

# Mandating COVID-19 Vaccines in Hospitals



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On June 4, 2021, a federal judge denied a request for a temporary restraining order that would have blocked Houston Methodist Hospital (the "Hospital") from requiring its employees to receive one of the currently-available COVID-19 vaccines.

One hundred sixteen employees of the Hospital (the "Plaintiffs") filed suit in the U.S. District Court, Southern District of Texas, after the Hospital enacted a policy requiring its employees to be vaccinated against COVID-19 by June 7, 2021, or be fired. The Plaintiffs moved to enjoin the Hospital from enforcing the vaccination deadline.

According to the Order Denying Temporary Restraint (the "Order"), available [here](#), the District Court found that none of the criteria required to obtain a temporary restraining order were met. The Order explained that a temporary restraining order would disserve the public interest and concluded, "The public's interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences of 116 employees. The employees are not just jeopardizing their own health, they are jeopardizing the health of doctors, nurses, support staff, patients and their families."

This Order is particularly relevant given the number of states that have recently enacted laws prohibiting mandating COVID-19 vaccines. Arkansas recently passed two such bills: House Bill 1547 ([Act 977](#)) and Senate Bill 615 ([Act 1030](#)).

Act 977 prohibits the state, a state agency or entity, a political subdivision of the state, or a state local official (collectively "State Parties") from mandating or requiring an individual to receive a vaccine for COVID-19. A state-owned or state-controlled medical facility may seek approval from the Legislative Council, however, to require that its employees be vaccinated. Moreover, the State Parties are permitted to offer positive incentives to an individual to receive a COVID-19 vaccine, however, these incentives must not add up to "coercion." Coercion may include making the vaccine a condition of education, employment, entry, or services from the state or a state agency or entity. Act 977 also prohibits the State Parties from discriminating against an individual for refusing to receive a COVID-19 vaccine. The prohibitions and requirements under Act 977 will expire two years from the date the United States Food and Drug Administration ("FDA") approves the COVID-19 vaccine. Act 977 was approved on April 28, 2021.

Act 1030 further prohibits the State Parties from requiring an individual to use a vaccine passport in Arkansas for any purpose. Vaccine passports are documentation that show an individual has been vaccinated against COVID-19. Moreover, a vaccine passport cannot be a condition for entry, travel, education or services. Act 1030 was approved on April 29, 2021.

As the country opens up, it is likely more hospitals will grapple with whether they can, or should, mandate that their employees receive a COVID-19 vaccine. To further complicate the issue, on May 28, 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued updated guidance, [available here](#), stating that Equal Employment Opportunity (“EEO”) Laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated from COVID-19, so long as employers comply with the reasonable accommodations provisions of the American with Disabilities Act (“ADA”), Title VII of the Civil Rights Act, and other EEO considerations. (The guidance acknowledges other laws not in the EEOC’s jurisdiction may place additional restrictions on employers.) The guidance also acknowledges that vaccine incentives are permissible, but cautions employers that large incentives may pressure employees into disclosing protected medical information that they otherwise would not want to disclose.

However, the EEOC guidance does not clarify whether this applies only to vaccines with full FDA approval or if it includes vaccines granted Emergency Use Authorizations (“EUA”); the currently-available COVID-19 vaccines were granted EUAs. Under the Federal Food, Drug, and Cosmetic Act, individuals to whom an EUA product is administered must be informed of the option to accept or refuse administration of the product.<sup>[1]</sup>

Notwithstanding all the recent legislation, court orders, and agency guidance, there are still many questions surrounding whether businesses can require their employees receive a COVID-19 vaccine. In Arkansas, public hospitals may not require vaccines, per Act 977. Under current guidance, private hospitals may choose to require vaccines but should exercise caution in doing so to ensure that they do not violate EEO laws or other state and federal laws in the process.

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<sup>[1]</sup> See 21 U.S.C § 360bbb-3(e)(1)(A)(ii)(III).