



What Employers Need to Know About the Vaccination Mandate

SEPTEMBER 27, 2021

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OSHA Emergency Temporary Standard (ETS)

- **What businesses will be covered?**
 - Employers with 100 or more “workers.”
 - Not clear whether “workers” will include only employees.
 - Not clear whether related entities will be required to aggregate their worker headcounts for coverage determinations.
- **What must a covered business do?**
 - Covered businesses must (1) require their “workforce” to be vaccinated or, (2) unvaccinated workers must present negative test on at least weekly basis before coming to work.
- **Subjects are predictable, exact language is not.**
- **Standard effective upon publication in Federal Register (however, states with OSHA “State Plans” will have 30 days to incorporate the ETS into their “State Plans”).**
- **Standard will likely give employers 30 days or more to comply. OSHA may add informal “grace period” during which employers attempting in good faith to comply won’t be cited.**

ETS Timeline

- Employers are not required to take any action to start implementing the ETS until publication. More on that later.
- ETS remains in effect until permanent standard enacted. Permanent standard must be enacted within 6 months of ETS.
- Groups have promised lawsuits challenging ETS.
- Courts will probably “stay” order during challenge. If that happens compliance will not be required until lawsuits finally resolved. Could end up at Supreme Court.
- The 22 OSHA state plan states have 30 days from publication to implement in their states. (practical effect-employers in those states may get an extra 30 days to comply).

Anticipated Legal Challenges

- Occupational Safety and Health Act requires any rule challenge to be filed in U.S. Court of Appeals by any aggrieved party-multiple suits in different courts likely.
- Constitutionality
- Occupational Safety and Health Act requirements for ETS.
 - OSHA must prove:
 - Grave danger
 - Standard is necessary
 - OSHA not required to prove scientific certainty but needs evidence to support

OSHA's Track Record with ETS Attempts

- There have been 10 ETSs in OSHA 50-year history (including 2021 healthcare ETS).
- Courts have fully vacated or stayed ETSs 4 times and partially vacated in 1 case.
- Most recent challenge – asbestos ETS – 19
 - Fifth Circuit (based in Texas) found insufficient evidence of necessity.

Key Subjects for ETS

- **Interaction with other employment laws.**
 - Expect carve-outs for disability and religious accommodations required by law.
 - Will wage law require payment for the test expense and wages for time spent testing?
- **Determining which workers to count for determining ETS coverage.**
 - How will non-employee workers or jointly-employed workers be counted?
 - Count workers of related entities together?
- **Acceptable type(s) of COVID testing**
 - PCR and/or antigen testing?
 - What happens if testing resources are not available?
- **Collecting and retaining vaccination/test records**
 - If records are not retained, how would an employer demonstrate compliance in an audit?
 - Will such records, if collected, be subject to OSHA 30 -year medical record requirements?
- **Applicability to remote/semi-remote workers - unclear**

Who Pays for COVID-19 Testing Expenses?

- Free testing resources are available at no cost.
- Health insurance may cover the cost of tests.
- If neither of these options is available:
 - Federal Law – Private Sector
 - No clear direction from the EEOC on this specific issue.
 - The answer may turn on whether the test is “required” by the employer.
 - Potential argument under the OSHA ETS that test is not “required” by the employer, but rather, by OSHA.
 - Federal Law – Public Sector
 - Agencies must pay.
 - State Law – Varies Across Jurisdictions
 - California, Illinois, etc. – Express testing cost payment rules in place.
 - Missouri, etc. – State law silent on the question of testing cost payment.

Who Pays for COVID-19 Testing?

■ Federal Law – Private Sector, Continued

- Guidance prior to COVID-19 has been that employers must cover the cost of “medical examinations” that are “required” by the employer.
 - Is a COVID test a “medical examination?”
 - Likely. The EEOC has used the ADA medical examination framework as a backdrop for its earlier analysis regarding employer ability to require or inquire about employee COVID tests.
 - Is a COVID test “required” by the employer?
 - If the ETS requires testing or vaccination, and the employee chooses testing, is it “required” by the employer?
 - Alternatively, if the testing is required by OSHA, not by the employer, does that change the analysis?

Is Testing Time Compensable Work Time?

▪ Federal Law – Private Sector

- Existing US DOL guidance provides that when a COVID-19 test is required by the employer, time spent obtaining the test is compensable time—whether during the normal workday or otherwise.
- Employers may argue that, under the OSHA ETS, the test is “required” by the government—not by the employer. However, it is not clear what position the DOL will take on this point.

▪ Federal Law – Public Sector

- Time spent testing is treated as compensable.

▪ State Law – Varies Across Jurisdictions

- California – Express testing time payment rules in place.
- Illinois – Likely, but not expressly stated.
- Other states may have different rules.

How Can Employers Control Costs?

- Utilize free testing resources.
- Utilize health insurance coverage, if applicable.
- Consider testing on-site.
 - Helps control both cost of test and wait/travel time.
 - However, there are other considerations.

Federal Contractors (EO 14042)

- **Federal contractors and subcontractors with a covered contract are required to comply with the following:**
 - Vaccine mandate;
 - Guidance relating to masking and physical distancing; and
 - Designation of a person or persons to coordinate COVID-19 safety protocols at covered contractor workplaces.

Important Definitions

- “Covered contract”
- “Covered contractor employee”
- “Covered contractor workplace”
- Contractor or subcontractor workplace location”

Covered contract

- Any new contract (or subcontract), new solicitation for a contract, extension or renewal of existing contract, and exercise of an option on an existing contract entered into on or after October 15, with limited exceptions.
- Exclusions:
 - Grants;
 - CONTRACTS WITH INDIAN TRIBES;
 - CONTRACTS OR SUBCONTRACTS OF \$250,000 OR LESS IN VALUE (**HOWEVER**, Executive agencies are encouraged to include clauses requiring compliance with EO 14042 in contracts that have a value of less than \$250k even though that is not required by EO 14042);
 - EMPLOYEES WHO PERFORM WORK OUTSIDE THE UNITED STATES;
 - SUBCONTRACTS SOLELY FOR THE PROVISION OF PRODUCTS; and
 - WHERE AGENCIES HAVE ISSUED A SOLICITATION PRIOR TO OCTOBER 8 AND THE NEW CONTRACT IS ENTERED INTO WITHIN 30 DAYS THEREAFTER.

Covered Contractor Employee

- Any full- or part-time employee working on or in connection with a covered contract or working at a covered contractor workplace.
- Questions:
 - What does “in connection with” a covered contract mean?
 - Are employees of covered contractors – who are not themselves working on or in connection with a covered contract – covered?
 - Are remote workers covered?

Covered Contractor Workplace

- A location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.
- Questions:
 - Does it include outdoor locations?
 - Does it include every floor/area in a building, or every building in a multi-building complex, if covered contract employees work only in one area?

Vaccine Mandate

- **Mandates that every “covered contractor employee” be fully vaccinated by December 8, 2021**
 - Except where a covered contractor employee is “legally entitled to reasonable accommodation”
- **Questions:**
 - Is it a HIPAA violation to ask for proof of vaccination?
 - Does prior infection mean a vaccine will not be required?
 - Can a recent antibody test prove vaccination status?
 - Is an attestation adequate proof of vaccination?
 - Does the mandate apply to workplace visitors?

Reasonable Accommodation

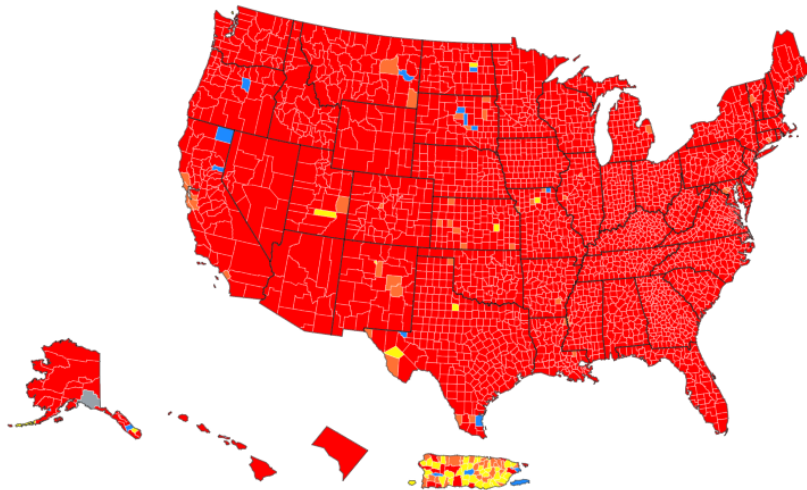
- Vaccine contraindicated because of medical condition.
- Sincerely held religious belief, practice or observance prevents the individual from receiving the vaccination.
- Questions:
 - Are health care providers generally supporting requests for medical exemptions?
 - Are personal/ethical anti-vaccination positions sincerely held religious beliefs?
 - Is a sincerely held religious belief valid if it is not a directive from a religious leader?

Masking and Physical Distancing

- **Covered contractors must ensure that all covered contract employees and visitors to covered contractor workplaces abide by the CDC guidance for masking and physical distancing.**
 - Vaccinated: indoors, in areas of high or substantial community transmission. No physical distancing required.
 - Unvaccinated: indoors, regardless of level of transmission, along with distancing. Outdoors, in crowded settings .

Community Transmission (as of 9/24)

Level of Community Transmission All Counties in US



Community Transmission in US by County

	Total	Percent	% Change
High	2125	65.99%	-28.45%
Substantial	355	11.02%	8.29%
Moderate	386	11.99%	10.65%
Low	284	8.82%	7.36%

[How is community transmission calculated?](#)

● High ● Substantial ● Moderate ● Low ● No Data

Designated COVID-19 Safety Coordinator

- **Duties include:**

- Ensuring that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces.
- Ensuring that covered contractor employees comply with the requirements of the Guidance relating to provide proper vaccination documentation.

Legal Challenges

- **Brnovich v. Biden**. AZ AG and AZ claim that mandates violate:
 - the Equal Protection clause because vaccines are not mandated for unauthorized aliens at the border or already present.
- **Costin v. Biden**. Individuals who are Federal employees, employees of Federal government contractors, and active-duty service members claim that vaccine mandates violate:
 - the Due Process clause and impinges on rights to liberty and to bodily integrity.
 - the Equal Protection clause because exceptions are made based on medical conditions and sincerely held religious beliefs.
 - the Food, Drug, and Cosmetic Act, the Administrative Procedures Act, and the Religious Freedom Restoration Act.

Interim Strategies to Prepare for Vaccination Rules

- 1. Start planning for mandate-related contingencies:**
 - How will you address employees who refuse to get vaccinated or tested?
 - Map out the process that will be utilized for processing accommodation requests.
 - Consider applicable employee privacy laws, such as HIPAA and state laws.
- 2. Start collecting pertinent information from employees, such as vaccination cards.**
- 3. Encourage or require employees to get vaccinated in anticipation of the ETS and/or the federal contractor Executive Order.**



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