California's failed mandates offer some lessons for President Biden's vaccine mandate

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As everyone who has access to a television or the internet knows these days, the Biden administration recently opened a new front in its war on COVID-19 and many people are quite unhappy with it. "The president directed OSHA to write a rule requiring employers with at least 100 workers to force employees to get vaccinated or produce weekly test results showing they are virus-free," the Associated Press reports. Rather than try to mandate that individual American adults get COVID-19 vaccines, the federal government is trying to use workplace safety laws to strong-arm the nation's employers to do the job for them.

With debates about the constitutionality of President Joe Biden's move, threats of lawsuits flying before the rule has been drafted, and many citizens questioning the federal government's overreach, it is important to note that what's happening now looks similar in some ways to the big government playbook laid down by the South Coast Air Quality Management District (SCAQMD) in Southern California back in 1990. The district, as friends and enemies called it, was ground zero for aggressively expansive government public health regulations in Southern California.

In the halcyon days of the late-1980s and early-1990s, California had severe problems with ambient air pollution and traffic congestion. Although a vast swath of industries had been forced to reduce their air pollution emissions (or leave California entirely) in order to combat the menace, one last stubborn source of emissions remained: the dreaded, selfish, "single-occupant vehicle" drivers who would drive by themselves in their very own cars over California's gridlocked freeways to get to and from work. About 70 percent of total emissions in the South Coast Air Basin at the time came from "mobile sources," mainly cars and light trucks, and that percentage was rising. At the time, it was estimated that by 2010 mobile sources would contribute 95 percent of carbon monoxide emissions, 80 percent of oxides of nitrogen (an ozone

precursor chemical in vehicle emissions), and 40 percent of what were then called "reactive organic gases" — the photochemical smog that covered the Los Angeles skyline at the time.

The dreaded drivers and rideshare-resisters were deemed a sufficient evil that SCAQMD issued a rule to require employers with over 100 employees to find ways to discourage solo-commuters and encourage their employees to carpool, vanpool, or take mass transit to and from work instead. In some ways, it's similar to the approach that the Biden administration is taking to force the vaccine-resistant into the vaccinated carpool lane.

In 1988, the SCAQMD developed Rule 1501 which required large employers (of over 100 employees) to increase the average vehicle ridership (AVR) of their employees to 30%, 50%, or 75% depending on such things as transit availability in their regions, and the district's expectations about their ability to achieve such targets. The average vehicle ridership at the time was 1.13, or basically, one person per vehicle. To give you a flavor of the rule's specificity, the first version of Rule 1501 called for:

"…employers with 100 or more employees to develop and implement a trip reduction plan for those employees who report to work between 6:00 a.m. and 10:00 a.m. These employers would be required to designate a trained transportation coordinator to develop and implement the trip reduction plan. This plan would include an inventory of current measures used by the employer to increase AVR, a verifiable estimate of the current AVR at the worksite, and a list of incentives the employer would commit to undertake which could reasonably be expected to achieve the AVR target within 12 months of plan approval."

The requirements of Rule 1501 grew more stringent over time, ultimately requiring the region's employers, specifically via the personal authority and certification of the company's executive officer— to submit complex, rigidly standardized rideshare plans to SCAQMD. (We're talking about full, four-inch binders with prescribed color-coded tabs and a signed letter by the company CEO.) The requirements also included submitting the results of a week-long ridership survey of employees (to be conducted every six months) that met a district-specified 75-percent-response rate from employees who commuted in the previously mentioned time slot.

As two of my doctoral advisors, the University of California-Los Angeles' Martin Wachs and the University of Southern California's Genevieve Giuliano, demonstrated, the onerous rules created a new job description of "employee transportation coordinators" and an entirely new class of professionals. Ultimately, many employee transportation coordinators would wind up representing the government and other rideshare-promoting groups more than their own company's interests. And many of them went on to work at state air pollution agencies once they moved on from their private-sector origins.

As was the case for many environmental regulations, the employer mandates pioneered locally in California by aggressive air pollution control districts would subsequently be adopted at state and federal levels. In 1991, Federal Clean Air Act Amendments and the California Clean Air Act later ratified the district's approach. The Federal Clean Air Act required that areas with ozone emissions grossly exceeding the Federal Ambient Air Quality Standard for Ozone must require employers of 100 or more employees to achieve a 25 percent increase in AVR levels above a

1991 baseline level by the end of 1996. The 1991 California Clean Air Act reflected the federal mandate but added more specific requirements that severely polluted areas achieve an average of 1.5 or more persons per passenger vehicle during weekday commute hours by 1999. Finally, the California Air Resources Board approved a guidance document that included employer-based trip-reduction measures as strategies to be pursued by air districts in their attainment programs in 1991.

As I noted in my doctoral dissertation back in 1994, Regulation XV was wildly unpopular with large companies in Southern California and while it was not as objectionable to most employees (who could mostly ignore it or accept subsidies that companies were forced to offer them), it was, nonetheless, one of the most hated environmental regulations in California history.

Thanks to California's Brown Act, the state's pioneering sunshine law that requires public access to government meetings, employers, trade associations, and other regulatory critics could regularly vent their spleens about Regulation XV at public hearings of the SCAQMD governing board and the California Air Resources Board. Those review boards, with members appointed by the major political parties and governor, were influenced by the negative public relations stemming from these meetings and eventually watered down subsequent versions of the rule.

The change was also spurred by data emerging that showed the employer rideshare mandates weren't working. For example, as my doctoral research showed, Hughes Aircraft Company, with over 40,000 employees in the region, spent up to $1 million per year to implement massively complicated rideshare incentive programs, only to see single-occupant commuting actually increase. Ultimately, Rule 1501 was de-fanged, and weakened, renamed as the innocuous "Rule 2202," and largely disappeared from sight as a major bone of contention in California air quality regulations. There is a cautionary note here, however. Government regulations are much like vampires: they rarely die, they just go underground for a while before emerging again at a later date.

Using employers to coerce employees to overcome public resistance to government fiats is not new, but it is an ill-advised way for the government to exert its will under the cover of public health and safety rules. If the Biden administration moves ahead with employer-vaccination mandates through the Occupational Safety and Health Administration, it seems certain the backlash will continue to grow. Opposition to California's rideshare mandate led to what may have been the first real popular revolt over an environmental public health regulation in the United States.

Mandates didn't work for California's environmental regulators then, and won't likely work for the Biden administration now. President Biden's COVID-19 vaccine mandate, no matter how well-intentioned to fight the pandemic, can only serve to further politicize and undercut public trust in workplace health and safety regulations and regulators. As legal analyst Walter Olson writes at Reason.com, Congress has armed OSHA "with grossly overbroad powers" but "courts have frequently struck down OSHA actions." The Biden administration could save America from a lot of regulatory, legal and political fighting over its proposed COVID-19 vaccine mandate by recognizing how this mandate approach failed in California in the past.