

## OSHA Vaccine Mandate

Understanding the Obligations, Legal Challenges, and Best Practices

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HEALTHCARE  
PURCHASER  
ALLIANCE  
OF MAINE



# Outline of Presentation

Understanding the Legal Challenges



What the Rule Provides



Busting Misconceptions



Best Practices for Responding to the Rule

# Understanding the Legal Challenges: Fifth Circuit Decision

- Make up of the Court and why it matters
- Opinion
  - Mandate is Overinclusive – Not every workplace has had COVID cases
  - Mandate is Underinclusive – Why 100+?
  - ETS cannot be a stop-gap measure
  - Mandate flunks a cost-benefit analysis (\$3 billion compliance costs)
  - Constitutional concerns
    - Commerce Clause – “A person’s choice to remain unvaccinated and forgo regular testing is noneconomic activity.”
    - Police Power – Police Power of a state to provide for compulsory vaccination.
- Order: Granted stay pending review; ORDERED that OSHA take no steps to implement or enforce the Mandate until further court order.

## Understanding the Legal Challenges: Multi-circuit Lottery

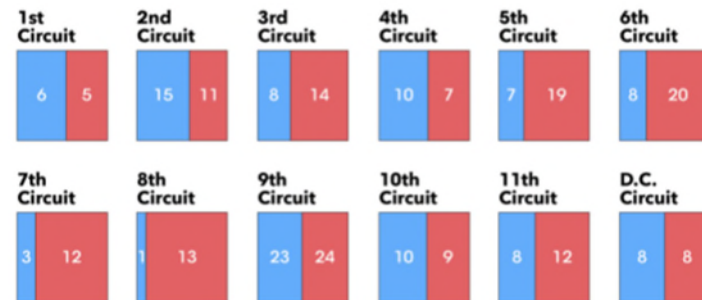
On 11/16 a multi-circuit lottery resulted in the Sixth Circuit “winning” the opportunity to review the legitimacy of OSHA’s ETS for employers with 100 or more employees.

Three panel or en banc?

Supreme Court weigh in?

### Circuit Court Judges Based on Party of Appointing President

Includes both active and senior status judges in each federal circuit



Note: As of Nov. 15, 2021

Bloomberg Law

## State Laws?

- State laws limiting employer authority to require vaccination
  - ETS pre-empts State law
- State laws providing additional protections
  - State law pre-empts ETS

## What Workforces are Covered?

## Who is covered?

- 100 employees (all levels/locations; part time and full time remote and in person)
- Exclude independent contractors and staffing agency workers
- Unionized workforces must cover the ETS standards
- Workforces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors are excluded
- Employers covered by the Healthcare ETS are excluded

# What is required under the ETS?





## Policy on Vaccinations

- No submission requirement to OSHA unless requested
- Natural immunity?
- Content of plan

## Determination of Vaccination Status

- Accepted Documentation
  - The record of immunization from a health care provider or pharmacy;
  - a copy of the U.S. COVID-19 Vaccination Record Card;
  - a copy of medical records documenting the vaccination;
  - a copy of immunization records from a public health, state, or tribal immunization information system; or
  - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- Confidentiality Obligations

## Support for Employee Vaccination

- Provide up to 4 hours of paid time at regular rate
- Cannot require use of personal or sick leave for vaccination
- Can required use of paid sick leave to recover from side effects, but if sick leave and vacation leave are provided, cannot require use of vacation leave if sick leave is exhausted.
- Cannot require employees to use advanced sick leave
- Employers can set a cap on the amount of paid sick leave to recover from side effects but must be reasonable. (up to 2 days).

## COVID-19 Testing for Unvaccinated

- Does not apply to remote workforce
  - If a visit to the worksite, must be tested 7 days prior
- Isolation and face covering is insufficient
- Can use pool testing
- Prior Positive – Testing suspended for 90 days
- Maintain records of each test result in employee medical records
- Who pays? ETS = Employee ; Maine Law = Employer

## What tests constitute a COVID-19 Test?

1. cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the U.S. Food and Drug Administration (FDA) to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);
2. administered in accordance with the authorized instructions;  
**and**
3. not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

## Notification of Positive Test & Removal

- Employees who test positive must promptly notify the employer
  - As soon as practicable before scheduled to start shift or return to work
- Employees who test positive must be removed from the workplace
  - May telework/work remotely
- Time away from work is unpaid under the ETS
- False positive?
- Close contact – No requirement that unvaccinated employees be removed.
- No requirement to do contact tracing
- No requirement to maintain records under ETS – But may have obligations under other statutes

## Face Coverings

- What constitutes a face covering?
- Exceptions to face covering requirement for unvaccinated:
  - Alone with floor to ceiling walls and closed door
  - Employee eating or drinking
  - For identification purposes
  - Respirator or facemask
  - Face covering is infeasible or creates a greater hazard

## Notice to Employees

- Employer's COVID Policy
- Process to determine vaccination status
- Leave and Pay policy entitlements to obtain a vaccination and side effects following vaccination
- Procedure to follow if a positive COVID-19 test or diagnosed with COVID-19 by a healthcare provider
- Procedure for requesting records
- *Key Things to Know about COVID-19 Vaccines*
- Anti-retaliation rights
- Criminal penalties for false vaccination cards
- For unvaccinated employees: Information on COVID-19 testing and face coverings



# Reporting Fatalities and Hospitalizations

- Must be work-related COVID-19 fatality and in-patient hospitalizations
- Does not apply to employees working remotely
- How to?
  - Telephone to OSHA Area Office
  - Telephone to OSHA toll-free (1-800-321-6742)
  - Electronic submission at [www.osha.gov](http://www.osha.gov)
- What Information?
  - Business name; deceased or hospitalized employee; time and location of exposure; description of incident; name and contact info for employer's designated contact person

## Record Availability

- Employees are entitled to see their own COVID-19 vaccine documentation and text results by end of the next business day
- An individual with authorization/consent from that employee can view the records by the end of the next business day after a request
- Provide employees or employee representative with the aggregate number of fully vaccinated employees at the workplace and total number of employees at the workplace
  - Provided by the end of the next business day after a request by the employee

## Effective Date

# When Must the Requirements Be Implemented?

| Requirement   | December 6, 2021 | January 4, 2022 |
|---|------------------|-----------------|
| Establish policy on vaccination (paragraph (d))   | X                |                 |
| Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))  | X                |                 |
| Provide support for employee vaccination (paragraph (f))  | X                |                 |
| Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))  | X                |                 |
| Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))   | X                |                 |
| Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))  | X                |                 |
| Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j)) | X                |                 |
| Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))  | X                |                 |
| Make certain records available (paragraph (l))  | X                |                 |
| Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g))  |                  | X               |

## Best Practices

- The Rule has not been overturned
- OSHA's General Duty Clause remains in effect
- OSHA has now provided guidance as to beliefs as to duties/obligations
- While implementation has been stayed, there are steps that employers can take to protect interests if the rule is upheld



Questions?

Thank You

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