

# Getting the Job Done Right: Vaccines in the Workplace

CLE Seminar for In-House Counsel Webinar Series  
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# Getting the Jab Done

Legal Landscape

## The Great Vaccine Debate What Does The Law Require?

• **Are employers allowed to mandate the vaccine?** Yes, with limitation.

- Medical and religious accommodations (federal and state law - ADA, Title VII, etc.).
- Collective bargaining agreements.
- Conflicting state / city rules.
- Employee resistance / retention.

• **Are employers required to mandate the vaccine?** Potentially.

- OSHA Healthcare ETS
- OSHA ETS (provides test-or-mask option).
- Forthcoming state OSHA rules.
- Federal Contractor Rule
- CMS Rule
- State COVID-19 rules (e.g., California).

• **Should employers require the vaccine?** It depends.

- Is the workforce in a high-risk / high-exposure setting?
- What is the community spread rate?
- What are the potential losses to headcount?
- Will it impact recruiting?
- Consider changing positions and impact it may have.

• **Can employers encourage people to get the vaccine?** Yes, with limitation.

- Incentives (e.g., gift cards, cash payments, raffles).
- Disincentives (surcharge on health insurance).
- Inconvenience (regular testing / masking).
- Discrimination / retaliation claims (EEOC guidance).

## **Getting the Job Done**

OSHA Healthcare ETS, Omnibus ETS, Federal Contractor Rule, CMS Rule



## OSHA Background

- **Stands for** Occupational Safety and Health Administration (OSHA).
- **Part of** the US Department of Labor.
- **Administrator** is Doug Parker.
- **Covers** most private sector employees in all states.
- **22 states** have OSHA-approved State Plans, which are OSHA-approved workplace safety and health programs operated by individual states or U.S. territories. State Plans must be at least as effective as OSHA rules from a worker protection standpoint.
- **Section 5(a)(1) of the OSH Act** requires an employer to furnish a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.
- **OSHA may issue** a "standard" (subject to formal rulemaking, notice, and comment) or an "emergency temporary standard" (ETS).
- **ETS** applies when workers are in grave danger due to exposure to toxic substances or agents determined to be toxic or physically harmful.
- **Validity of an ETS** may be challenged in the federal U.S. Court of Appeals.

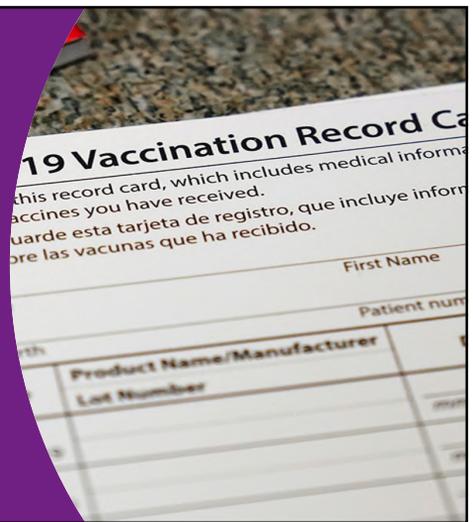
## OSHA Healthcare ETS

- **Took effect** on 6/21/21.
- **Applies to covered healthcare employers**, including employees in hospitals, nursing homes and assisted living facilities, emergency responders, home healthcare workers, and employees within ambulatory care settings.
- **Requires** non-exempt facilities to conduct a hazard assessment and develop a written plan to mitigate the spread of COVID-19, and to provide certain PPE to employees.
- **Requires** non-exempt employers to provide covered employees with paid time off to get vaccinated and recover from side effects.
- **Exempts** fully vaccinated employees from masking, distancing and barrier requirements when in well-defined areas where there is no reasonable expectation that any person will be present with suspected or confirmed COVID-19.



## OSHA General ETS

- **Took effect** on 11/5/21.
- **Applies to** employers with 100 or more employees (entire US workforce counted).
- **Imposes** a vaccination or test/mask requirement.
- **Most requirements are due** by 12/6/21. Requirement to be vaccinated or test/mask is 1/4/22.
- **Does not apply** to employees who are working from home until they come into the physical work space.
- **Does not apply** to employers covered by OSHA's Healthcare ETS or federal contractors subject to the Safer Federal Workforce Task Force rules.
- **22 states with OSHA-approved State Plans** have 30 additional days to decide whether to adopt the ETS or implement a program that is at least restrictive.
- **Challenged by multiple states** and business groups. Stayed by 5<sup>th</sup> Circuit Court of Appeal on 11/6, affirmed 11/12.
- **Consolidated challenges** in the 6<sup>th</sup> Circuit, pending determination.



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*Our message to businesses right now is to move forward with measures that will make their workplaces safer and protect their workforces from COVID-19.*

*That was our message after the first stay issued by the Fifth Circuit. That remains our message and nothing has changed. We are still heading towards the same timeline.*

*The Department of Justice is vigorously defending the emergency temporary standard in court and we are confident in OSHA's authority.”*

11/18/21



Jen Psaki  
White House Press Secretary

“

*[T]he stay should be dissolved, and OSHA should be permitted to respond to the particularly acute workplace danger of the COVID-19 virus.*

[...]

*If the Court were inclined to leave the stay in place, the stay should be modified so that the masking-and-testing requirement can remain in effect during the pendency of this litigation.”*

11/23/21



Department of Justice

## OSHA ETS Practical Advice

### Prepare for Vaccination & Testing

- How will you collect vaccination cards? How will they be secure?
- How will you ensure time off is properly provided for vaccinations?
- How will you run a testing program?
- Who pays for the testing?
- What tests are acceptable?
- What is the discipline for non-compliance?
- How do you monitor the time off?

### Prepare for Exemptions

- What type of proof will you require?
- How do you determine whether there is a sincerely held religious belief?
- What will constitute undue hardship?
- What about local exemption requirements?
- How to handle the interactive process?

### Prepare for Enforcement

- OSHA relies on whistleblowers.
- Requirement to provide records and logs is very short duration.
- Must develop means to collect and maintain vaccination and testing verification and produce records to OSHA in short order.
- OSHA inspections, by regulation, are not announced. There will be no notice of the agency coming.
- Penalties can be high.
- How do you demonstrate compliance?

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## Federal Contractor Rule

- **Executive Order** signed 9/9/21, effective 1/18/22.
- **Safer Federal Workforce Task Force** issued guidance on 9/24/21.
- **FAR Council** released contract language on 10/7/21.
- **Applies to** government contractors under "contracts and contract-like agreements" (i.e., legally enforceable agreement). Also required to be "flowed-down" to subcontractors.
- **Applies to contracts for** services (not goods, but including leasehold interest) with a value of at least \$250,000. Applies to newly awarded contracts and extensions.
- **Requires** all employees to be fully vaccinated, no testing option. Accommodations must be considered. Masking requirements for both vaccinated and unvaccinated. Remote included.
- **Covers** employees who work on a contract or in connection with a contract and any employees working at the same facility as those employees.



## CMS Rule

- **Announced** intent on 9/9/21 by Centers for Medicare & Medicaid Services (CMS).
- **Regulations released** on 11/4/21.
- **Applies** to eligible staff employed or working at certain participating Medicare and Medicaid providers and suppliers.
- **Staff definition** includes all employees, volunteers, students, trainees, etc.
- **What about** service providers?
- **Required** to develop and implement policies.
- **Same vaccination proof requirement** under OSHA ETS, but no attestation option. Facilities can develop their own or use CDC staff vaccination tool.
- **Exemptions** must be considered.
- **More guidance** will be forthcoming.
- **CMS will assess compliance** through usual survey and enforcement activities. Downside can include penalties, denial of payment, or termination of Medicare / Medicaid provider agreement.
- **Preliminary injunction** granted on Nov. 29, applicable in 10 states.



UNITED STATES

Department of  
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# Key Takeaways

# Thank you

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