



2021

SPORTS LAW CLE SERIES

Proskauer»



Sports Law CLE Session 1: Vaccination Policies for Staff, Players & Patrons/Fans

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- Member of Proskauer's Executive Committee; former co-chair of Proskauer's Labor & Employment Department; and co-head of the Class & Collective Actions Group.
- Frequently advises clients in the sports, media & entertainment, and financial services industries.
- Particularly well-known for handling high profile, bet-the-company matters on behalf of significant national employers.



Ask the Audience: Vaccination and Reopening Issues

Ask the Audience!

Which of the following most closely describes the position that your organization has taken in terms of returning employees to the workplace?



- A. Mandatory In-Person:** All (or most) employees are required to report to work in-person.
- B. Mandatory Hybrid:** Some employees are required to report to work in-person; others work remotely.
- C. Voluntary Hybrid:** Employees are generally working remotely, but may work in-person on a voluntary basis.
- D. Mandatory Remote Work:** All (or nearly all) employees are required to work remotely.

Ask the Audience!

For those of you *not subject to a mask mandate*, are you requiring employees to wear masks in public spaces/common areas?

- A. Yes, all employees must wear masks in common areas.
- B. Yes, but only unvaccinated employees.
- C. No, we are not requiring employees to wear masks.



Ask the Audience!

Does your company mandate (or plan to mandate) vaccines for employees before they can return to the workplace?

- A. Yes – employees must be vaccinated.**
- B. Either vaccination or weekly COVID-19 testing.**
- C. No vaccination requirement.**
- D. Unsure.**



Trends in Employer Vaccine Mandates

- In a survey that Proskauer conducted in April, 13% of employers said that they were planning to mandate vaccines. Smaller employers were more likely than larger employers to require vaccinations.
- According to a recent survey:
 - 9% of employers are currently mandating vaccines for some or all employees;
 - 12% of employers are planning to mandate vaccines in the near future; and
 - Only 22% of employers have firmly decided to not mandate vaccines.
- Most employers are encouraging, rather than mandating, vaccinations.
 - According to a survey conducted by Proskauer in April, 75% of employers are encouraging the vaccine.
 - According to a recent survey, 63% of employers are encouraging the vaccine.

Ask the Audience!

For those of you who require (or will require) that employees be vaccinated, what type of proof are you requiring?

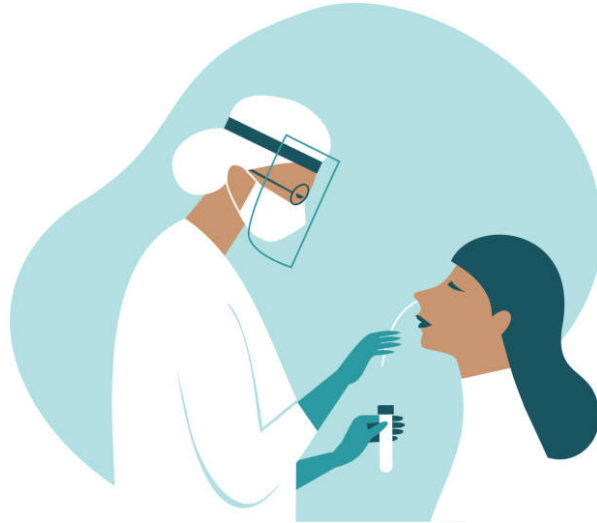
- A. Employees must submit a copy of their vaccination card or other proof of vaccination.**
- B. Employees must present a copy of their vaccination card or other proof of vaccination.**
- C. Employees must sign a form in which they state they are vaccinated.**
- D. None/other.**



Ask the Audience!

Does your company mandate (or plan to mandate) vaccines for *fans/patrons*?

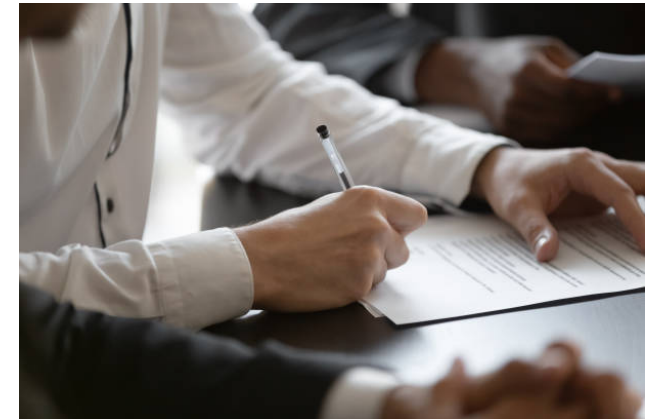
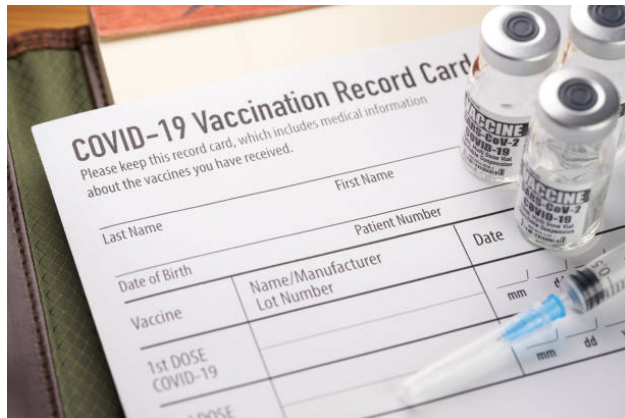
- A. Yes – fans/patrons must be vaccinated.
- B. Either vaccination or proof of a recent negative test.
- C. None.
- D. Unsure.



Ask the Audience!

For those of you who require (or will require) that ***fans/patrons*** be vaccinated, what type of proof are you requiring?

- A. Fans/patrons must present a copy of their vaccination card or other proof of vaccination.**
- B. Fans/patrons must sign a form in which they state they are vaccinated.**
- C. None/other.**





Federal, State, and Local Vaccination Mandates

Forthcoming OSHA Emergency Temporary Standard

- On September 9, President Biden announced that OSHA is developing an Emergency Temporary Standard (“ETS”) that will require employers to:
 1. Ensure that their workforce is fully vaccinated; or
 2. Require unvaccinated workers to provide a weekly negative test.
- Only applies to employers with 100+ employees.
 - OSHA officials have stated that the count will be based on a companywide headcount rather than the number of employees at a particular worksite.
 - Joint employer rules will likely be addressed in the ETS.



Forthcoming OSHA Emergency Temporary Standard *(cont'd)*

- The ETS will likely address who will bear the cost of testing.
 - Reimbursement may be required under **federal** wage and hour law if the cost of the testing cuts into the minimum wage or overtime due to an employee.
 - Reimbursement may also be required under **state** wage and hour laws (e.g., California).
- OSHA will also require employers with 100+ employees to provide paid time off to get vaccinated and recover from side effects.
- According to OSHA, the ETS will be issued “in the coming weeks.”
 - A draft of the rule was sent to the White House on October 12.
- The ETS is likely to allow employers to require vaccinations (without a test-out option), provided that they consider reasonable accommodations.

Key to NYC

- As of August 17, people age 12+ must show proof of at least **one dose** of a COVID-19 vaccine at **indoor** dining, fitness, and entertainment venues.
 - **Indoor fitness** includes: gyms, fitness centers and classes, pools, studios.
 - **Indoor entertainment** includes: professional sports arenas, stadiums, recreational game centers, among others.
- These requirements do **not** apply to:
 - **Outdoor** portions of covered venues;
 - Covered areas in private residential buildings, private office buildings, and schools;
 - Individuals under the age of 12;
 - Individuals over age 12 participating in a school trip or after school program;
 - Individuals making deliveries or pickups; and
 - Individuals entering for a short and limited purpose (e.g., to use the restroom).

Key to NYC *(cont'd)*

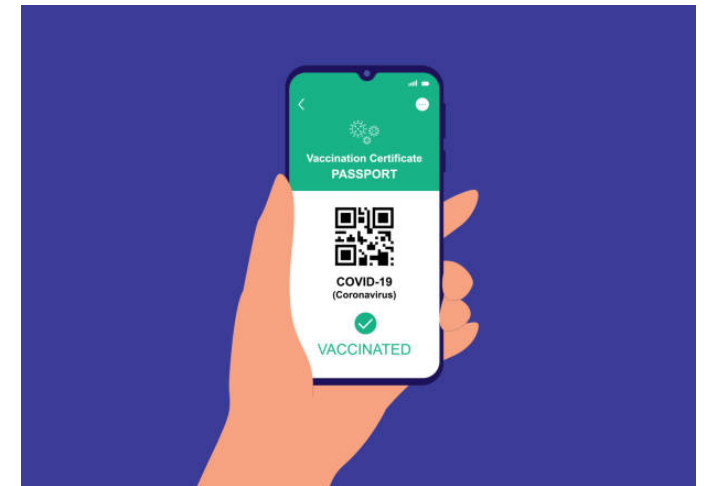
- Application to athletes:
 - Facilities must verify vaccination for professional and college athletes, and individuals accompanying them as part of their employment **unless** these individuals do not live in NYC and are entering the facility to participate in a game.
 - NYC “home team” players and staff must be vaccinated regardless of where they live.
- The requirement applies to employees, patrons, interns, contractors and volunteers (not suppliers or vendors).
- Covered entities must:
 1. Check vaccine status of anyone age 12+ **and** identification of anyone appearing 18+.
 2. Post a sign about the vaccination requirement in a location that is easily visible.
 3. Maintain a written record that describes how you will verify proof of vaccination.
 - The record must be on site and available for inspection.

Key to NYC *(cont'd)*

- Businesses must provide **accommodations** (absent undue hardship) to:
 1. **Customers** who need them because of a disability; and
 2. **Employees** who need them because of a disability, pregnancy, or religious belief.
- **Dixon v. De Blasio** – Plaintiffs are arguing that the program is unconstitutional to the extent that it lacks a religious exemption for patrons.
- Businesses must engage in a cooperative dialogue to determine if an accommodation is possible absent undue hardship.
- Examples of accommodations (**from NYC guidance**):
 - **For employees**: Remote work, work outside or isolated from others, leave of absence.
 - **For customers**: Food to go, virtual exercise class, speak to a rep on the phone.
 - The guidance does not provide examples that would apply in the context of a sports venue.

Key to NYC *(cont'd)*

- Businesses may keep a record of people who have previously provided proof of vaccination, rather than requiring proof every time the person enters.
- The City began **enforcement** on September 13.
 - All City inspectors (regardless of agency) will be inspecting for compliance.
 - An establishment found to be noncompliant may be subject to a fine of \$1,000.
 - Repeated violations may result in increased fine amounts or other enforcement action.



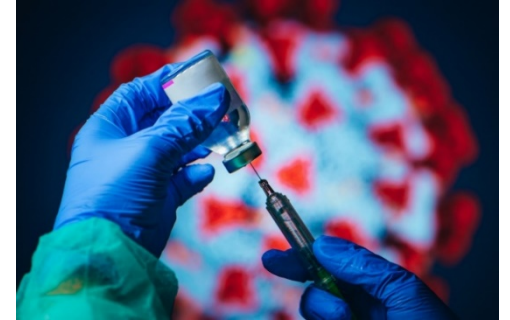
California Rules for Mega Events

- Mega events are indoor events with 1,000+ people and outdoor events with 10,000+ people.
- All attendees (regardless of age) must:
 1. Be fully **vaccinated**; or
 2. Have received a **negative COVID-19 test** conducted within 72 hours before the event's start time (both PCR and antigen tests are acceptable).
- Information must be prominently placed on all communications to ensure guests are aware of testing and vaccination requirements.



San Francisco Vaccine Mandates

- There are two sets of relevant mandates in San Francisco.
- **Vaccine Mandate #1:**
 - Applies to Mega Events and Large Indoor Events.
 - Large Indoor Events: 1,000-4,999 people attending indoors.
 - Mega Events: 5,000+ people indoors or 10,000+ people outdoors.
 - The deadline for staff to be vaccinated was yesterday (October 13, 2021).
 - Visiting team members are not covered, but if unvaccinated, must: (1) remain 6 feet from the public; (2) test negative; (3) wear a mask when not playing; and (4) not enter areas covered by Vaccine Mandate #2.
 - Attendees age 12+ must show proof of vaccination prior to entry.
 - Children under 12 may enter, but must show proof of a negative COVID-19 test.



San Francisco Vaccine Mandates *(cont'd)*

- **Vaccine Mandate #1:** *(cont'd)*

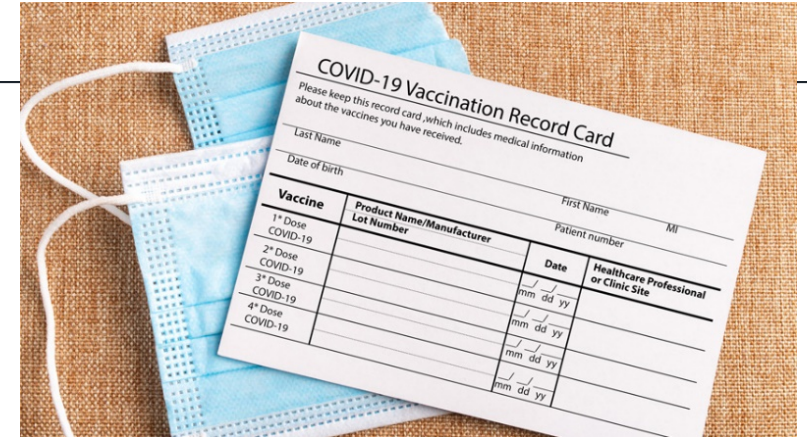
- Accommodations must be offered to the extent required by applicable law.
- However, according to the guidance accompanying the order:
 - “Those patrons who do not provide proof of full vaccination cannot enter indoor areas regardless of the reason they are unvaccinated. And they cannot test out of this requirement even if they have a medical or religious exemption.”
 - “This same rule applies to professional basketball players and other performers.”
 - “To perform at those events in San Francisco, home players must be fully vaccinated by October 13.”
- The host must submit a plan detailing procedures to minimize the risk of transmission.



San Francisco Vaccine Mandates (cont'd)

- **Vaccine Mandate #2:**

- Applies to indoor establishments or events where food or drink is served, gyms, recreation facilities, and other fitness establishments.
- All patrons 12+ must show proof that they are fully vaccinated before entering the facility.
 - Businesses may obtain proof in advance, but must confirm identification at the time of entry.
- As of yesterday (October 13), staff who **routinely work onsite** must be fully vaccinated.
 - Staff who enter or work for intermittent, occasional, or short periods of time are not covered.
 - Covered entities must maintain records of staff vaccination or exempt status.
- Accommodations must be considered for employees and patrons in accordance with applicable law.
- Covered entities must post signage informing patrons and staff of the requirement.



Los Angeles Vaccination Ordinance

- Beginning November 4th, patrons must provide proof of vaccination before entering the **indoor portion** of a covered location.
 - Includes: (1) locations where food or beverage is served; (2) gyms and fitness venues; (3) entertainment and recreation venues (including **sports arenas**); and (4) personal care establishments.
 - There is an exception for “non-resident performers” (*i.e.*, non-resident **athletes or sports teams** and individuals accompanying them as part of their employment).
 - Covered locations must check identification of anyone appearing over 18.
- Exceptions are available for those who cannot be vaccinated due to a **medical condition** or a sincerely-held **religious belief**.
 - Those with exemptions may enter the outdoor portion of the location, or if none, the indoor portion with a negative test conducted within 72 hours of entry (PCR or antigen).
- **Notice** requirement begins October 21st.
- Must develop a **written** policy for implementing and enforcing the mandate.

Summary of Local COVID-19 Vaccine Mandates

	New York City	San Francisco #1	San Francisco #2	Los Angeles
Application	<ul style="list-style-type: none"> Indoor dining Indoor fitness Indoor entertainment and recreation 	<ul style="list-style-type: none"> Mega events Large indoor events 	<ul style="list-style-type: none"> Indoor food service Indoor fitness Indoor recreation 	<ul style="list-style-type: none"> Indoor food service Indoor fitness Indoor entertainment and recreation Indoor personal care
One dose or full vaccination?	One dose	Full vaccination	Full vaccination	Full vaccination
Out of town performers exempt?	Yes, to the extent needed to perform/play	Yes, with additional health/safety protocols	Yes, to the extent needed to perform/play	Yes, to the extent needed to perform/play
Religious exemption for patrons?	No (but subject to litigation)	Cannot allow unvaccinated in regardless of reason	Unclear ("subject to ... requirements ... requiring accommodation")	Yes



COVID-19 Vaccination Policies in Employment

Can Employers Require That Employees Receive a COVID-19 Vaccine?

- **Yes**, according to the EEOC, subject to certain limitations.
- State-level exceptions:
 - **Montana**, where vaccination status is a protected characteristic.
 - **Texas**, where a recent executive order prohibits employers from compelling vaccinations: (1) for any reason of **personal conscience**; (2) based on religious belief; or (3) for medical reasons, including prior COVID-19 recovery.
- ***Bridges v. Houston Methodist Hospital (S.D. Tex. June 1, 2021)***
 - Upheld a hospital's vaccine mandate for employees.
 - Rejected claims regarding: (1) wrongful termination; (2) violation of public policy; and (3) federal law governing medical experimentation.
 - ***Plaintiffs “can freely choose to accept or refuse a COVID-19 vaccine; however, if [they] refuse, [they] will simply need to work somewhere else.”***

A. v. Hochul (N.D.N.Y. Sept. 14, 2021)

- The New York State Department of Health issued a regulation in August that mandates COVID-19 vaccinations for hospital and nursing home workers.
 - The regulation **did not allow** for religious exemptions.
- Plaintiffs filed this 42 U.S.C. § 1983 action alleging that the mandate violates the First and Fourteenth Amendments, the Supremacy Clause, and the Equal Protection Clause of the U.S. Constitution.
- On September 14, Judge David Hurd issued a TRO enjoining enforcement of the vaccine mandate to the extent that it requires denying religious exemptions.
 - On October 12, the TRO was converted to a preliminary injunction.



Confidentiality

- Under the ADA, **employee** medical information, which includes information about an employee's vaccination status and accommodation requests, must be:
 - Kept confidential; and
 - Stored separately from other personnel records.
- Courts have found violations of the ADA's confidentiality requirements when:
 - Employers have shared medical information with a colleague with no supervisory authority over the plaintiff;
 - An employer merged the employee's medical records with personnel files upon termination; and
 - The employer left a doctor's note regarding an employee uncovered on a desk where others could view it.

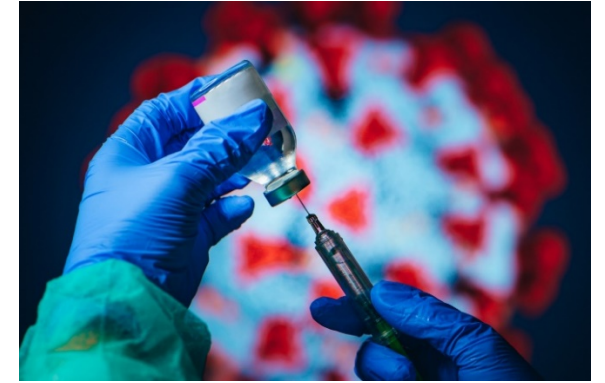




COVID-19 Vaccination Policies in Employment: Reasonable Accommodations

Reasonable Accommodations

- Employers must provide reasonable accommodations:
 - For known **disabilities** of employees; and
 - For an employee's sincerely held **religious beliefs**.
- Employers may be obligated to provide a **disability-related** accommodation if the employee has:
 - An impairment that is a contra-indicator to the COVID-19 vaccine.
 - A mental disability that would be exacerbated by a mandatory vaccination.
 - An allergy or sensitivity to the vaccine.



Religious Accommodations – Overview

- Title VII defines “religion” broadly.
 - Includes “all aspects of religious observance and practice as well as belief,” and not just practices that are mandated or prohibited by a tenet of the individual’s faith.
 - Protects beliefs, practices, and observances with which employers may be unfamiliar.
 - Religious beliefs may be non-theistic, and may include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.
 - The EEOC instructs that employers should ordinarily assume that an employee’s request is based on a sincerely held religious belief.
- However, Title VII does **not** generally protect political, social, and economic philosophies (and personal preferences).

Religious Accommodations

- Beliefs that courts *have found to be sincerely held religious beliefs* warranting of accommodation include:
 - Employee refused to let employer scan their hand because it gave the employee the “Mark of the Beast.”
 - Employee would not counsel homosexual clients because doing so was immoral based on belief that it is “immoral to engage in same-sex relationships.”
 - Employee would not work on Saturdays because it went against Seventh-Day Adventist observation of the Sabbath.
 - Employee would not attend meetings that began with a prayer because it conflicted with employee’s atheism.
 - Employee could not move to sales territory as required by employer because he needed to live in an active Jewish community.

Religious Accommodations *(cont'd)*

- Beliefs that courts **have found to not** warrant accommodation include:
 - Employee refused to receive flu vaccine because of a Buddhist teaching and a belief that the vaccine “would do more harm than good.”
 - Employee refused to receive the flu vaccine because she believed it contained impurities but admitted she would likely receive it if it was “scientifically proven” effective.
 - Employee refused to get the mumps vaccine because of his vegan beliefs and the use of a chicken embryo in the vaccine’s development.
- San Francisco Department of Public Health provided these examples of beliefs that state and federal courts have held are not religious:
 - Fear of possible side effects from immunization;
 - A desire to live a “healthy” or “pure” lifestyle;
 - Opposition to vaccination due to veganism; and
 - Distrust in the government or the science supporting vaccination.



Examples of Accommodations

- Employers can only bar an unvaccinated employee (entitled to an accommodation) from the workplace if no effective accommodation exists.
- **Examples** of accommodations:
 - Requiring the use of a mask or other types of PPE;
 - Requiring the employee to work at a social distance from others;
 - Requiring the employee to work a modified shift;
 - Submitting to **periodic testing** and/or maintaining a temperature log; and/or
 - Reassigning the employee to a vacant position that does not require vaccination.
- There is no obligation to provide the accommodation of the employee's choice, so long as a reasonable accommodation is offered.

Limits on the Duty to Accommodate

- Employers do not have a duty to provide reasonable accommodations that would impose an “**undue hardship**” on the employer.
 - **ADA standard:** Significant difficulty or expense incurred by the employer.
 - **Title VII standard:** More than a *de minimis* cost or burden.
- Employers may deny **disability-related** accommodations where there is no available alternative that alleviates the “**direct threat**” posed by an unvaccinated employee.
 - **Direct threat:** A significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.
 - In assessing this risk, the EEOC notes that employers should consider the number of other employees in the workplace who have received the vaccine.



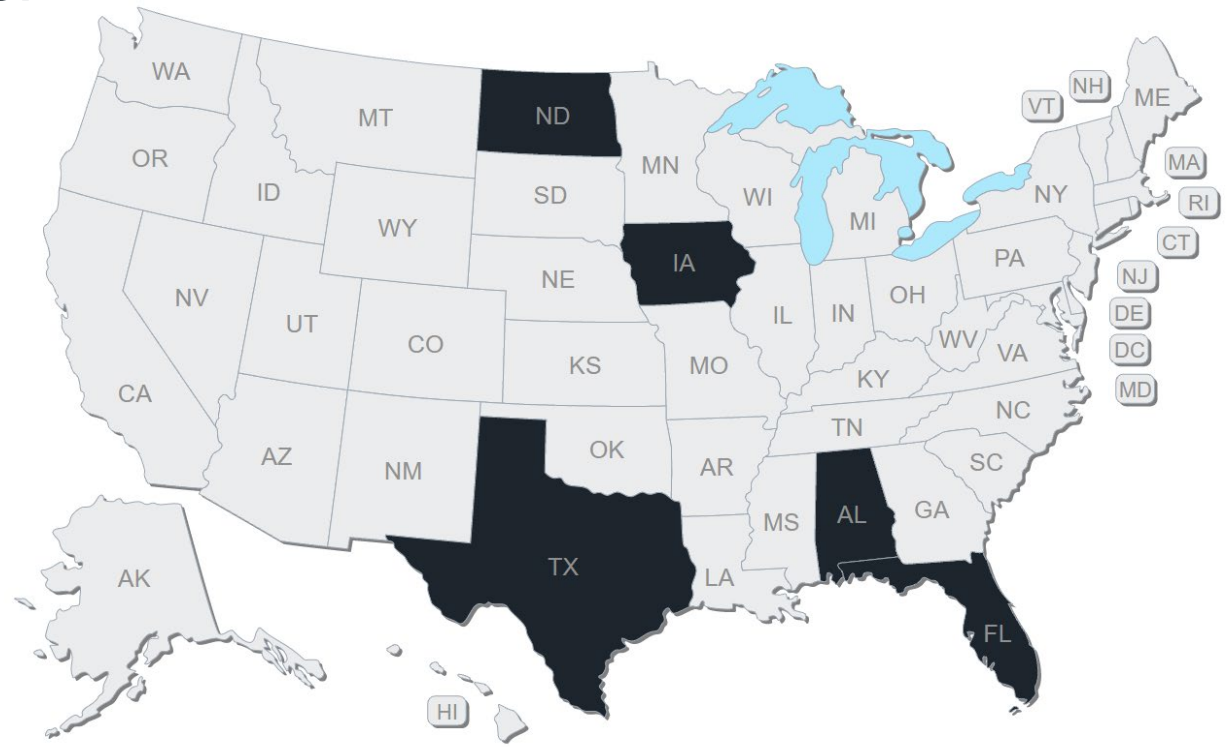
COVID-19 Vaccination Policies for Fans/Patrons

Can COVID-19 Vaccines Be Required for Fans/Patrons?

- **Yes**, in most jurisdictions.
 - Tickets are generally viewed as revocable licenses, and the licensor has the discretion to place certain terms and conditions on such tickets.
 - Sellers should clearly and conspicuously state the policy on the tickets to ensure purchasers understand the condition of entry.
- Under Title III of the ADA (places of public accommodation), **reasonable modifications** must be considered for those who cannot be vaccinated because of a disability.
 - Modifications are **not** required where (1) the program constitutes a legitimate safety requirement, or (2) it is necessary to prevent a direct threat.
 - A requirement to produce a negative COVID-19 test would be a potential modification that would give fans who are unable to be vaccinated equal access.
 - No requirement to consider religious accommodations for fans under federal law.

State Exceptions

- Laws in the following states prohibit businesses from requiring proof of vaccination in order for **patrons and/or customers** to gain access to or receive service from a business:
 - Alabama
 - Florida
 - Iowa
 - North Dakota
 - Texas
 - These laws, however, currently do not apply to **employees**.
- 
- A map of the United States with states colored in light blue, dark blue, or black. The dark blue states are North Dakota, Iowa, Texas, and Florida. The black states are Alabama and Georgia. The light blue states include Washington, Oregon, Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Nevada, California, Utah, New Mexico, Oklahoma, Kansas, Nebraska, South Dakota, Minnesota, Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, New York, Vermont, New Hampshire, Maine, New Jersey, Delaware, Maryland, Virginia, West Virginia, Kentucky, Tennessee, Mississippi, Louisiana, Arkansas, Missouri, Kentucky, Tennessee, North Carolina, South Carolina, and Georgia. The Great Lakes are also shown in light blue.



Vaccination Policies for Fans/Patrons – Confidentiality

- There is no provision in Title III of the ADA that requires confidentiality of medical information from providers of public accommodation.
 - Also generally not subject to HIPAA, which only applies to certain “covered entities.”
- All states have data breach laws that should be considered when collecting any personal information from fans/patrons.
 - Disclosure of personal information to an unauthorized party may be considered a data breach.
 - A breach of vaccination data, coupled with identifying information, may trigger data breach notification obligations in these states.
- As a best practice:
 - Treat all medical information as confidential.
 - Store this information in a secure manner.
 - Use encryption when storing information electronically.





Recent Developments in Sports and the Law

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October 14, 2021

Proskauer»

Alston v. NCAA

- In June, the Supreme Court handed down a landmark decision in the battle over NCAA rules regarding benefits paid to college athletes.
- While not directly at issue in the case, athletes' ability to profit off of their name, image and likeness has been one of the major consequences of the decision.



Alston v. NCAA

- In 2020, the Ninth Circuit affirmed a lower court decision finding that the NCAA violated federal antitrust law when it placed limits on education-related benefits schools could provide to athletes.
- The decision was seen at the time as opening the door to other potential benefits previously foreclosed under NCAA rules.



Alston v. NCAA

- History of rules regarding benefits to athletes:
 - In 1948, the NCAA's "Sanity Code" authorized schools to pay tuition.
 - In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry."
 - In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another.
 - In 2014, the NCAA announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance.

Alston v. NCAA

- NCAA and conferences argued that “amateurism” rules were vital to what made college sports special.
- Players countered that the NCAA and schools are not exempt from antitrust laws—that is an issue for Congress, not the courts.

“Maintaining that distinct character is both procompetitive because it differentiates the NCAA’s product from that of professional sports and can be achieved only through agreement.”
-- NCAA

“If there’s something special about the NCAA that deserves not to be subject to the antitrust laws, that’s a congressional policy determination...[the NCAA has argued] over and over again that each loss was going to hurt college sports and destroy this revered tradition. It’s never happened.”
--College athlete Plaintiffs

Alston v. NCAA

- Writing for a unanimous Court, Justice Gorsuch rejected the NCAA's arguments.
 - Supreme Court decision in *NCAA v. Board of Regents of Univ. of Okla.* not binding.
 - “The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law. That review persuades us the district court acted within the law’s bounds.”

“The NCAA is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of antitrust laws – but that appeal is properly addressed to Congress.”

- Justice Neil Gorsuch

“Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.”

- Justice Brett Kavanaugh, concurring

Post-Alston Developments

- Individual conferences introduced their own rules.
- Both the SEC and the Big 12 announced that universities can provide up to \$5,980 in education-related benefits each year.
- That number is a ceiling—individual universities have discretion as to their own rules.



Post-*Alston* Developments: Name, Image and Likeness (“NIL”)

- Following *Alston*, the NCAA announced it would allow college athletes to profit for the use of their names, images, and likenesses, suspending all applicable NIL rules.
- Governed by patchwork of state laws – no federal framework for NIL.

“In just the few months these laws have been in effect, this patchwork approach to NIL has created serious inequities among student-athletes and athletics programs. We already are hearing from athletics programs giving evidence of a negatively changed recruiting landscape.”



Post-Alston Developments: Notable NIL Deals

- College football players from big-name programs like Alabama, Auburn, Miami, and Clemson cashed in with deals.
- Ranging from large brands like Nike, CashApp and Bojangles to local brands such as a restaurant in Baton Rouge called Small Sliders and a Tampa moving service called College Hunks Hauling Junk.
- These deals range from tens of thousands of dollars to near seven figures.



Cash App



Post-Alston Developments: Notable NIL Deals

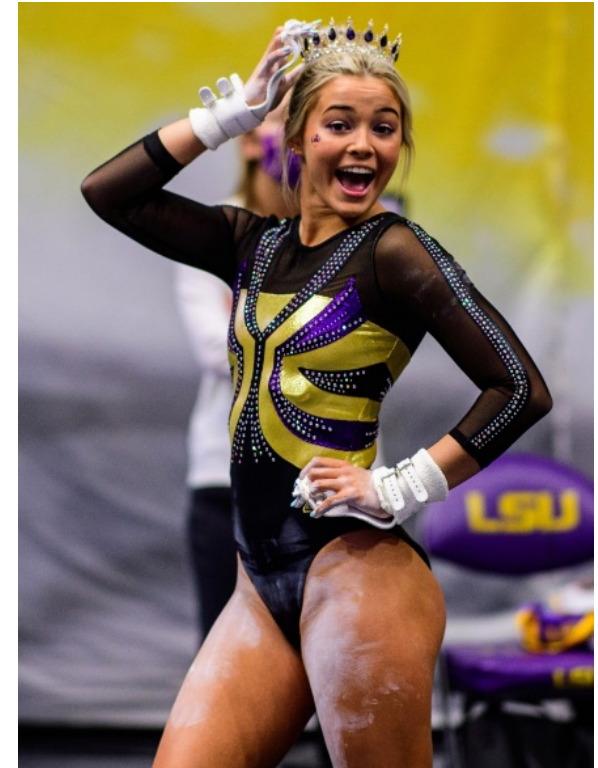


Alabama Quarterback, Bryce Young

“Our quarterback already has approached ungodly numbers—I'm not going to say what they are—and he hasn't even played yet. Hasn't even started. It's almost seven figures. And it's like, the guy hasn't even played yet. But that's because of our brand.”
--Alabama Coach, Nick Saban

Post-Alston Developments: Notable NIL Deals

- Olivia Dunne—gymnast at LSU
 - Currently the most-followed collegiate athlete across combined social media platforms: TikTok (4.5 million followers) and Instagram (1.3 million followers).
 - NIL experts estimate she has been able to monetize that following into more than one million dollars in brand deals.
 - Exclusive brand partnership with active-wear brand Vuori.
 - Long-term deals with, e.g., American Eagle, PlantFuel and Bartleby



Post-*Alston* Developments: Notable NIL Deals

- Others have launched business ventures. For example, two brothers who play basketball for Nebraska launched a sponsored podcast.
- Lexi Sun, a Nebraska volleyball player, now has her own clothing line.



Post-Alston Developments: Notable NIL Deals

- Haley and Hanna Cavinder, twins who play basketball for Fresno State, have a shared TikTok account valued at \$520,000 annually and a shared YouTube channel valued at \$600,000 annually.
- Barstool Sports launched an effort to sign athletes as “Barstool Athletes” to help sell Barstool merchandise.



College Athletes and Unionization: Justice Kavanaugh

“And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes? Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. ***Or colleges and student athletes could potentially engage in collective bargaining*** (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues.”



--Justice Kavanaugh, concurring opinion in *Alston*

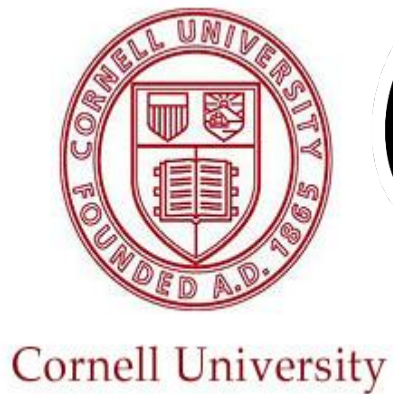
College Athletes and Unionization: The NLRB

- September Memo from the NLRB General Counsel:
 - “Prosecutorial position that certain Players at Academic Institutions are employees under the Act.”
 - “[M]isclassifying such employees as mere ‘student-athletes’, and leading them to believe that they do not have statutory protections is a violation of” federal labor law.
- Applies to private colleges and universities.
- Potential joint employer liability for NCAA and conferences.



College Athletes and Wage/Hour Laws

- *Ralph Johnson, et al. v. NCAA, et al.* (E.D. Pa)
 - Court denied motion to dismiss, holding that the complaint plausibly alleged that athletes were employees.
 - Judge rejected the schools' argument that the athletes were not employees under a U.S. Department of Labor Field Operations Handbook that says there is no employment relationship for students engaged in extracurricular activities.
 - Instead, the court relied on seven-factor test articulated by Second Circuit in *Glatt*.



COVID-19 – Insurance Coverage

- Multiple cases in the sports and entertainment industry seeking coverage from insurers for COVID-19-related losses.
 - University of Pennsylvania tracking project: More than 2,000 coverage cases filed since March 2020 generally.
- Language of policies:
 - “Physical loss or damage” to property.
 - “All-risk” policies
 - Exclusions for viruses or other communicable diseases
- State law issues



COVID-19 – Insurance Coverage

- Example: Philadelphia Union
 - More lost revenue than years prior because it won its first-ever title and could not capitalize on championship.
 - Fans not allowed in 18,500-seat stadium.
 - Continental deemed the steps “preventative.”
 - Policy contained no language addressing “virus” or “disease,” but does exclude damage by “microbes,” which the team argues means “living organisms” and not viruses.
 - Continental has since amended the policy to include a virus and disease carve-out.



COVID-19 – The Rose Bowl and the City of Pasadena



V.



**Pasadena Tournament
of Roses Association**

The City of Pasadena

COVID-19 – The Rose Bowl and the City of Pasadena

- COVID-19 forced the Pasadena Tournament of Roses Association to move the Rose Bowl to Texas.
- City of Pasadena referred to the game in an Instagram post, and Pasadena Mayor, Victor Gordo, claimed that the city shared the Rose Bowl trademark and that the game belonged to the city.



The single objectionable Instagram post, a throwback Thursday (“#TBT”) showing an old program and using the hashtag #RoseBowl.

COVID-19 – The Rose Bowl and the City of Pasadena

- Tournament of Roses sued the City of Pasadena in California federal court:
 - City’s Instagram Post infringed on its trademark
 - Declaration that it had the right to move the game in the event of future force majeure events
- Court dismissed both claims
 - Instagram post “nominative fair use”
 - Declaratory judgment not ripe

Federal Court Dismisses Angel Hernandez's Bias Suit

- Angel Hernandez filed a lawsuit against Major League Baseball in 2017.
- Hernandez, who is Cuban-born, alleged that he was passed over for crew chief positions and World Series assignments due to his race and ethnicity.
- Alleged claims of disparate treatment and disparate impact under federal, New York State and New York City anti-discrimination laws.

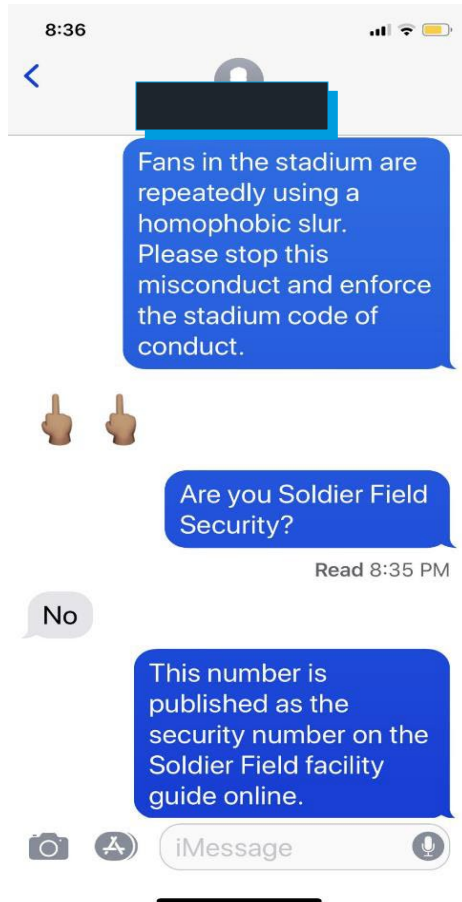


Federal Court Dismisses Angel Hernandez's Bias Suit

- “The explicit reason MLB offers — that according to Torre, Hernandez ‘has not demonstrated the leadership ability and situation-management skills in critical, high-pressure roles on a consistent basis’ — is presented in clear and specific terms. And the comments regarding leadership in Hernandez’s evaluations support MLB’s position that, in Torre’s eyes, Hernandez was not as qualified as the umpires who were promoted.”
- “Hernandez has not shown that MLB treated him less well than other umpires ‘at least in part for discriminatory reasons.’”



Soccer Fans Sue Soldier Field Over Discriminatory Chants



- LGBTQ fans at 2019 CONCACAF Gold Cup match file suit in Illinois State Court after Mexican national team fans hurled chant containing a homophobic slur.
- Fans alleged that the stadium owner violated the Illinois Human Rights Act by letting chants continue.
- Complaint alleges that the Illinois Department of Human Rights later investigated and determined Soldier Field violated the law.
- Plaintiffs seeking cease-and-desist preventing stadium from allowing this conduct in the future as well as damages.

Alleged texts Plaintiffs received when they contacted the number listed for security in the Soldier Field online guide.

The FBI's Non-Investigation into Larry Nasser

- July 14: FBI watchdog finds FBI failed to take action or notify local authorities after tipped off in 2015.
- Nasser would continue to abuse more than 70 athletes before he was arrested by Michigan police.
- Nasser is serving what amounts to be a life sentence.



FBI Director Christopher Wray



L to R: Aly Raisman, Simone Biles, McKayla Maroney, and Maggie Nichols

Horse Racing Ensnared in Sprawling Doping Scheme

- In March 2020, then-Manhattan U.S. Attorney Geoffrey Berman accused 27 people in four indictments related to a widespread doping scandal in the horseracing world.
- Alleged scheme involved the manufacturing and administering of 1,000s of units of PEDs, and systematically defrauding and misleading investigators and regulators.



“These defendants engaged in this conduct not for the love of the sport, and certainly not out of concern for the horses, but for money. And it was the racehorses that paid the price for the defendants’ greed.”

- Former Manhattan U.S. Attorney Geoffrey S. Berman

Horse Racing Ensnared in Sprawling Doping Scheme

- Likely the biggest name involved in the scheme, trainer Jorge Navarro, pled guilty to administering and directing others to administer PEDs.
- The deal carried a maximum sentence of five years and a restitution order of more than \$25 million in fraudulently obtained winnings. Sentencing scheduled for December.
- Navarro's plea came roughly one week after New York-based veterinarian Kristian Rhein pled guilty to drug adulteration and misbranding.



In Other Horse-Doping News: Bob Baffert Fights to Lift Ban

- Medina Spirit won the Kentucky Derby, but was disqualified after testing positive for PEDs.
- The New York Racing Commission banned Baffert from entering horses at the three thoroughbred tracks in the state.
- Baffert filed suit in the Eastern District of New York, alleging that NYRA revoked his license without due process.
- The judge agreed, temporarily blocking the ban.



Joe Pepitone Wants His Bat Back

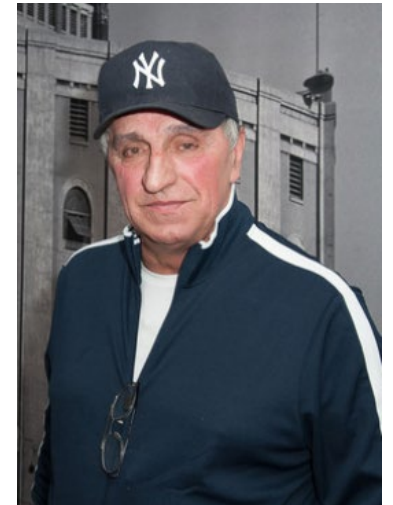
- Former Yankee filed suit in Northern District of New York against the National Baseball Hall of Fame and Museum.
- Peptione demands return of the bat he gave Mickey Mantle, which Mantle then used to hit his 500th career home run. Also seeks at least \$1,000,000 in damages.
- The bat has been at the Hall of Fame since 1967.
- Dropped suit on Monday, October 11.

“Pepitone has visited the Museum several times since May 25, 1967, and was always reassured by Museum staff...that [the bat] was his ‘for the asking’”

- Complaint

“The Hall of Fame owns this historical bat and for more than fifty years, the Hall of Fame has preserved it and proudly put it on display for millions of fans to see as they tour the Museum.”

- Hall of Fame Spokesman, Jon Shestakofsky



Fallout from Astros Sign Stealing Scandal

- Texas Appeals Court reversed lower court decision and rejected proposed class seeking refunds for ticket purchases.
 - "In their consolidated petition, the plaintiffs expressed their disappointment and shame over the Astros' stealing opposing teams' signals," the panel wrote in its opinion. "Claims based on how a sports team plays the game are not cognizable."
- Former Pitcher: "Stealing Signs Ruined My Career!"
 - Michael Bolsinger alleged the Astros violated the Texas Uniform Trade Secrets Act by stealing his signs during one appearance in 2017.
 - Claims he was sent to the minor leagues after the bad outing and his career never recovered.
 - Dropped case in September.

"I don't know if I've had a worse outing in my professional career. I remember saying, 'it was like they knew what I was throwing...I felt like I didn't have a chance.'"

- Michael Bolsinger

"[Bolsinger] had limited professional success before ever facing the Astros, and he had limited professional success after."

-Houston Astros



The (Highly Litigious) Greek Freak



- Milwaukee Bucks star Giannis Antetokounmpo, known as “The Greek Freak,” has filed 51 intellectual property infringement lawsuits, all in the SDNY.



- Has registered “Greek Freak” and has a pending application for “Greek Fr34k.”



- Shows no signs of slowing down, targeting people selling knockoff goods on sites like Etsy and Amazon.

2021

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