

## Federal Vaccine Mandates: *How to Respond to Ever-Changing Court Rulings*

Understanding the Obligations, Legal Challenges, and Best Practices

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HEALTHCARE  
PURCHASER  
ALLIANCE  
OF MAINE



# Outline of Presentation

Understanding the Legal Challenges to  
Mandates

What the Rules Provide and Who is  
Covered

Busting Misconceptions

Best Practices for Responding to the  
Rules

## Legal Status of Regulations

- OSHA 100+ ETS – Supreme Court Heard Oral Argument Friday
- Federal Contractor Executive Order (EO 14042)
  - Stayed nationwide – Southern District of Georgia (12/7/2021)
  - Additionally stayed in Kentucky, Ohio, Tennessee, Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, Wyoming, Florida, Louisiana, Indiana, Mississippi, Texas, Arizona
- CMS Vaccine Mandate – Supreme Court Heard Oral Argument Friday
  - In effect in 25 states and the District of Columbia
  - Stayed in: Alaska, Arkansas, Iowa, Kansas, Missouri, New Hampshire, Nebraska, Wyoming, North Dakota, South Dakota, Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio
- State/Local Rules and Regulations
  - Legal challenges/standard

# Understanding the Legal Challenges

## OSHA ETS: 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
- Sixth Circuit (12/17/2021) lifted stay – OSHA demonstrated pervasive danger that COVID-19 poses to workers

## Understanding the Legal Challenges Federal Contractor Executive Order

- Procedural issues as to the Executive Order
  - OMB Rule and FAR Council guidance are agency action and exceed permissible agency authority
  - Unreasonable and baseless decisions under the Administrative Procedure Act (APA)
- Constitutional
  - Tenth Amendment
  - Federalism
  - Separation of Powers (state v. federal)

## Understanding the Legal Challenges CMS Mandate

- Limitations on the Secretary's power to protect health and safety of patients
  - Can require handwashing? Yes.
- CMS has clear authority to impose requirements to protect the health and safety of Medicaid and Medicare patients

## State Laws and How They Interact with Mandates?

- CMS & Federal Contractor
  - Pre-empts State law
- OSHA ETS
- 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? OSHA ETS

- 100 employees (all levels/locations; part-time and full-time remote and in person)
- Excludes 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

## Who is Covered? Federal Contractors

- **What Contracts Will Include the Requirements?**

- All new contracts for services awarded on or after November 14, 2021, from solicitations issued before October 15, 2021;
- New orders after November 14, 2021 under indefinite-delivery service contracts;
- All new solicitations for services issued on or after October 15, 2021 (without regard to award date);
- Extensions of existing service contracts after October 15;
- Renewals of existing service contracts after October 15; and
- Options exercised on any existing service contract when the option is exercised on or after October 15.

- **What Other Contracts May Include the Requirements?**

- Contracts or subcontracts for the manufacturing of products;
- Contracts or subcontracts that are under the Simplified Acquisition Threshold;
- Contracts awarded prior to November 14 without regard to when solicitation occurred; and
- Contracts that are not covered by the order because it is under the threshold of the simplified acquisition threshold.

## Who is Covered? CMS Mandate

- Medicare and Medicaid-Certified Provider and Supplier
- All Eligible Staff working in almost all CMS-certified facilities regardless of clinical responsibility or patient contact
- Full-time teleworkers?

# What Does Vaccinated Mean?



## Definition of Vaccinated

- Does not include booster
- Does not include “natural immunity”
- Two weeks out from last required shot (second in two dose and first in one dose)

## What is Required?



## Federal Contractor Executive Order

- **Vaccination and Testing** – Complete COVID-19 vaccination of covered contractor employees by January 18, 2022, except in instances where an employee is legally entitled to an accommodation based on a strongly held religious belief or disability.
- **Masking and Distancing** – Compliance by unvaccinated individuals, including covered contractor employees and visitors, with masking and physical distancing requirements established by the Centers for Disease Control and Prevention (CDC).
- **Designation of COVID-19 Coordinator** – Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

## CMS Mandate

- Vaccine Mandate (Clinical and Nonclinical)
- December 6 application date
- January 4, all vaccinated
- No requirement for pay for time away (unlike former Healthcare ETS)



## OSHA ETS Policy on Vaccinations

- Must be vaccinated or subject to weekly testing
- No submission requirement to OSHA unless requested
- Natural immunity?
- Content of plan

## OSHA ETS – 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

## OSHA ETS - 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 require 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).

## OSHA ETS- 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

## OSHA ETS – 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.

## OSHA ETS – Notification of Positive Test & Removal

- Employees who test positive must promptly notify the employer
  - As soon as practical 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

## OSHA ETS – 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

## OSHA ETS- 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



# OSHA ETS – 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](https://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

## OSHA ETS – 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 OSHA ETS

# When Must the Requirements Be Implemented?

January 10 February 9

X

X

X

X

X

X

X

X

X

X

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



Questions?

Thank You

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