

The Mandate Maze: Navigating COVID-19 Vaccinations at Colleges and Universities

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As colleges and universities end an incredibly challenging year and begin to prepare for the fall 2021 semester, among the more hot-button issues they are grappling with is whether they can or should mandate that students and/or employees receive COVID-19 vaccinations before returning to campus. Several institutions have already decided to require vaccines, others have opted not to do so, and still others have found themselves caught up in what is becoming an ever more politically charged issue.

Now that COVID-19 vaccinations have become increasingly available to the public, the number of colleges and universities mandating them has soared. Rutgers University led the charge, [announcing](#) in late March 2021 that it would require students to be fully vaccinated before returning to campus in the fall. Fast-forward to today, and approximately [400 campuses](#) have announced student vaccine requirements of some sort.

While these institutions' policies vary in scope and applicability, they largely require that all students intending to return to campus receive a full COVID-19 vaccination prior to beginning the fall 2021 semester. Only a handful of colleges and universities exempt students who do not live on campus. By contrast, some higher education systems, such as the University of North Carolina, have already announced that they will not require vaccinations for the upcoming semester.

The decision whether or not to mandate vaccines is not an easy one, in part because many of the relevant legal issues remain largely untested by courts. Those include what might constitute legally permissible exemptions to any vaccine requirement and methods to confirm that those students returning to campus have indeed received a vaccination. A fundamental question is whether state and federal laws even permit higher education institutions to mandate these vaccines. The calculus will likely vary from state to state and differ depending on whether an institution is public or private.

Legal Gray Area

Courts have not yet weighed in on whether colleges and universities may mandate COVID-19 immunizations. The U.S. Supreme Court upheld an adult immunization mandate over a century ago in *Jacobson v. Massachusetts*, finding that a state was authorized pursuant to its general police powers to require smallpox vaccinations in

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order to protect the general health and safety of its people. More than a decade later, in *Zucht v. King*, the Supreme Court confirmed that states have the power to condition K-12 school attendance on proof of vaccination for certain types of illnesses, such as smallpox.

Today, all 50 states have some vaccination requirements for K-12 students enrolled in public schools, subject to certain medical or religious exemptions. And while contemporary vaccination requirements for adults are often limited to the health care industry, some colleges have recently, and successfully, mandated flu vaccinations to protect their communities during the convergence of the annual flu season and the COVID-19 pandemic. But institutions should note that these mandates have been premised on vaccines with full approval from the Food and Drug Administration (FDA).

At present, the vaccines available in the United States only have temporary emergency use authorization (EUA) and not full FDA approval, and there is little precedent indicating whether colleges' mandatory COVID-19 vaccination policies will receive the same treatment in court. The [EUA statute](#) provides that persons receiving a vaccine available under EUA must only be informed "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks."

Some commentators believe that the option to refuse an EUA vaccination precludes colleges from requiring them, while others argue that the statute contemplates adverse "consequences" for refusal, such as inability to enroll. Beyond the legality of mandating EUA immunizations, questions have arisen surrounding the ethics of requiring a vaccine that has not completed the rigors of full FDA testing and approval.

Despite the ambiguity, many colleges have already announced COVID-19 vaccination mandates, as noted, and more are expected to do so. For example, while no Virginia public universities have issued any mandates as of the publication of this article, the state's Attorney General recently [opined](#) that they may legally condition students' in-person attendance on receipt of a COVID-19 vaccine.

Further, Pfizer and BioNTech recently [announced](#) that they have begun submitting an application for full FDA approval of their COVID-19 vaccine for persons aged 16 and older. If the FDA grants approval in advance of the fall semester, the number of college mandates may rise even higher. The [University of California](#) and [California State University](#) systems, for example, have both proposed requiring COVID-19 vaccines for in-person attendance once at least one such vaccine receives full FDA approval.

Permissible Exemptions

Colleges considering implementing a mandatory COVID-19 vaccination policy must also consider appropriate exemptions for medical, religious or philosophical reasons. Those that have already issued mandates vary in terms of permissible exemptions. While all appear to grant exemptions for medical reasons, some institutions like [Boston University](#) and [Oregon State University](#) offer a religious exemption, and few appear to formally offer a philosophical exemption to the vaccination mandate.

Such an approach is consistent with [state vaccination laws](#) for K-12 students—44 states and Washington, D.C. grant religious exemptions, and 15 states, such as

Arkansas and Washington, permit exemptions for philosophical reasons. **Connecticut** recently became the sixth state to repeal the religious exemption from its immunization requirements for K-12 and higher education institutions, which has already sparked legal challenges.

Proof of Vaccination

After deciding whether to mandate COVID-19 vaccines, college administrators must then consider how to confirm that students have complied with the mandate. At present, there is no universal document or database to confirm that a person has received a COVID-19 vaccination, which has spurred both private and public institutions to study viable solutions beyond the printed “vaccination cards” received at one’s vaccination site. For example, IBM developed its own **Digital Health Pass**, a smartphone-based passport that allows users to save and share proof of health, including their vaccination status. The state of New York’s **Excelsior Pass** is built on the Digital Health Pass and allows businesses to scan a person’s special code to confirm vaccination status without transferring any personal data.

While many colleges have not yet announced how they will confirm students’ vaccination status prior to the fall 2021 semester, some have committed to accept vaccination cards as proof of compliance. For example, **Cornell University** students already use a digital app to share their COVID-19 testing results, and come this fall, will use it to upload their vaccination cards. Any “passport” method an institution chooses to adopt will need to be tailored to avoid running afoul of the many potentially relevant data privacy laws.

State Restrictions

And as some institutions have already learned, colleges’ ability to require proof of vaccination may be constrained in other ways as well, namely by their state governments and their status as a public or private entity. As debates continue over the propriety of vaccine passports, some states—including Texas, Florida and Arizona—have taken executive or legislative action to prevent institutions in their state from requiring proof of vaccination.

Texas’s **executive order** applies to state agencies and organizations that receive public funds, which encompasses public universities as well as private colleges that accept public funding. Florida’s recently enacted **legislation** prohibits the use of vaccine passports entirely. Arizona’s **executive order** prohibits only state and local governments from requiring proof of vaccination, leaving private colleges free to mandate vaccine certification. Other state leaders have introduced bills or otherwise indicated opposition to the passport practice, such as those in Georgia, Pennsylvania and Tennessee.

Looking Ahead

As colleges and universities close out the current semester and look ahead to the fall, the COVID-19 vaccines appear to provide a means for in-person classes and other on-campus activities to take place safely. College and university leaders, however, face a number of critical questions, among them:

- Will we require students to receive a COVID-19 vaccination? If so, by when?
- What exemptions will we allow?

- Will we mandate vaccines operating only under EUA?
- How will we confirm students' vaccination status?
- Does our state even permit such a requirement?

And as they deliberate, colleges should bear in mind the many federal, state and local laws they may need to navigate as they plan their best path toward restoring the congregate nature of their campuses.

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