

# Mandating Vaccinations and Return to the Workplace

## A Global Overview

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Grow | Protect | **Operate** | Finance

# Welcome

## Today's Speakers



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# Agenda

- Global overview and current landscape
- Mandating vaccination and testing
- Asking for proof of status
- Enforcing mandatory vaccinations/testing and risks
- How can Dentons help?
- Q&A



# Global Overview

**What are some  
general themes?**

**What do you see  
in the market?**

**What's the direction  
of travel?**

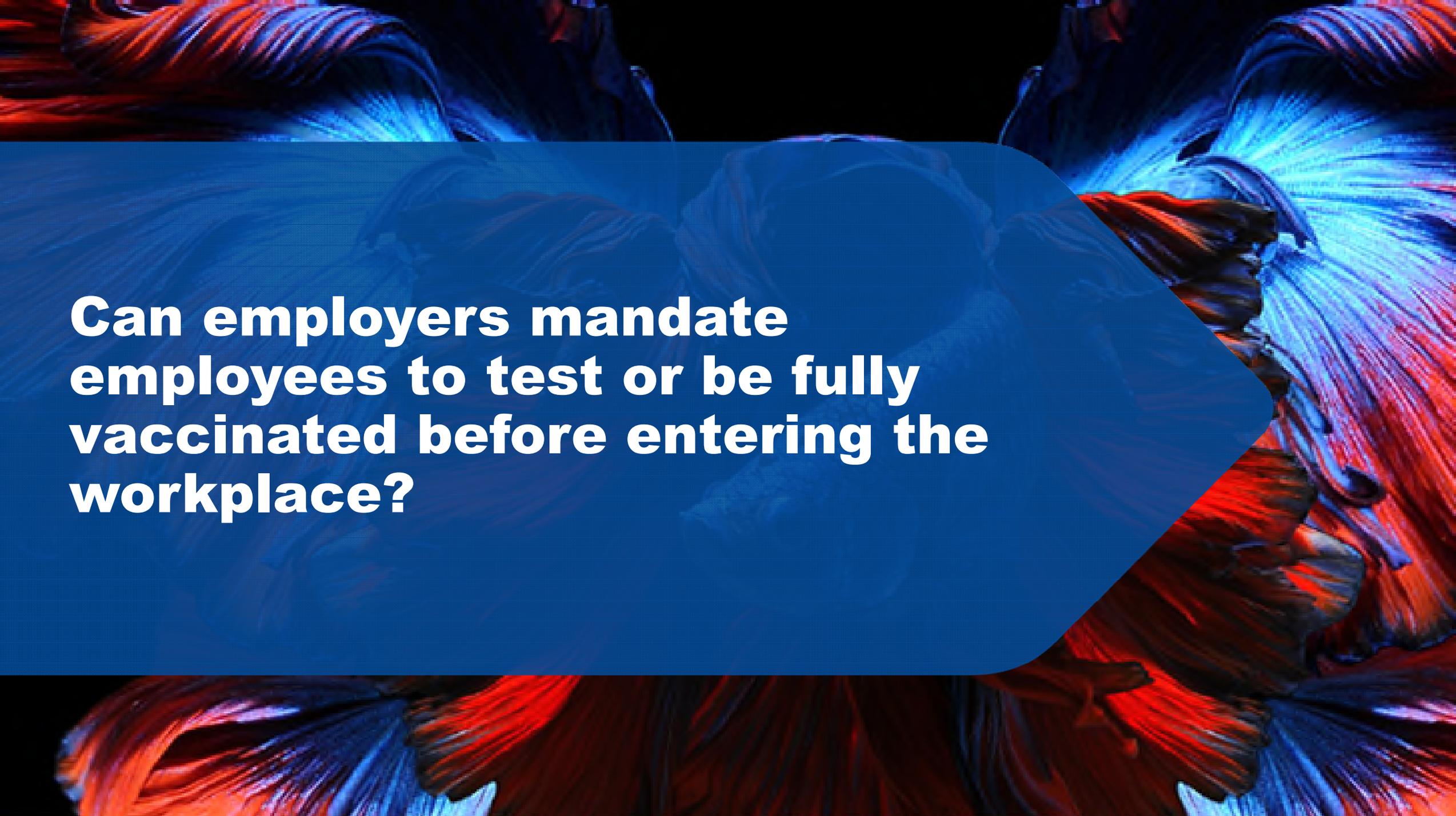
# POLL

**Where it is lawful to do so, have you introduced or are you planning to introduce mandatory vaccination across your offices?**

a.) Yes

b.) No

c.) No, but we have introduced or we are planning to introduce mandatory testing before allowing employees entry into the workplace.

A group of people in a meeting, with a blue semi-transparent overlay containing text. The background shows several people in a meeting, with a blue semi-transparent overlay containing text. The text is white and bold, asking a question about workplace mandates.

**Can employers mandate employees to test or be fully vaccinated before entering the workplace?**

# APAC

- Employers in APAC can impose a vaccine mandate in the sectors/occupations specified by Government mandates (subject to certain exemptions, e.g., medical grounds)
- Without a Government mandate, employers can only impose a vaccine mandate if the circumstances justify it
- Common concepts of reasonableness, proportionality and necessity
- **But** mandating vaccination in Japan, South Korea and Malaysia is currently generally not advisable
- In most APAC jurisdictions (save for South Korea and Japan), a testing mandate may be a reasonable alternative to a vaccine mandate but it is subject to the same considerations as a vaccine mandate

## China

Employees in “limited positions” such as bus drivers and medical personnel and individuals who provide services directly to consumers, as well as students and workers in education are under a compulsory Government vaccine mandate

## Taiwan

Employees in education, economic, labour and health/welfare based institutions are under a compulsory Government vaccine mandate

## New Zealand

Employees in certain roles in health and disability, education, corrections, defence, fire, emergency and police are under a compulsory Government vaccine mandate

# EMEA

- Europe - rather than vaccine or testing mandates, more common approach is by way of COVID 'passporting'
- But different countries operate different scopes for their passporting regime. If an employer / workplace does not fall within a country's regime, mandating testing or vaccination will often be unlawful or limited
- Some European countries have a less structured approach. Specific analysis of the circumstances, and following processes, will be necessary
- Middle East - proportionally more nations have made vaccination mandatory either as a whole or for workplace attendance.
- Africa - broad trend is toward less or no specific legislative or similar infrastructure around vaccination or testing mandates, with position stemming more from wider health and safety obligations

## Europe

**Austria, Germany** – wide passporting approach

**France, Switzerland** – narrower passporting approach

**UK, Netherlands** – less structured, case-by-case approach

## Middle East

Greater prevalence of state-mandated vaccinations  
(**Saudi Arabia, Pakistan**)

Where no state mandate, position often less structured  
(**UAE** – limited passporting)

## Africa

**South Africa** – recent judicial finding in favour of employer mandated vaccine in particular circumstances

**Nigeria** – employer mandated vaccinations appear lawful

# LATAM

## **COVID-19 Vaccination is voluntary in most countries in LATAM**

- Mandating vaccination can be seen as an infringement of constitutional rights to life and physical and intellectual integrity in most LATAM countries
- Due to lack of law in this area, employers should weigh up Individual rights vs. collective rights
- Exception – Vaccination can be mandated in Costa Rica provided that there is a written corporate policy in place stating that COVID-19 vaccination is mandatory to return to the workplace

## **COVID-19 Testing is voluntary in most countries in LATAM**

- Picture is very mixed
- Some countries allow employers to mandate COVID-19 testing provided that it is not invasive or discriminatory, a protocol has been issued, and that data privacy is protected (e.g. Argentina, Brazil, Ecuador, Panama, and Peru)
- In other countries such as Chile, Colombia and Venezuela, an employer can ask an employee to test but consent is needed

# UNITED STATES

## Multiple Mandates Increase Business Chaos (U.S.)

- Federal Employees (stayed)
- Federal Contractors (stayed)
- U.S. Military (Completed)
- Employers with 100+ employees (withdrawn)
- Healthcare Workers (going forward via CMS)
- State Based Mandates (healthcare)
- Local Mandates (healthcare)
- Individual Employer Mandates

## The Rules Can Change Abruptly (U.S.)

- State legislatures are currently in session and are creating new state-based laws
- Ongoing litigation
- OSHA and other agencies can issue new rules and have signalled they will. This includes emphasis on the “general duty clause” of OSHA
- Very dependent on geography and industry type
- Can vary by city

# UNITED STATES

## Dependent on Geography and Industry

Healthcare has a higher number of successful mandates than other industries

### New York

- New York mandates vaccines for healthcare workers with limited medical exemptions
- Employers may mandate vaccinations but if they do so NY takes an “all or nothing” approach and it must apply to all employees and customers

### Florida

- No mandate rules unless state based exemptions for a broad array of reasons are used, including pregnancy, willingness to test, and prior infection. Prohibition on governmental entities such as schools from mandating vaccines
- Florida created a full complaint and penalty process for violations of mandate limitations

### California

- Testing must be made available to unvaccinated employees who have symptoms during work hours
- N95 face masks are available upon request to those who are not fully vaccinated
- If there is a work based outbreak, two sets of testing must be offered to the exposed group during work hours with certain limitations

# CANADA

## Mandatory vaccine mandates

- Federally regulated employers (federal government; airlines; rail)
- Potential to extend to other federally regulated employers (banks; telecoms)
- Some health care facilities and hospitals
- Some long-term care and retirement homes
- Some educational settings

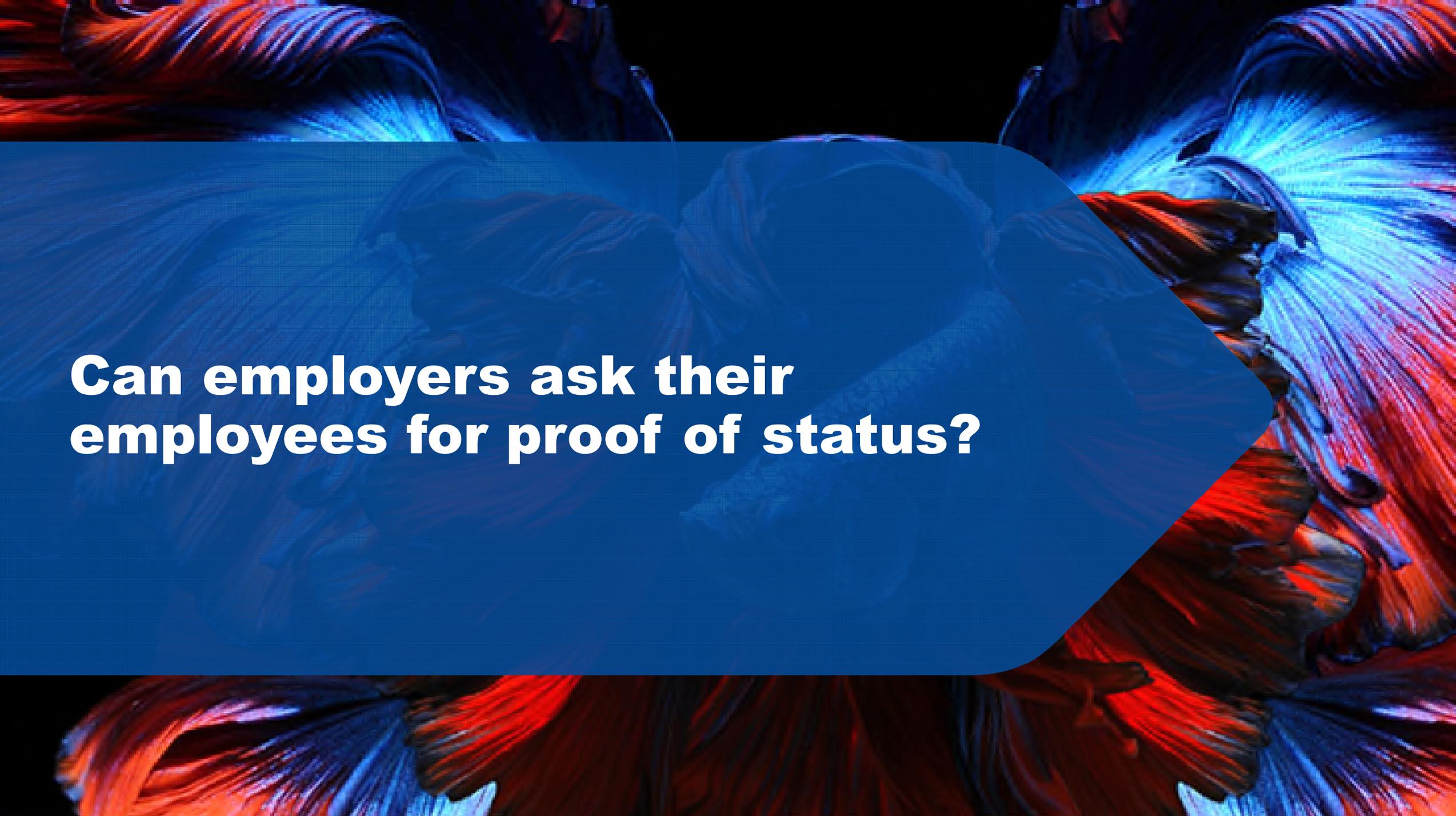
## Optional vaccine mandates

- For most other employers, mandatory vaccination is optional
- The question of whether vaccination should be mandatory depends upon factors such as whether employees can work remotely
- Some Canadian provinces require employers to have vaccination policies in place if employees don't work remotely, but vaccination itself is not mandatory under these policies

# CANADA

## COVID-19 Testing

- Workplaces may mandate testing as a supplement to, or in place of, mandatory vaccination
- Testing is required in certain cases under mandatory vaccination policies when an employee is unable to be vaccinated due to medical or religious reasons

A group of people in a meeting, with a blue semi-transparent overlay containing text. The background shows several people in a meeting, with a blue semi-transparent overlay containing text. The text is in white, bold font. The background is a blurred image of people in a meeting, with blue and red lighting.

**Can employers ask their employees for proof of status?**

# EMEA

## In some LATAM countries employers need to obtain workers' consent to collect and process proof of vaccination (Uruguay, Colombia, Venezuela, Brazil)

- Sensitive health information is subject to privacy protection laws
- Data privacy breach

### Argentina

Employers can ask for proof of status as a preventive measure and in specific cases. Data must be kept confidential

### Chile/Panama

Proof of vaccination must be shown when going to public places

### Costa Rica/ Ecuador

Employers can ask for proof of status provided that employers have a corporate policy allowing it to ask for proof of vaccination status from its employees

### Peru

Employers can ask for proof of status in respect of workers rendering services on-site

# UNITED STATES

## New York

- Proof of vaccination can be required
- Can use Excelsior Pass, SMART Health Cards and other e-docs

## Florida

- Can request proof of vaccination – generally a paper card
- Exemptions to vaccination are very broad

## Tennessee

- Cannot request or require proof of vaccination

# CANADA

## Can proof of vaccination status be requested?

- Yes
- January 2022 Ontario arbitration decision confirmed that an employee could be placed on leave for failing to confirm vaccination status

## Privacy tips for vaccination disclosure

- No more information should be sought than is necessary
- Information should only be used for the purposes for which it was sought
- Information should only be retained for as long as necessary
- Information should not be disclosed more broadly than is necessary
- Information should be protected

# APAC

- Generally in APAC, there is no law prohibiting employers from asking employees about their vaccination status
- However, employees are not obliged to answer
- Disclosure of vaccination status is usually on a voluntary basis
- Employers must comply with relevant data privacy laws

## **EXCEPTION: Singapore**

Employers can collect employee vaccination status information without obtaining consent (on the basis that it is reasonable for the purpose of managing the employment relationship under Singaporean law)

# EMEA

- In nations which have adopted COVID passports, requests as to status may be limited to asking for sight of current passport
- In some European countries it may well be unlawful to ask for any information, or for information in line with the passporting regime
- Rarely permissible in Europe to require specific status information, other than in line with lawful employer mandated vaccination / testing (and even then limitations may apply)
- Africa - broad trend is limited specific legislative framework around vaccination or testing status – wider local law limitations around employee and health data will be relevant
- Middle East - position has similarities with Europe, although the difference in data privacy regimes will broadly mean fewer strictures around requesting status on a voluntary basis

The background of the slide features a crowd of people, possibly at a public event or protest, with their faces partially obscured by a semi-transparent blue overlay. The scene is lit with dramatic blue and red lighting, creating a high-contrast, somewhat somber atmosphere. The text is centered within the blue overlay.

# **Enforcing a mandatory testing or vaccination policy and risks**

# EMEA

Broadly will be high-risk to sanction or dismiss employees who refuse to comply with an employer mandated vaccination or testing policy

State-mandated vaccination / testing regimes, or passporting regimes, will often prescribe sanctions or employer powers in the event of non-compliance

In the absence of prescribed sanctions / powers, exploration of all alternatives (work from home, social distancing) will likely be necessary before sanctioning

## Suspension or unpaid leave

**France** – employers may suspend employees who refuse to comply with passporting requirements, but dismissal would carry risk

## Sick Leave

Some trend toward employers limiting sick pay for unvaccinated staff – likely to be unlawful in some European jurisdictions, but potentially lawful in others

# APAC

- Enforcement is generally difficult in the absence of a Government vaccine mandate
- Refusal of entry to work premises in certain circumstances - BUT this may not be a long term solution, and may not always be justified
- Termination in exceptional cases (e.g., in Australia and New Zealand) - BUT termination may be subject to challenge
- Risk of claims for breach of contract or unlawful/wrongful termination if employers punish those who refuse to comply
- Relief may include monetary compensation or reinstatement

## **EXCEPTION: Hong Kong**

- A large transportation company have imposed a vaccine mandate, but regular testing will NOT be accepted
- An airline has terminated employees who refuse to be vaccinated (without proper medical exemptions)
- The Hong Kong Government (as an employer) now requires all unvaccinated civil servants to provide a negative test result to enter the work place (i.e., Government premises) at their own cost and in their own time every 3 days

# LATAM

- Legislation in LATAM is very protective of workers' rights
- Enforcement of a vaccination policy is medium to high risk in some countries if that results in disciplinary action or termination (Brazil, Chile, Mexico, Bolivia, Colombia, Panama, Argentina, Venezuela)
- Workers' suspension or dismissals may result in
  - ✓ Constitutional injunctions due to discrimination
  - ✓ Claims for wrongful termination
  - ✓ Reinstatement, indemnities
  - ✓ Fines
- Other countries allow employers to issue Covid-19 protocols mandating vaccination, reducing enforcement risk (Costa Rica, Peru, Ecuador)
- Employee's with certain medical conditions, pregnant employees, or employees who are not vaccinated because of religious belief should be considered on a case-by-case basis

# CANADA

**Employees terminated for failure to be vaccinated or tested under a policy must generally be provided with notice or pay in lieu of notice**

**The better option is to place employees on unpaid leave – BUT risk of constructive dismissal claims**

**Accommodation may be required for those with medical or religious reasons – BUT the threshold for employees to be eligible for accommodation is very high**

# CANADA

## Dentons Canada COVID-19 vaccination and related resources

- The wait is over – judicial guidance on employer vaccination policies arrives – [here](#)
- Ontario - Return to the Workplace Toolkit #2 (a.k.a. “Haven’t we been down this road before?”) - [here](#)



# UNITED STATES

- Record collection and assessment
- Assess exemptions through documented interactive process
- What reasonable accommodations can occur (double masking, N95's, etc.)
- Update mitigation plans
- Discipline / termination
- State based discrimination claim (religion / medical)
- State created penalty system relating to COVID-19 vaccine programs
- Employee's pushback

# How can Dentons help?

Experience in conducting global vaccination projects in over 50+ Countries

**GLOBAL  
TRACKERS &  
REPORTING**

**HEAT MAPS**

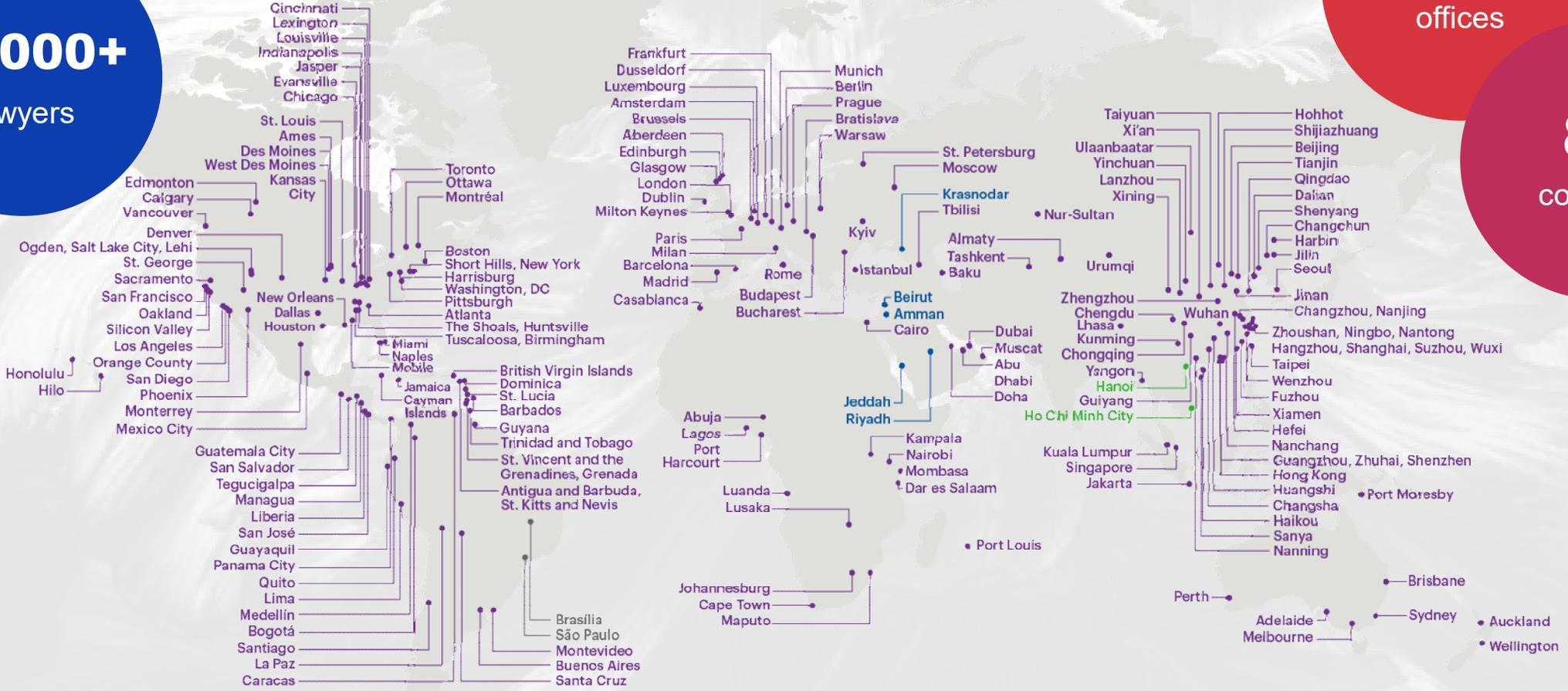
**COUNTRY  
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# Thank You



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