID-19 pandemic. Since January, the Biden-Harris Administration has taken aggressive actions to make vaccinations free and convenient, executed a robust campaign to educate Americans about the importance of getting vaccinated, and deployed hundreds of millions of dollars in resources for states, localities, Tribes, and community organizations to encourage vaccinations.

These efforts have led to tremendous success. At the start of the year, only 34% of adult Americans were eager to get vaccinated. Today, 78% of adults have at least their first shot. Overall, more than 185 million Americans are fully vaccinated—up from just 2 million when the President took office. The unprecedented pace of the President’s vaccination campaign saved over 100,000 lives and prevented 450,000 hospitalizations.

This is significant progress, but after months of education and incentives, additional actions needed to be taken in order to reach the tens of millions of people who remained unvaccinated. The strain on our hospital systems, our economy, and the risk to our children was too great not to use every tool available. To that end, last month, the President laid out a six-part plan to accelerate our path out of the pandemic. Central to that plan is getting remaining Americans vaccinated, and to do so, the President announced vaccination requirements that in total will cover approximately 100 million people.

As this report demonstrates, it is clear that vaccination requirements result in millions more people getting vaccinated. Without vaccination requirements, we face endless months of chaos in our hospitals, further detrimental impacts on our economy, and anxiety in our schools. With them, we will accelerate our path out of the pandemic.

According to a White House analysis:

Vaccination requirements result in more people vaccinated and save lives.

- **Vaccination requirements have increased vaccination rates by 20+ percentage points to over 90% in many organizations.** An analysis of health care systems, educational institutions, public-sector agencies, and private businesses shows that organizations with vaccination requirements have seen their vaccination rates increase by more than 20 percentage points and have routinely seen their share of fully vaccinated workers rise above 90%. That is substantially higher than broader working-age vaccination rates for Americans aged 18 to 64 where only 63% are fully vaccinated.
- **Vaccination requirements have already helped cut the rate of unvaccinated Americans by one-third.** In late July, when the President announced the first vaccination requirement for the federal government, 95



million eligible Americans were unvaccinated. Today, thanks in part to vaccination requirements, that number has been reduced to 67 million unvaccinated eligible Americans. Increasing vaccination rates among workers by 20 percentage points or more—consistent with what vaccination requirements have been able to accomplish to date—would reduce the number of unvaccinated Americans by tens of millions of people, profoundly reducing the risk of COVID-19 to individuals and communities.

Vaccination requirements are good for the economy.

- **Increasing vaccination rates could return up to 5 million workers to the labor force.** An economic analysis by Goldman Sachs found that “an increase in vaccination and almost full vaccination at workplaces should encourage many of the 5 million workers that have left the labor force since the start of the pandemic to return.” In addition to workers who are no longer employed, nearly 5 million American workers reported missing work in early September because they had COVID-19 or were caring for someone with COVID-19, an increase of 2.8 million relative to late June.
- **Higher vaccination rates lead to lower COVID-19 rates and a stronger economy.** During the recent spread of the Delta variant, cases, hospitalizations, and deaths were roughly two-and-a-half times higher in states with low vaccination rates compared to high-vaccination states. Small business employee hours grew faster and stayed higher during the rise of the Delta variant in the states that have higher working-age vaccination rates, versus states with lower vaccination rates.

Vaccination requirements are becoming the standard across all sectors and have broad public support.

- **More than 3,500 organizations have already stepped up to require vaccinations, and thousands more will require vaccinations in the weeks ahead.** Vaccination requirements are in place at 25% of businesses, 40% of hospitals, and colleges and universities serving 37% of all graduate and undergraduate students. While this is extraordinary progress in a short period of time, thousands more businesses will put in place requirements over the weeks ahead as new rules for employers with 100 or more workers are finalized.
- **Businesses, labor unions, workers, and a majority of the public support vaccination requirements.** The Business Roundtable—which represents more than 200 businesses that employ a total of 20 million workers—as well as some of the largest labor unions in the country, including the National Education Association and the American Federation for Teachers, all support the President’s plan to increase vaccinations. And, public polls from Fox News, Axios, and the Associated Press among others, show that strong margins of Americans support vaccination requirements.



History of Vaccination Requirements

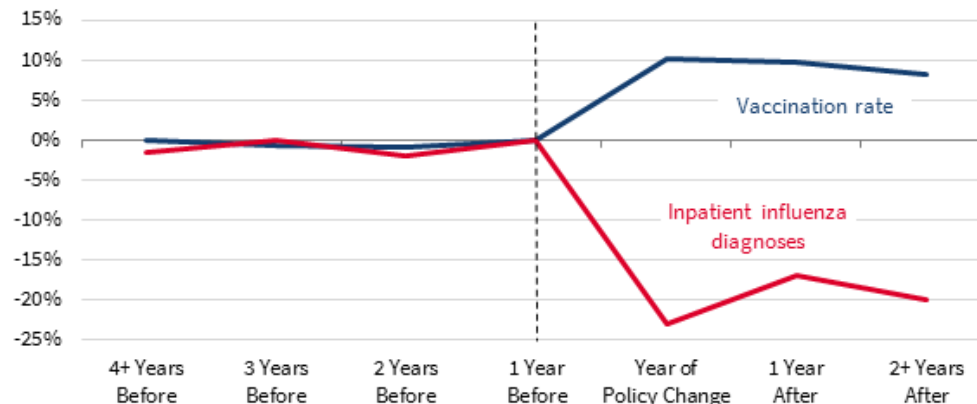
Vaccination requirements have a long history in the United States dating back to the American Revolution. More than 90% of deaths among Continental soldiers in the American Revolution were due to disease.¹ As a result, before he was our first President, George Washington mandated smallpox inoculations for the soldiers under his command in 1777, writing, “Necessity not only authorizes but seems to require the measure, for should the disorder infect the Army . . . we should have more to dread from it, than from the Sword of the Enemy.” Smallpox largely disappeared among the Continental Army’s ranks after the requirement went into effect.

Vaccination requirements continued in the centuries to come. Boston Public Schools required smallpox vaccination for students as early as 1827. Urbana, Ohio, enacted a requirement in 1867 that in any future epidemic, “the heads of families must see that all the members of their families have been vaccinated.”

We can also look at more recent experiences with requirements to see the impact. In California, some counties introduced flu vaccination requirements for all workers in licensed health care facilities between 2017 and 2019, whereas other counties did not institute such requirements. One study compared health outcomes in counties before and after they adopted these requirements relative to counties in California with no requirements over the same period. It found these requirements increased the vaccination rate of health care workers by 10 percentage points, from 74% to 84%, and reduced the number of inpatient influenza diagnoses by 20%, as shown in Figure 1.²

Figure 1. Flu Vaccine Requirements for Healthcare Workers Reduced Hospital-Acquired Infections in California

Change in percentage points from year before county vaccine mandate



Source: White, C. (2021). Measuring social and externality benefits of influenza vaccination. *Journal of Human Resources*, 56(3), 749-785.

¹ <https://loc.gov/rr/scitech/GW&smallpoxinoculation.html>

² <https://muse.jhu.edu/article/798143>



A similar study of statewide flu vaccination requirements for nursing-home workers and residents found that when states introduced these requirements, flu cases and deaths in nursing homes fell 20% and 10% respectively, relative to states without changes in policy over the same period.³

Among K-12 students, all 50 states require vaccinations for school attendance, and every state has held student vaccination requirements for the last 40 years.^{4, 5} Vaccine requirements have been key to reducing vaccine inequities that have existed among school-age children.⁶

Evidence of the effectiveness of vaccination requirements for children abound. During the 20th century, measles infected an average of more than 500,000 Americans each year; by 2005, after decades of school vaccination requirements and vaccination rates higher than 90%, it infected 66 people.⁷

In Alaska, when major outbreaks of measles were occurring, the state announced a strict measles vaccination requirement for students. When enforcement of the requirement went into effect, about 7,400 students failed to provide proof of vaccination and were excluded from school. After one month, more than 7,300 of those students were in compliance with the requirement and no further cases of measles occurred.⁸

Comparison of 20th Century Annual Morbidity and Current Morbidity: Vaccine-Preventable Diseases

Disease	20 th Century Annual Morbidity [†]	2020 Reported Cases ^{††}	Percent Decrease
Smallpox	29,005	0	100%
Diphtheria	21,053	1	> 99%
Measles	530,217	13	> 99%
Mumps	162,344	621	> 99%
Pertussis	200,752	5,398	97%
Polio (paralytic)	16,316	0	100%
Rubella	47,745	6	> 99%
Congenital Rubella Syndrome	152	0	100%
Tetanus	580	15	97%
<i>Haemophilus influenzae</i>	20,000	11*	> 99%

[†] JAMA. 2007;298(18):2155-2163
^{††} Centers for Disease Control and Prevention. National Notifiable Diseases Surveillance System, Weekly Tables of Infectious Disease Data. Atlanta, GA. CDC Division of Health Informatics and Surveillance. Available at: https://wonder.cdc.gov/nndss/nndss_weekly_tables_menu.asp?mmwr_year=2020&mmwr_week=53. Accessed on January 7, 2021.
 * *Haemophilus influenzae* type b (Hib) < 5 years of age. An additional 7 cases of Hib are estimated to have occurred among the 136 notifications of *Haemophilus influenzae* (< 5 years of age) with unknown serotype.

National Center for Immunization & Respiratory Diseases
 Historical Comparisons of Vaccine-Preventable Disease Morbidity in the U.S.

2/4/2021




Figure 2, Credit: Centers for Disease Control and Prevention

³ https://www.katherinewen.com/wen_influenzaVax_nov2020.pdf

⁴ <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx#Table1>

⁵ <https://www.nytimes.com/2021/09/09/us/politics/vaccine-mandates-history.html>

⁶ <https://pubmed.ncbi.nlm.nih.gov/18310176/>

⁷ <https://fivethirtyeight.com/features/vaccines-mandates-work-but-theyre-messy-business/>

⁸ https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf



The Biden Administration's Vaccination Requirements

From Day One, President Biden marshalled a wartime effort to make vaccinations free, convenient, and available to all.

Over the past eight months, the Biden-Harris Administration has pulled every lever possible to get more shots in arms—from implementing a tax credit for businesses that provide paid time off for vaccinations, to encouraging incentive programs, to engaging with celebrities, trusted messengers, and professional sports leagues, to giving states resources to run lotteries.

Starting in July when the President announced the first requirement for the federal government, 95 million eligible Americans were unvaccinated. Today, only 67 million are unvaccinated. We are now in a pandemic of the unvaccinated, and after months of the vaccine being free and available to everyone 12 years and older in the country, the most effective way to drive up vaccination rates is through vaccination requirements.

Starting in July, the President announced a series of vaccination requirements, including:

Requiring all federal executive branch employees, including the military, and all federal contractors be fully vaccinated. The President signed an Executive Order to require all federal executive branch workers to be vaccinated and another Executive Order extending this standard to employees of federal contractors. Prior to the President's Executive Order, the Department of Veterans Affairs (VA), the Department of Defense (DoD), and the Department of Health and Human Services (HHS) announced requirements for certain employees to be fully vaccinated. The new requirement covers more than 3.5 million people and ensures a consistent standard across the federal government.

Ensuring that all businesses with 100 or more employees require every worker be fully vaccinated or tested weekly. The Occupational Health and Safety Agency (OSHA) is developing an Emergency Temporary Standard that will require employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to be tested weekly. This requirement will impact over 80 million workers in private sector businesses with 100 or more employees.

Requiring workers in health care settings that receive Medicare or Medicaid funding be fully vaccinated. In the coming weeks, the Centers for Medicare & Medicaid Services (CMS) will take action to require that workers in most health care settings that receive Medicare or Medicaid reimbursement be fully vaccinated. This action builds on an earlier vaccination requirement for nursing



facilities announced by CMS, and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings. These requirements will apply to approximately 50,000 providers and cover more than 17 million health care workers across the country.

Requiring all Head Start educators, teachers and staff at federally-run schools be fully vaccinated. To help ensure the safety of students, families, and their communities, in the coming weeks, HHS will implement a requirement that educators, teachers and staff at Head Start and Early Head Start programs be fully vaccinated. In addition, vaccination requirements are being implemented for teachers and youth program personnel at the DoD and teachers and staff at Bureau of Indian Education-operated schools. These schools and programs collectively serve more than 1 million children each year and employ nearly 300,000 staff.

In total, the Administration's vaccination requirements apply to about 100 million Americans—two-thirds of all U.S. workers.

And since the President first announced COVID-19 vaccination requirements, hundreds of private and public sector institutions have stepped up and adopted requirements of their own, covering tens of millions of Americans.

The rationale is simple: Vaccination requirements work. They drive up vaccination rates, which in turn makes our communities and schools safer, and strengthens our economic recovery. That is why they are widely supported—and becoming the standard across the country.



Vaccination Requirements Sector Analysis

In Brief

Vaccination requirements dramatically drive up vaccination rates across economic sectors. As data demonstrate, when organizations implement vaccination requirements, vaccination rates have soared to 90% or greater among the workforce.

As this section illustrates, health care systems, private businesses, public employers, and schools have all successfully instituted vaccination requirements and have seen rising vaccination rates without a correspondingly undesirable impact on their labor force.

Across industries, thousands of employers have stepped up to require vaccinations—more than 2,500 hospitals, hundreds of private businesses, and more than 1,050 colleges and universities. These vaccination requirements cover millions of employees, and they are critical to helping accelerate our path out of the pandemic.

Health Care Sector Analysis

COVID-19 vaccination requirements for health care workers have become common across the U.S. to protect patients and workers from the virus. On April 1, Houston Methodist became the first health system in the country to require all of its employees be vaccinated against COVID-19. A significant increase in health systems adopting similar policies followed in July and August, amid an announcement by the President that America's largest health system, the Department of Veterans Affairs, would ensure its entire health care workforce would be vaccinated. Today, almost 2,500 hospitals, 40% of all U.S. hospitals, have announced vaccination requirements for their workforce. They span all 50 states, the District of Columbia, and Puerto Rico. In addition, eight states—California, Colorado, Maine, New Mexico, New York, Oregon, Rhode Island, and Washington—and the District of Columbia are requiring all health care workers in the state to get vaccinated, and four states—Delaware, Illinois, Maryland, and New Jersey—are requiring health workers to get vaccinated or tested regularly, according to the Kaiser Family Foundation.

Leading health care organizations like the American Medical Association, American Hospital Association, American Nurses Association, and American Academy of Pediatrics, which represent millions of workers, called for “mandatory COVID-19 vaccination for health care workers to protect the safety of patients and residents of long-term care facilities and make the health care sector a leader in COVID-19 vaccinations.”

Health care providers and states have adopted requirements for a simple reason—vaccination requirements work.



At Houston Methodist, out of 25,000 employees, 98% got vaccinated.⁹ Trinity Health, one of the largest Catholic health care systems in the nation, went from 75% to 96% of its 123,000 employees vaccinated and in compliance. Henry Ford Health System in Detroit went from 68% vaccinated to 98% of its workforce vaccinated or in compliance.¹⁰ Two of the largest health systems in North Carolina, UNC Health and Novant Health, reached 97% and 99% staff vaccination rates respectively after implementing a vaccination requirement.¹¹ In New York, 92% of employees at hospitals and nursing homes received a shot by the September 29 state-wide deadline to do so, a major increase from just a week earlier—when only 82% of nursing home employees had received a shot.¹²

Figure 3 illustrates the significant impact of vaccination requirements on the health care sector. In the five days leading up to New York's vaccination deadline, the twenty New York City nursing homes with the highest proportion of unvaccinated employees saw substantial increases in their staff vaccination rates. Fourteen of those nursing homes saw the proportion of their staff vaccinated increase greater than 20 percentage points in the five-day period. Twelve of the nursing homes eclipsed 95% staff vaccination rates by the deadline.

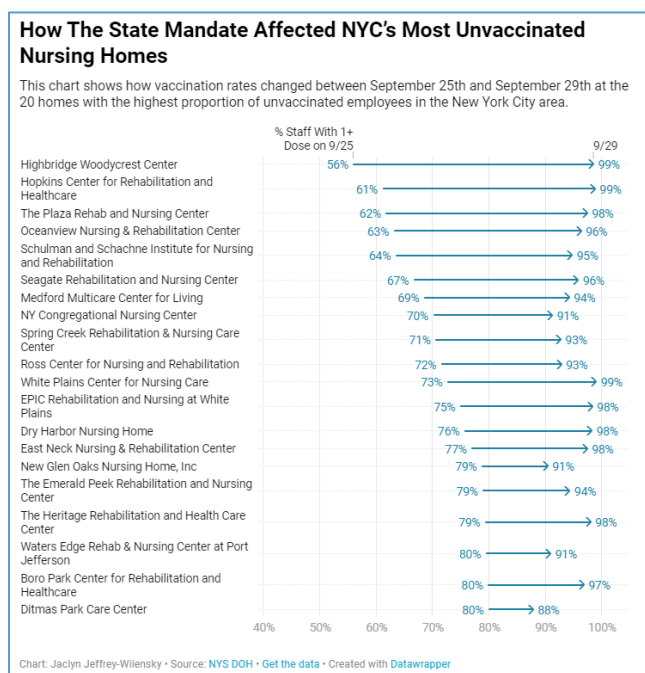


Figure 3, Credit: Gothamist

⁹ <https://www.webmd.com/lung/news/20210528/texas-standoff-illustrates-battle-over-covid-vaccines>

¹⁰ [https://www.henryford.com/news/2021/09/sept-13-covid19-media-briefing#:~:text=Henry%20Ford%20Health%20System%20Achieves%2098%25%20COVID%20D19%20Vaccination%20Compliance&text=DETROIT%20\(September%2013%2C%202021\),10](https://www.henryford.com/news/2021/09/sept-13-covid19-media-briefing#:~:text=Henry%20Ford%20Health%20System%20Achieves%2098%25%20COVID%20D19%20Vaccination%20Compliance&text=DETROIT%20(September%2013%2C%202021),10)

¹¹ <https://www.nytimes.com/2021/09/29/health/us-hospital-workers-vaccine.html>

¹² <https://www.nytimes.com/2021/09/28/nyregion/vaccine-health-care-workers-mandate.html>



Importantly, vaccination requirements have not led to widespread resignations, as some predicted. At Houston Methodist, the hospital lost only 153 out of 25,000 employees.¹³ A rural health system in Kentucky, St. Claire Healthcare, lost less than 4% of their 1,100 employees. Novant Health in North Carolina suspended only about 375 of its over 35,000 employees for failing to get vaccinated.¹⁴ 200 of those suspended employees decided to get vaccinated so they could return to their jobs.¹⁵

Maine's two largest health care providers, MaineHealth and NorthernLight, lost only 65 out of 33,000 employees.¹⁶ Medical University of South Carolina Health had to let go only five of its more than 17,000 employees for failing to comply with their requirement.¹⁷ At Hanceville Nursing & Rehab Center in Alabama, six of 250 workers quit rather than get a shot. Only five of 527 employees quit at Jewish Home Family in New Jersey, and only two of 250 employees left at Westminster Village in Illinois.¹⁸

Health care worker vaccination requirements have been shown to work time and time again. They boost vaccination rates and result in limited resignations and dismissals. They are an essential tool to help protect U.S. patients and health care personnel.

Corporate and Public Sector Analysis

Vaccination requirements in private businesses and public employers are becoming the standard.

Currently, one in four companies have instituted a vaccination requirement and an additional 13% of companies plan to put a requirement in place in the months ahead. These numbers have increased sharply after President Biden announced that all employers with 100 or more employees would be required to get workers vaccinated or tested weekly, according to human resources consultant Gartner.¹⁹ And these data are supported across job postings. The number of job postings that list COVID-19

¹³ <https://www.cnn.com/2021/06/22/us/houston-methodist-employees-covid-vaccine-resign-fired/index.html>

¹⁴ <https://www.washingtonpost.com/health/2021/09/28/nc-hospital-175-unvaccinated-fired/>

¹⁵ <https://www.wsocv.com/news/local/fewer-than-200-novant-health-employees-fired-not-getting-covid-19-vaccine/WBV64JW6QZC5FKXNVUIG2RA7VI/>

¹⁶ https://mainebeacon.com/few-health-workers-actually-quitting-over-vaccine-mandate-despite-ongoing-protests/?fbclid=IwAR2wNVKC3DJFGHU7Ugmm_m0dBqbYz7CXKO7FnDdVwCLmA4pmGrWkQ8Vj51I

¹⁷ <https://www.thestate.com/news/charleston/article252780718.html>

¹⁸ <https://www.scientificamerican.com/article/unvaccinated-workers-say-theyd-rather-quit-than-get-a-shot-but-data-suggest-otherwise/>

¹⁹ <https://www.bloomberg.com/news/articles/2021-09-30/one-in-four-companies-now-have-vaccine-mandate-after-biden-order?srnd=markets-vp>



vaccination as a requirement jumped 20 times in the past two months, according to LinkedIn data.²⁰

The reason is simple: Vaccination requirements work.

On August 6, United Airlines announced that all 67,000 of its employees would need to be vaccinated within five weeks after FDA's approval of a COVID-19 vaccine. When United began its vaccination requirement, only 59% of its employees were vaccinated. In fewer than two months, United announced that 99% of its employees were vaccinated and in compliance. As United began the process of separation from workers who refused to comply, about half of the remaining unvaccinated chose to get the shot.²¹ In less than 60 days, the company with 67,000 employees faced the prospect of losing less than 200 individuals. More than 99% of workers stepped up to comply with the vaccination requirement.

A similar trend is happening right now at Tyson Foods. On August 3, when Arkansas-based Tyson Foods announced its employees would need to be vaccinated, only 45% of its workforce had gotten a shot. Today, that number stands at 91%. That's a 102% increase in two months. The company's vaccination requirement covers all of its 120,000 U.S. employees, and the company's vaccination rate will continue to rise as workers have until November 1 to get vaccinated.²²

Some of the largest employers in the U.S., like AT&T, Bank of America, CVS, Disney, Google, Hess, Johnson & Johnson, Microsoft, Netflix, Procter & Gamble, and Walgreens already have a vaccination requirement. And, more and more companies step up to require vaccinations each week.

Organizations have taken different approaches. Some places like Amtrak are implementing a system to allow workers to test weekly or get vaccinated, so they will be prepared for the upcoming rule from the Department of Labor requiring all employers with 100 or more employees implement such a system. Other companies, such as United Airlines and Tyson Foods, do not allow for a testing opt-out and have seen some of the highest vaccination levels in the private sector.

The trend of vaccination requirements working holds true in the public sector as well.

In Orange County, Florida, the Tax Collector's office went from 45% of staff vaccinated to above 90% in little more than a month. In deciding to implement a requirement,

²⁰ <https://www.newsweek.com/companies-listing-being-vaccinated-requirement-job-postings-jumped-20-times-1634043>

²¹ <https://www.nytimes.com/2021/10/02/business/united-airlines-coronavirus-vaccine-mandate.html>

²² <https://www.nytimes.com/2021/09/30/business/tyson-foods-vaccination-mandate-rate.html>



Scott Randolph, Orange County's Tax Collector noted "Our healthcare is paid by taxpayer dollars...it's not right for them to pay for something that is easily avoidable."²³

Republican Governor Charlie Baker of Massachusetts announced a vaccination requirement for Commonwealth workers on August 19. All 42,000 state employees, including hospital workers, executive branch employees, and state troopers would need to get vaccinated. According to the Boston Globe, "despite claims by the Massachusetts State Police union that 'dozens of troopers' have submitted their resignation papers due to a COVID-19 vaccination requirement, a State Police spokesman said late Monday that only one trooper has definitively said he will retire because of the mandate."

Education Sector Analysis

Across the country, we have seen the power of vaccination requirements at colleges and universities and in K-12 educational settings.

Higher Education

Currently, there are more than 1,050 institutions of higher education (IHEs) with a vaccination requirement. Cumulatively, these institutions represent about 17% of all IHEs, and serve about 37% of all graduate and undergraduate students.

College Announcements by Date

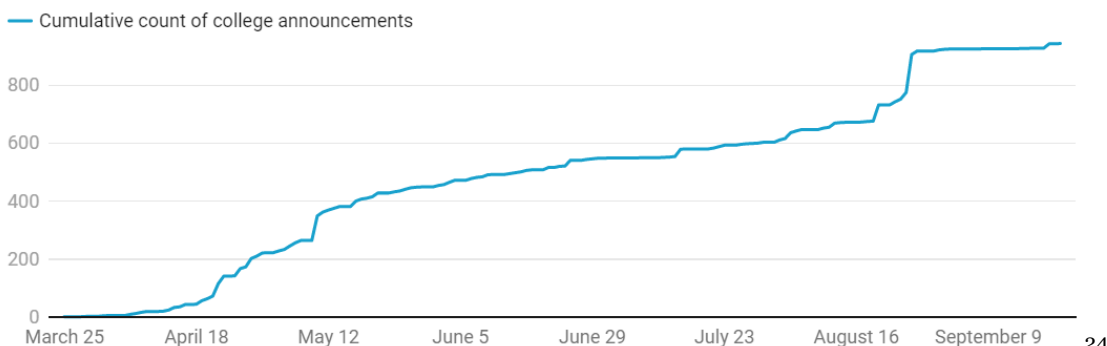


Figure 4, Credit: *Chronicle of Higher Education*

The American College Health Association—an organization advising colleges and universities on their health protocols—has called on all higher education settings to adopt vaccination requirements, citing both the “enormous impacts on our college

²³ <https://www.wftv.com/news/local/12-people-chose-quit-their-jobs-instead-get-vaccine-documents-reveal-why/EAGV5GTU45CGXA5SLQFLZVREOY/>

²⁴ <https://www.chronicle.com/blogs/live-coronavirus-updates/heres-a-list-of-colleges-that-will-require-students-to-be-vaccinated-against-covid-19>



communities, including economic, academic, social, physical, and mental health consequences for students, faculty, and staff.”²⁵

The Association stated “vaccination requirements for students attending institutions of higher education in the United States are not new and are time-tested. Most U.S. campuses have had vaccination requirements for decades, recognizing that vaccination is a primary strategy for advancing campus health by preventing outbreaks of vaccine-preventable diseases.”

There have been numerous examples of colleges and universities across the country that have implemented vaccination requirements and seen significant increases in vaccination rates.

Rutgers University was the first institution of higher education in the nation to implement a vaccination requirement, promulgating a policy in March 2021. The University achieved a vaccination rate of 99.5% across its 71,000 students.²⁶

Indiana University requires its more than 100,000 students and employees to get the COVID-19 vaccine. The University’s requirement has been upheld by the U.S. Supreme Court, and today the flagship campus has a 93% vaccination rate for students and staff.²⁷

The University of Illinois Chicago has taken a number of creative approaches to getting its students vaccinated, including extensive education and outreach, incentives, and on-campus vaccinations. As of today, the University has achieved a 96% vaccination rate among staff and students.²⁸

Following FDA approval of the Pfizer-BioNTech vaccine, Louisiana State University required vaccination for students, faculty and staff. Students who do not submit proof of vaccination, or produce a weekly negative COVID-19 test can be removed from enrollment. In mid-September, 1,200 of the 34,000 enrolled students had yet to comply with the school’s COVID-19 protocol, so a text message was sent to those students informing them of the rules and the potential they would be disenrolled. After that, the pool of students not in compliance was reduced to just 78 people.

Over the summer, the University of California system implemented a COVID-19 vaccination requirement for all 280,000 students and 227,000 faculty and staff across

²⁵ https://www.acha.org/ACHA/About/ACHA_News/ACHA_Recommends_COVID-19_Vaccination_Requirements_for_Fall_2021.aspx#:~:text=Therefore%2C%20where%20state%20law%20and,inclusing%20exemptions%20for%20medical%20contraindications.

²⁶ <https://www.rutgers.edu/president/my-weekly-message-on-fall-planning-vaccination-rates-town-halls>

²⁷ <https://www.washingtonpost.com/education/2021/06/23/colleges-covid-vaccine-mandates-divide/>

²⁸ <https://covid-dashboard.uic.edu/view/>



10 campuses. For example, UC Berkeley, now boasts a vaccination rate of 98% of graduate and undergraduate students, as well as 91% of faculty and staff.²⁹

Finally, COVID-19 vaccination requirements are well accepted by most students. An Axios study from August 2021 of a representative sample of students nationwide showed that 73% of students said their schools should implement a vaccination requirement for those on campus.³⁰ Similarly, a Kaplan survey from September 2021 found “overwhelming support” among college students for vaccination requirements on campus, showing 72% supported colleges requiring students to be vaccinated if they want to attend in-person classes, and that support for vaccination requirements among college student is up since they last surveyed in May 2021.³¹

K-12 Schools

For those too young to be vaccinated, it is especially critical that they are surrounded by vaccinated people. Studies released by the CDC found that the rate of hospitalization for children was nearly four times higher in states with the lowest vaccination rates compared to states with high vaccination rates.

Even one unvaccinated teacher can lead to dozens of sick school children. Vaccination requirements give comfort to the parents across the country that rely on schools and early childhood centers to keep their children safe every day. And when coupled with strategies we know work to keep unvaccinated children under 12 years old safe—like mask wearing, maintaining physical distancing, and improving ventilation—vaccination requirements are a key way that we can keep our students safely learning in-person where they belong.

Currently, 10 states, as well as the District of Columbia and Puerto Rico, have vaccination requirements for K-12 school staff, including California, Connecticut, Delaware, Hawaii, Illinois, New Jersey, New Mexico, New York, Oregon, and Washington.

Where states and school districts have implemented vaccination requirements for school staff, they have seen strong results.

The Hawaii Department of Education implemented a requirement beginning August 30 that all unvaccinated employees be tested once a week for COVID-19. As of late September, about 89% of its salaried employees are fully or partially vaccinated against

²⁹ <https://coronavirus.berkeley.edu/dashboard/immunization/>

³⁰ https://fbdb594b-a366-4562-bad6-31eaf606c53a.filesusr.com/ugd/b2ee84_55ca98a2c7664c37acd8de2bb590f0f6.pdf

³¹ <https://www.kaptest.com/blog/press/2021/09/20/survey-finds-72-percent-of-college-students-support-vaccine-mandate-on-campus-mask-mandate-support-at-near-80-percent/>



COVID-19.³² Prior to the requirement, the state teacher's union estimated 80% of teachers were vaccinated.³³

In July, prior to New York City putting into place vaccination requirements, only about 60% of New York City Department of Education educators and staff were vaccinated.³⁴ Following implementation of a full requirement for all 150,000 school staff across 1,600 public schools, the City reported that more than 95% of all K-12 teachers and staff were vaccinated by the city's deadline.³⁵ This included an increase of about 10 percentage points for all staff over the course of the final weeks before deadline to submit proof of vaccination, leading to a significant uptick of last-minute vaccinations.³⁶

In mid-August, Portland Public Schools, the Portland Association of Teachers, and the Portland Federation of School Professionals came to an agreement that all employees—including classroom teachers, school-based and central office staff—will be required to be vaccinated against COVID-19. As of early October, with the vast majority of staff reporting, 95% of staff is fully vaccinated, and another 1% of staff has received at least one shot.³⁷

Educators and their unions overwhelmingly support vaccination requirements. The National Education Association released polling in September indicating that nearly 90% of members are vaccinated, and nearly two-thirds (65%) support their school district requiring school staff to receive COVID-19 vaccinations.³⁸ Polling from the American Federation of Teachers also demonstrates that two in three of its members support vaccination requirements. Educators of color voice particularly strong support for a requirement—78% among Black members, 73% among Hispanic members—as do those with someone in their household at high risk (75%).³⁹

³²

<https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/HIDOE-school-office-vaccinations.aspx>

³³ <https://bigislandnow.com/2021/08/03/doe-teachers-union-clash-over-return-to-in-person-learning-exclusively/>

³⁴ <https://www.thecity.nyc/coronavirus/2021/7/25/22590939/nyc-delta-covid-wave-hospitalized>

³⁵ <https://www.nytimes.com/2021/10/04/nyregion/vaccine-mandate-teachers-nyc.html>

³⁶ <https://slate.com/news-and-politics/2021/09/vaccine-mandates-work-misleading-mass-firings-headlines.html>

³⁷ <https://www.pps.net/Page/18151>

³⁸ <https://www.nea.org/about-nea/media-center/press-releases/nea-survey-nations-educators-are-vaccinated-and-school-last>

³⁹ <https://www.aft.org/press-release/poll-90-aft-members-are-vaccinated-and-two-thirds-support-vaccine-mandates>



Vaccination Requirements Economic Impact

In Brief

Increased vaccination coverage could result in as many as 5 million American workers going back to work⁴⁰ and would have a positive impact on communities of color who were disproportionately impacted by the economic consequences of COVID.⁴¹ And because high rates of COVID-19 cases can also suppress economic demand—particularly for in-person services businesses—increased vaccination rates that keep cases, hospitalizations, and deaths low likely increase consumers’ confidence to travel, dine out at restaurants, and engage in other in-person commercial activity.

As documented in earlier sections of this report, vaccination requirements have repeatedly been shown to increase vaccination rates among workers by 20 to 25 percentage points, and in some cases by significantly more. More than three out of four (75.5%) working-aged adult Americans are currently in the labor force, so increasing the share of workers who are fully vaccinated by 20 to 25 percentage points could vaccinate an additional 30 to 38 million working-age Americans, cutting the total share of unvaccinated Americans roughly in half. This could have a major effect on case rates, hospitalization rates, and death rates—preventing future waves of the virus from having as significant an effect as occurred during the spread of the Delta variant. At an individual level, unvaccinated people are more than five times as likely to get a symptomatic case of COVID-19 and more than 10 times as likely to be hospitalized or to die from COVID-19.

The economic rationale for vaccination requirements follows from the effect of vaccinations on health outcomes. Higher vaccination rates will keep more workers safe, healthy, and on-the-job, reducing worker morbidity and mortality as well as worker absenteeism both for the newly-vaccinated workers and people who work with them. In turn, safer and more vaccinated workplaces will likely have a positive impact on worker productivity, increase participation in the labor market, and increase consumer spending by diminishing the actual and perceived health risks of COVID-19. The bottom line is that increased vaccination rates through requirements enables a faster and stronger economic recovery.

As University of Michigan economist Justin Wolfers has noted, “Viewing [President] Biden’s vaccine mandate as simply economic policy, it’s surely the cheapest and most powerful economic stimulus ever enacted.” Wolfers went on to explain that “People are

⁴⁰ <https://www.gspublishing.com/content/research/en/reports/2021/09/13/cd67a3b5-bb9e-4659-b605-6618d5aa825f.html>

⁴¹ <https://www.brookings.edu/blog/up-front/2021/09/02/a-hot-labor-market-wont-eliminate-racial-and-ethnic-unemployment-gaps/>



more likely to work when they feel safe.”⁴² Mark Zandi, chief economist at Moody’s Analytics, has similarly stated that “more vaccinations means fewer infections, hospitalizations and deaths, which in turn means a stronger economy.”⁴³

Avoided Health and Economic Costs

Since the first case of COVID-19 was recorded in the United States in January 2020, COVID-19 has claimed more than 700,000 lives in America alone. Studies have shown that over 90% of those hospitalized were unvaccinated.^{44, 45}

Unvaccinated Americans are more likely to miss work due to illness and less likely to recover from COVID-19. In May and June of this year 2% of adults aged 18 to 44 could not work because they or a family member had COVID-19.⁴⁶ In early September, 4.6 million Americans reported not working because they were either caring for someone—or sick themselves—with COVID-19.⁴⁷ That is an increase of 2.8 million compared to late June, before the spread of the Delta variant.

Furthermore, the pandemic has imposed health costs on Americans who do not fall ill with COVID-19 but who need medical care for other reasons. When hospitals reach capacity with unvaccinated COVID-19 patients, people are more likely to be turned away or to receive lower-quality care, putting health and life at risk.⁴⁸

Increased Job Creation and Labor Force Participation

In addition to the 4.6 million workers not working because they or someone they cared for had COVID-19 in September, another 4.7 million Americans reported in September having been laid off or furloughed due to the pandemic, with 2 million reporting their employer was temporarily closed due to the pandemic and another 1.5 million reporting their employer went out of business due to the pandemic.

These survey results are also visible in the economic data. Though the unemployment rate has steadily declined in recent months, it remains nearly two percentage points above pre-pandemic levels, representing about 5.7 million additional unemployed workers relative to pre-pandemic. Nonfarm payroll employment remains about 5.3 million below pre-pandemic levels, and those missing jobs are concentrated in in-person

⁴² <https://twitter.com/JustinWolfers/status/1436300106702233600>

⁴³ <https://apnews.com/article/technology-joe-biden-health-business-coronavirus-pandemic-6ab9a65961289d5415984e2c52c7bb83>

⁴⁴ <https://www.sciencenews.org/article/covid-coronavirus-vaccines-hospital-cases-rates-unvaccinated>

⁴⁵ <https://www.cdc.gov/mmwr/volumes/70/wr/mm7037e1.htm>

⁴⁶ <https://www.cdc.gov/nchs/covid19/rands/work.htm>

⁴⁷ <https://www.census.gov/data/tables/2021/demo/hhp/hhp37.html#tables>

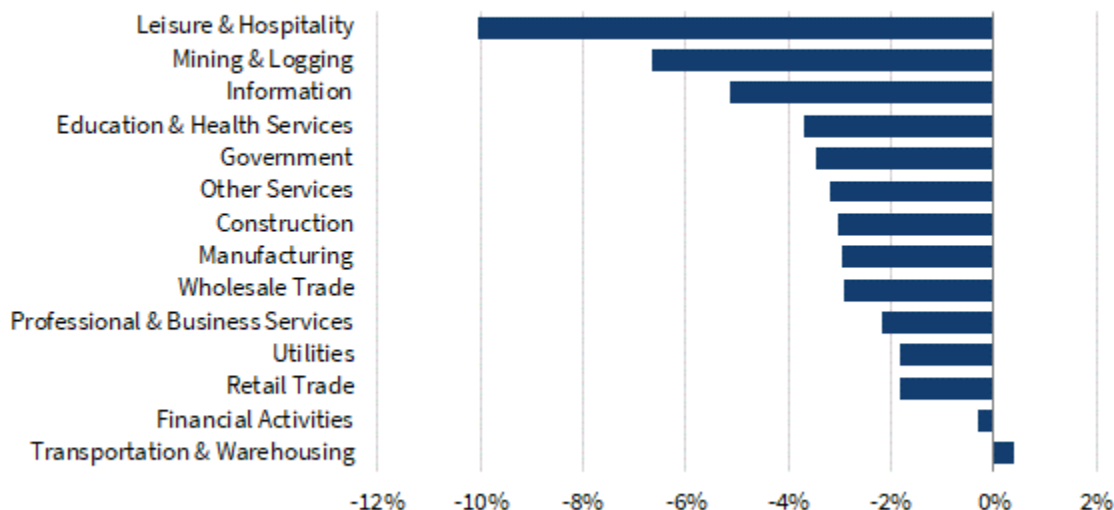
⁴⁸ <https://www.journalofhospitalmedicine.com/jhospmed/article/234348/hospital-medicine/analysis-hospital-resource-availability-and-covid-19>



service sectors where both workers and customers are concerned about their safety, leading to less labor supply and consumer demand. The 1.7 million fewer leisure and hospitality jobs than before the pandemic account for nearly one-third of the total job declines since February 2020 and represent a 10% decline from pre-crisis levels.

Pandemic Employment Gaps Across Sectors

Difference in employment, Feb. '20 to Aug. '21 (percent)



Source: Bureau of Labor Statistics, CEA calculations.

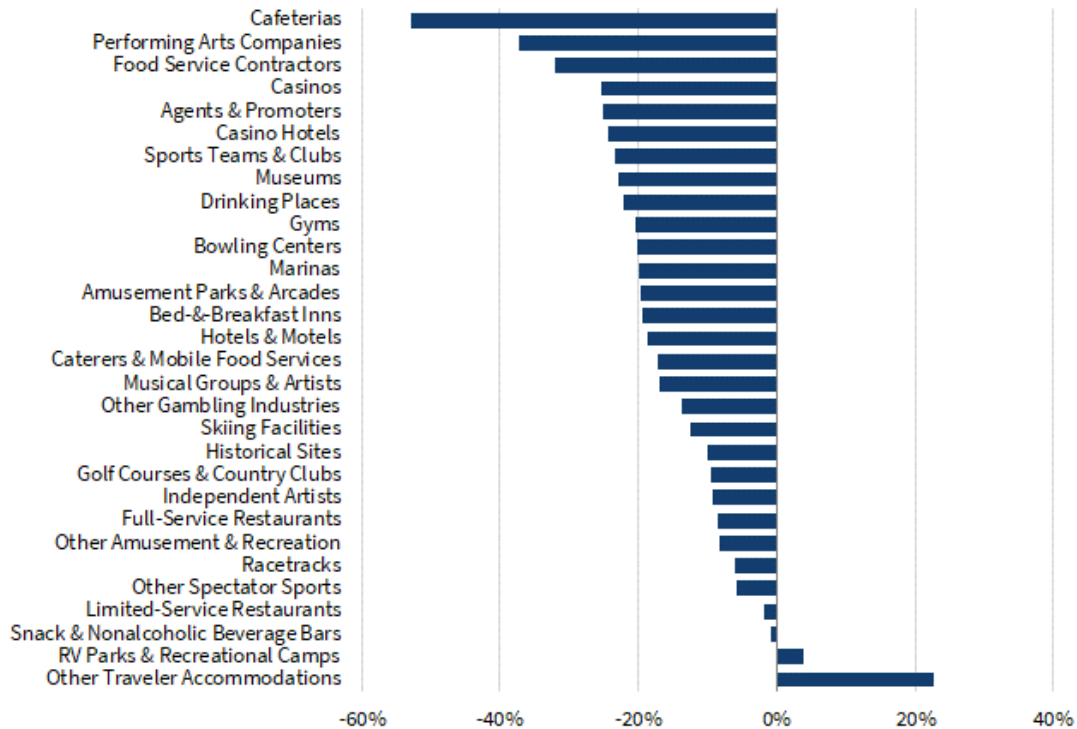
Figure 5

Substantial employment declines persist across nearly all leisure and hospitality industries.



Pandemic Employment Gaps in Leisure & Hospitality Industries

Difference in employment, Feb. '20 to Jul. '21 (percent)

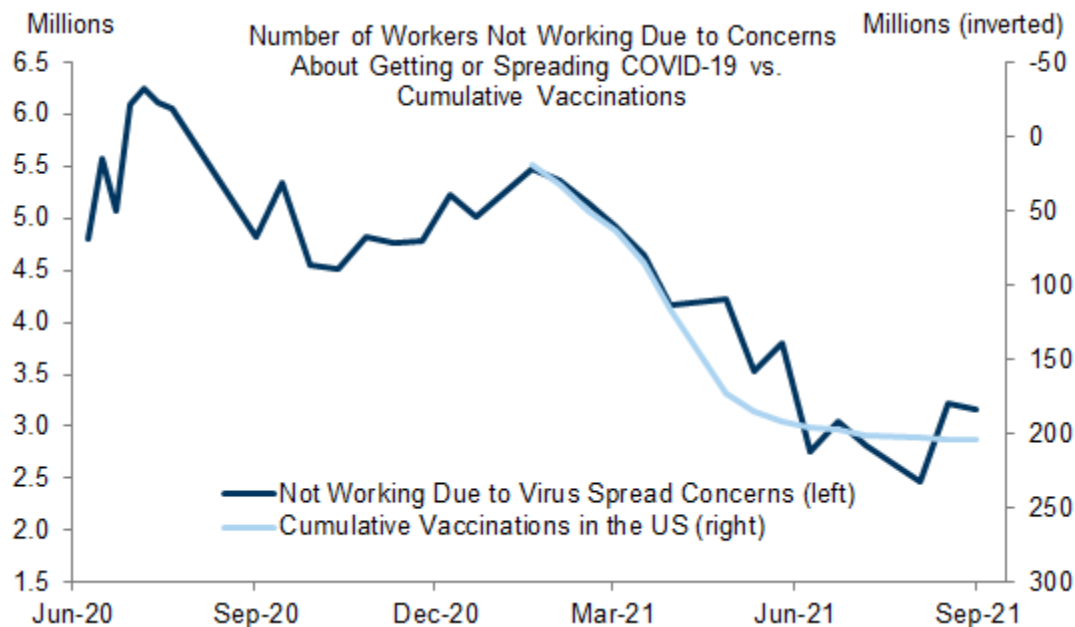


Source: Bureau of Labor Statistics, CEA calculations.

Figure 6

Other measures show similar pandemic-induced shortfalls in employment, with prime-age labor force participation down about one percentage point from pre-pandemic levels and overall labor force participation down about 1.6 percentage points.

As vaccination rates increased throughout the spring, a recent Goldman Sachs analysis showed there was a sharp decline in the number of people reluctant to return to the labor market due to the virus. In that analysis, the authors anticipated “that an increase in vaccination and almost full vaccination at workplaces should encourage many of the 5 million workers that have left the labor force since the start of the pandemic to return.”



Credit: Goldman Sachs

Figure 7

Some employers have been hesitant to require vaccinations without collective action from the government or other employers. One survey, fielded in August 2021, showed that the top three concerns that were cited among employers regarding COVID-19 vaccination requirements were resistance from employees, impact on company culture/morale, and loss of staff.⁴⁹

Government vaccination requirements can help employers overcome barriers to instituting their own vaccination requirements. If one firm requires vaccinations and others do not, workers who refused to get vaccinated can move to the firm that does not require vaccinations. However, if the government calls for vaccination requirements among whole industries or sectors, the risk to employers of employees leaving is mitigated, and the resulting level of vaccination is likely to be higher.

Impact on Consumer Spending

Recent evidence suggests that geographic variation in vaccination rates may be driving regional variations in economic activity. For example, small business employee hours as measured by Homebase, a scheduling firm, grew faster and stayed higher during the rise of the Delta variant in the states that have higher working-age (18-64) vaccination rates, versus states with lower vaccination rates (see figure below). The post-May wedge that has opened up was not present in the months immediately before Delta.

However, note that the damage from increased case rates extends across the country. Hours have been falling in all four groups of states in absolute terms over the past two

⁴⁹ <https://www.littler.com/publication-press/press/littler-survey-employers-increasingly-consider-vaccine-mandates-covid-19>



months, even as the high vaccination states remain relatively better off. That shows that we are truly all in this together—and if we are able to increase vaccination rates across the country consistent with the highest vaccination states, the economic benefits will extend to every community.

US Small Business Hours by State Vaccination Group

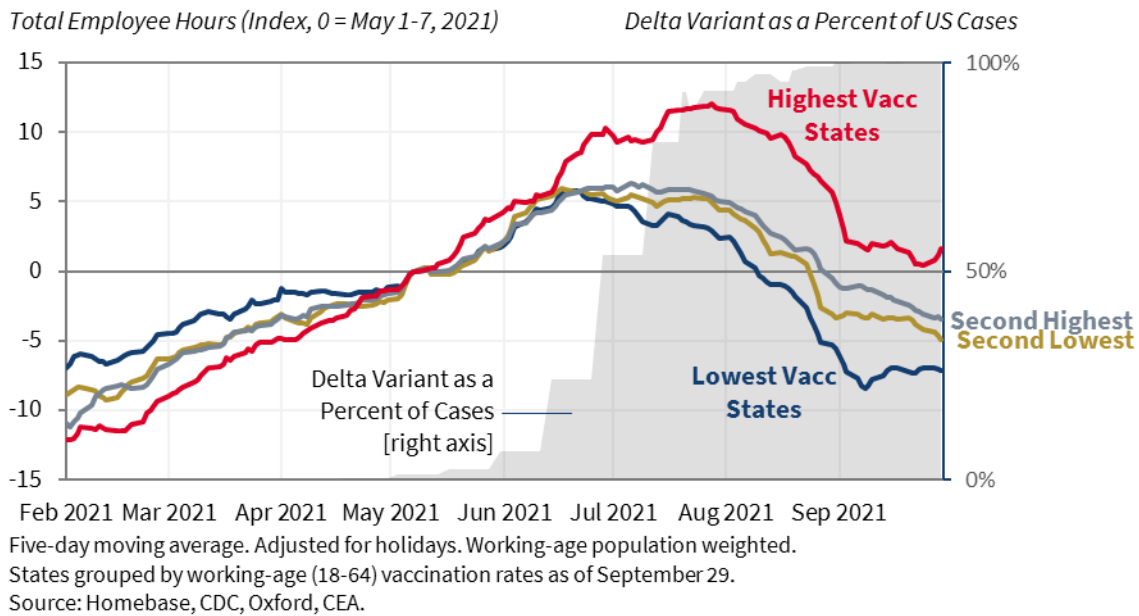


Figure 8

Over the same period, OpenTable reservations have opened up a small gap between the highest and the lowest vaccination states; pre-Delta, the highest vaccination states were relatively middle of the pack in OpenTable reservations (see figure below). But like small business hours, reservations have plateaued or even declined slightly in all four groups of states since July.

The difference between high vaccination states and low vaccination states is 5.9 percentage points between early May and September 29 (i.e., the highest vaccination states had grown 5.9 percentage points closer to pre-pandemic OpenTable bookings than lowest vaccination states.) Similar to the Homebase data, Delta-driven declines extended everywhere, showing that increasing vaccination coverage nationwide will help build consumer confidence and spending and drive growth in every community as well.



OpenTable Reservations by State Vaccination Group

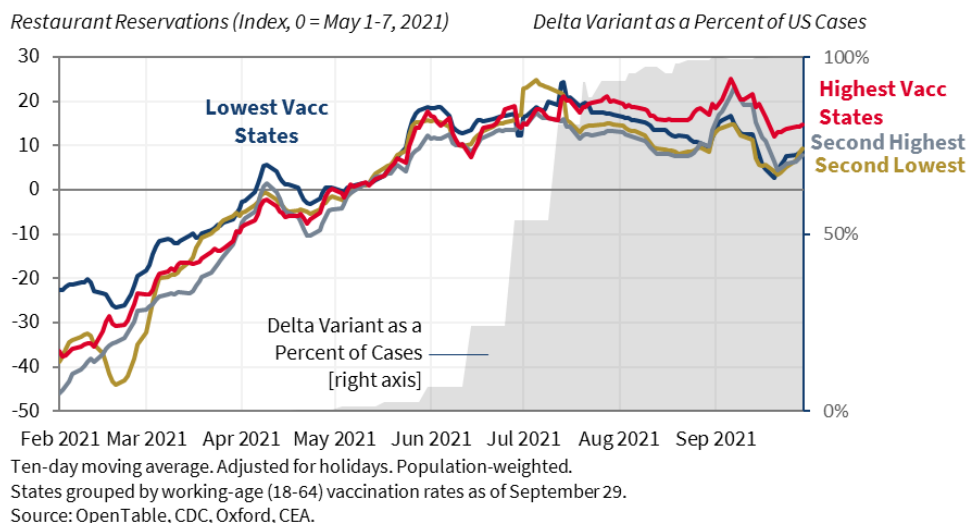


Figure 9

Both of these analyses are consistent with a tangible link between vaccinations and economic activity, but also suggest that common factors, such as media reports of surges in infections, hospitalizations, and deaths, play a role in impacting economic activity too.

Moreover, it is not just the direct impact of COVID-19—sickness, hospitalization, and death—that has economic costs, but the indirect impacts as well, such as consumer fear and social distancing. A 2020 study found that the lion's share of the decline in economic activity early in the pandemic was caused not by lockdowns or other legal restrictions, but by concerns about infection risk.⁵⁰

At the outset of the pandemic, the University of Michigan Consumer Sentiment Index—a measure of consumer confidence—dropped by nearly 30%. It had fitfully regained nearly half of that decline by spring of 2021, but then dropped to a pandemic low during the spread of Delta to about 30% below pre-pandemic levels in August.

For these reasons, economies across the world were severely disrupted by the onset of the COVID-19 pandemic. Before the pandemic, the U.S. Congressional Budget Office (CBO) projected that the U.S. economy would grow by 2.2% in inflation-adjusted terms in 2020, whereas real GDP actually contracted by 2%.^{51,52} Though today the U.S. economy is now bigger than it was just before the pandemic, it is still more than 2% smaller than CBO had projected it would be at this time—the equivalent of about \$450 billion of reduced annual output.

⁵⁰ <https://www.sciencedirect.com/science/article/abs/pii/S0047272720301754>

⁵¹ https://www.cbo.gov/publication/56073#_idTextAnchor074

⁵² <https://www.bea.gov/news/2021/gross-domestic-product-4th-quarter-and-year-2020-advance-estimate>



Economic forecasts for the upcoming fiscal year have been revised down recently, largely due to the spread of the Delta variant.⁵³ Restaurant reservations, hotel reservations, and hotel occupancy have also recently decreased—again, likely because of the Delta variant. In August 2021, growth in nonfarm employment in the U.S. slowed to 235,000—a decline of 73% from the monthly rate of 876,000 from May to July. One should never overinterpret a single month of jobs data; that said, some of the slowdown in the August recovery likely stems from continuing COVID-induced labor market disruption.

⁵³ https://www.nabe.com/NABE/Surveys/Outlook_Surveys/september-2021-Outlook-Survey-Summary.aspx

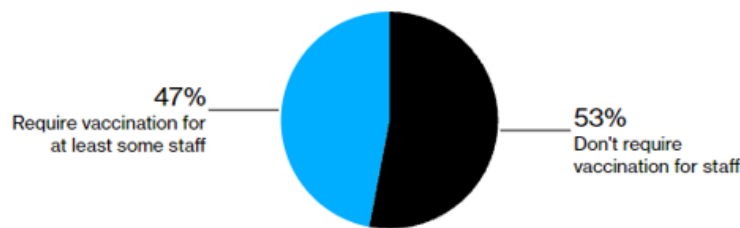


Public Support for Vaccination Requirements

In the days and weeks ahead, it is anticipated that additional organizations will announce vaccination requirements or the results of requirements currently in progress.

Under the President's Executive Order, federal contractors have until December 8 to ensure their workers are fully vaccinated. The Department of Labor and OSHA are moving forward to issue a rule applying to employers with 100 or more workers that will be finalized in the weeks ahead. According to Bloomberg News, as of early September, roughly half of all companies in America with 100 or more employees had announced a vaccination requirement for workers.

Figure 10: Share of companies with vaccination requirements



Source: Company press releases, news stories and Bloomberg reporting

In the weeks since the President laid out vaccination requirements, major companies have taken steps to implement the President's requirements, including 3M, AT&T, and Procter & Gamble. America's largest aerospace and defense companies—Lockheed Martin, Raytheon, and Northrop Grumman—also announced they will move ahead to implement vaccination requirements.

Since the President's September 9 announcement around vaccination requirements, numerous public, non-partisan polls including Fox News, Gallup, and the Associated Press show considerable support for the President's plan to require vaccinations in different settings.

According to Fox News, nearly 60% of Americans support the federal government requiring federal employees to be vaccinated and 56% support businesses requiring workers to be vaccinated or regularly tested. According to Axios, a majority of Americans, 60%—including a majority of voters—support vaccination requirements for federal workers as well as private companies. According to Gallup, roughly six in 10 U.S. adults are in favor of vaccination requirements for federal government workers, employees of large companies, and workers at hospitals that receive federal health care funds.



Americans Favor Worker Vaccine Requirements in Biden COVID-19 Plan		
Now thinking about President Biden's new plan to deal with the coronavirus, do you favor or oppose each of the following elements of that plan?		
	Favor	Oppose
	%	%
Requiring all federal government employees to be vaccinated against COVID-19	60	40
Requiring companies with 100 or more employees to have all their employees vaccinated against COVID-19, or be tested weekly for it	58	42
Requiring hospitals and other healthcare facilities that receive Medicare or Medicaid reimbursement money to have all their employees vaccinated against COVID-19	63	37
Requiring companies with more than 100 employees to provide paid time off for employees to get vaccinated or to recover from vaccine side effects	68	32
GALLUP PANEL, SEPT. 13-19, 2021		

Figure 11, Credit: Gallup



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