



## ISAC VACCINE AND MASKING FAQs

*Dated September 29, 2021 (all links contained herein were last accessed as of this date)*

Throughout the last 18 months, ISAC has strived to keep our member counties informed regarding rapidly changing laws related to the pandemic. Our last FAQ was in July 2021 and can be found here - <https://isacounties.wpengine.com/wp-content/uploads/2021/09/ISAC-FAQ-Electronic-Meetings-Vaccines-July-2021.pdf>. This FAQ covered electronic meetings and vaccines. The electronic meeting information is still our best advice given the current situation (the Governor's proclamation regarding electronic meetings has been allowed to expire). It is worth noting that ISAC will likely pursue legislation (we are still moving through our legislative priority setting process as of the date of this writing) and/or an advisory opinion from the Iowa Public Information Board to give counties more flexibility to hold electronic meetings in order to keep the public informed about local government actions in the most safe, efficient, and cost-effective manner.

### **Q: Can employers require employees to receive a COVID-19 vaccine? (UPDATED September 2021)**

**A:** Yes. Nothing under federal law explicitly prevents employers from mandating employees to receive vaccinations as long as employers are not discriminatory against employees who cannot receive a vaccination due to a disability or a sincerely held religious belief, practice, or observance (ADA, Title VII, Iowa Civil Rights Act). Litigation questioning whether an employer can mandate employees receive a COVID-19 vaccine that is available only under Emergency Use Authorization and has not received approval from the U.S. Food and Drug Administration has been dismissed since the last FAQ that we put out.

### **Q: Are counties required to mandate that their employees receive a COVID-19 vaccine?**

**A:** This is currently unclear. President Biden recently announced that "[t]he Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement" (<https://www.whitehouse.gov/covidplan/>). Iowa is one of 22 states that operates under a state OSHA plan (<https://www.osha.gov/stateplans>), however, state plans must be at least as protective as the federal OSHA standards, so it is likely that the ETS on vaccines from OSHA will apply in Iowa.

We won't be able to give anyone a definitive answer to this until we see the ETS. Of the many questions that remain unanswered, we do not know how employer will be defined (if the employer is the county or a department of the county could make a difference on if there are 100 employees or not) and how employee will be defined. We will definitely follow the ETS and keep you informed as we know more. In the meantime, you may wish to begin discussions with your county attorney on how you might process disability and religious exemptions for the vaccine.

The National Association of Counties (NACo) is also following the ETS and related issues. NACo's FAQ on this topic can be found here - <https://www.naco.org/resources/featured/employer-covid-19-vaccine-mandate-faqs>.

Some county employees may also be covered by vaccine requirements for employees of health care settings that receive Medicare or Medicaid reimbursement. "The Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings,



and home health agencies. This action builds on the vaccination requirement for nursing facilities recently announced by CMS, and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care.” When the CMS interim rule is published, we will provide additional information.

**Q: Does the recent Temporary Restraining Order (TRO) related to school mask requirements have an impact on counties?**

**A:** Not directly, but you may still want to discuss the issue with your county attorney. To summarize the TRO very briefly, this is a court ruling coming out of the U.S. Southern District Court in Iowa as a result of a group of parents suing the state on behalf of their minor children arguing that because of their children’s disabilities (mostly due to being immunocompromised) Iowa Code Section 280.31 (which prohibits schools from requiring masks) violates Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act. Of note, the TRO is not a ruling on the merits of the case, but the judge applied a balancing test and found that it warranted staying enforcement of Iowa Code Section 280.31 until a ruling could be made on a preliminary injunction (the TRO was extended for two more weeks on September 27, 2021). After this, the merits of the case will likely be heard.

Iowa Code Section 280.31 was enacted as a part of the same bill that limited the authority of local governments to enact mask requirements outside of the local government’s own property. However, the TRO is focused only on the provisions of the bill that apply to schools and focuses on the facts that children under 12 are currently ineligible to be vaccinated and the well-established right to a free public education. Counties are, however, also subject to Title II of the ADA, which is at issue in the TRO. Thus, the question becomes if similar claims could be made under Title II of the ADA by disabled individuals if a county does not require masks on county property. If your county does not require masks on county property, you may want to discuss with your county attorney about other reasonable accommodations that could be made for immunocompromised individuals that either are employees of the county and/or have business on county property. As this case progresses, we will continue to alert you to any updates that could impact counties.