

The Latest on Mandating Vaccinations

November 9, 2021

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Today's Overview

- Federal Contractor Mandate
- OSHA Emergency Temporary Standard
 - What's in it
 - Legal challenges



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Contractor Mandate

- The Money Question: Who is covered?
- Do you have a contract with the federal government, or a government contractor, that includes a clause that states that your company will comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force?
 - That's really it.
 - This clause is required in all contracts awarded after Nov. 14.
 - For contracts awarded before Nov 14, if they are extended or any option is exercised, the clause will be inserted at that time.

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Contractor Mandate

- “Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation.”***
- “*Covered contractors*” – as previously discussed.
- “*Covered contractor employees*”
 - “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.”

***All quoted passages are from the official contractor guidance at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf

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Covered Contractor Employees/Workplaces

- “*Covered Contractor Workplace*” – “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”
- What does this mean practically?
 - Any location at which any employee performing work on or in connection with a covered contract is likely to be present converts the entire workplace into a covered workplace, which means all employees at that workplace—regardless of whether they are working on a covered contract—are subject to the mandate.
 - Employees working entirely from home are the sole exception.

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Back to the Contractor Mandate

- “Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation.”
- “A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance.”

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Accommodations

- The contractor mandate does not have any particular requirements about documentation for accommodations or what accommodations must be provided.
- Medical accommodations generally – you can require documentation from a health care provider that supports the request for accommodation.
- Religious accommodations generally – you can require documentation to determine whether the employee has a sincerely held religious belief, but be careful not to request specific documentation.

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Back to the Contractor Mandate, Part II: The Quickening

- “Covered contractor employees must be fully vaccinated no later than December 8, 2021.”
 - BREAKING NEWS: On November 4, the White House announced that this deadline will be extended to January 4, 2022. This update has not yet been incorporated into the Safer Federal Workforce Task Force published guidance.
- For contracts starting after January 4, covered employees must be fully vaccinated by first day of work.
- “Fully vaccinated” is two weeks after last dose of two-dose vaccine, or two weeks after single-dose vaccine.

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How Do We Verify Employees Are Fully Vaccinated?

- You MUST review a physical or digital copy of:
 - the record of immunization from a health care provider or pharmacy,
 - a copy of the COVID-19 Vaccination Record Card,
 - a copy of medical records documenting the vaccination,
 - a copy of immunization records from a public health or State immunization information system, or
 - a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.

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Back to the Contractor Mandate, Part III: What Else Is In the Mandate?

- Masking and physical distancing requirements
 - Generally, all contractors must follow current CDC guidance.
 - In areas of high or substantial community transmission, everyone must mask indoors.
 - In areas of low or moderate community transmission, unvaccinated individuals must mask indoors, and outdoors in crowded environments.
 - You may provide exceptions where:
 - Mask may get wet
 - High intensity activities where employees may have difficulty breathing
 - Wearing a mask may create a risk to health and safety
 - Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor.

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Back to the Contractor Mandate, Part III: What Else Is In the Mandate?

- Specifying a compliance coordinator
 - “Covered contractors shall designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces.”

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Status of Legal Challenges to the Contractor Mandate

- October 29: 18 states file suits to block the mandate
- October 30: Texas gets in on the action



- “Misery acquaints a man with strange bedfellows.” – Shakespeare
- Today: “Politics makes strange bedfellows.”
- October 30: American Federation of Government Employees files suit to block the mandate, joining the “red” states.
- Thus far, no injunction yet.

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Will There Be an Injunction to the Contractor Mandate?

- Difficult to predict.
- The OSHA rule derives from the authority of the legislative branch, i.e. Congress.
 - One of the issues for the rule is whether Congress, through OSHA, has the authority to issue the rule under its limited, enumerated powers.
- For the Contractor Mandate, the power derives from the President's ability to oversee the executive branch.
 - Article II: "The executive Power shall be vested in a President of the United States."
 - This power is very broad, and includes the ability to issue rules covering federal employees and those doing work with them.

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Onward to OSHA!

- September 9: President announces OSHA will issue an emergency COVID rule within a few weeks.
- Also September 9: Overheard at 200 Constitution Ave NW, Washington DC, "wait, what did he just say?"
- November 4: OSHA announces the rule will be published the next day in the Federal Register.
- November 5: OSHA publishes the rule in the Federal Register.
- November 6: Fifth Circuit stays the rule, citing "grave statutory and constitutional issues," orders expedited briefing.

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Overview: What's in the Rule?

- Overall, sets a requirement for employers with 100+ employees to either require vaccinations or masks and weekly testing for employees starting January 4, 2022.
 - All other aspects of the rule (putting a written policy in place, informing employees, etc.) would go into effect December 5, 2021.
- Requires four hours of paid time off per shot (nothing new there for NY employers), AND paid time off for recovery from the shot.

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Scope: What Employers Would Be Covered?

- Those with 100+ employees EXCEPT:
 - Those covered by the contractor mandate
 - Those covered by the OSHA Healthcare ETS
- How do you count employees?
 - Company-wide, not site-specific.
 - Part-time employees count.
 - Temp employees provided by a staffing agency do NOT count.
- When do you count employees?
 - As of November 5. If you hit 100+ after November 5, it would apply on the date you hit. BUT – if it applies at any time because you are at 100+, and you then drop below 100, it would still apply.

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Scope: What Employees Would Be Covered?

- First question is whether it applies to the employer. So you would count all employees, including remote/outdoor employees. Then:
- To the extent you have an employee working entirely remotely, the vaccination/testing/masking requirements do NOT apply to that employee.
- Requirements do not apply to employees working “exclusively outdoors”—but be careful!
 - Only de minimis time indoors (bathroom, admin building).
 - Time spent indoors in a day will be added up, cumulatively.
 - Time spent together with others in a vehicle is considered indoor time.

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Written policy

- Either mandatory vaccinations, or choice between vaccination and testing/masking

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Determine and Track Employee Vaccination Status

- Acceptable documentation for vaccination status same as for contractor mandate, with one BIG addition.
- Employee may provide signed and dated attestation:
 - Attesting to their vaccination status (fully vaccinated or partially vaccinated);
 - Attesting that they have lost and are otherwise unable to produce proof required by this section; and
 - Including the following language: “I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”
- From the preamble to the rule: “While employers may not invite or facilitate fraud, the ETS does not require employers to monitor for or detect fraud.”
- Employer must keep a roster of employee status.

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Paid Time Off for Vaccination

- Four hours of paid time, can be during the workday.
- If the employer offers time during workday and employee does not accept, and gets vaccinated on own time, employer does not have to pay the vaccination time.
- Employer would have to pay if does not allow employee to take time to be vaccinated during the workday.
- Time off for vaccination CANNOT be offset by sick or vacation time.

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Paid Time Off for Recovery

- “Reasonable” paid time off for recovery
 - “Reasonable” not defined – but OSHA has said it will not enforce if at least two days for each shot was provided.
- This CAN be offset by employee time:
 - Sick, or overall PTO – yes.
 - But if sick time and vacation time are tracked separately, then employer can require use of sick time but NOT require use of vacation time.
 - Employer also cannot require employee to have a negative sick or PTO balance.

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Testing for Unvaccinated Employees

- Every seven days
- Does not have to be PCR – rapid OTC tests acceptable.
- Self-administered is okay, and self-read is okay, but
- BOTH self-administered and self-read is NOT okay.
 - Interesting that employees can attest that they are vaccinated, but cannot attest that they administered a test with a negative result.
- Cannot require employee to be tested for 90 days after COVID-positive due to false positives.
- If employee is in the vaccination process, must test until fully vaccinated UNLESS employee gets last dose on or before January 4.

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Removal of COVID-positive Employees from the Workplace Until...

- Negative PCR test
- Okay to return to workplace per CDC guidance, or
- Healthcare provider greenlights return to the workplace

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Face Coverings for Unvaccinated Employees

- Gaiters once again acceptable! (Just have to be doubled up)
- Unless alone in closed room, eating, or infeasible/greater hazard
- Cannot prevent any employee from voluntarily wearing a mask unless hazardous/unsafe
- Cannot prevent any visitor or customer from voluntarily wearing a mask.

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Employee Information Requirements

- Must inform employees of the requirements of this rule, and
 - “Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - That they can’t be retaliated against, and
 - The criminal penalties for false statements

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Records

- By the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- If OSHA asks for the written policy and the number of vaccinated employees and total employees during an inspection, that must be produced within four hours of the request.

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So...Is This Going to Happen?

- Placed my bet early on September 13: Likely not.
 - Does Congress have this power under the Commerce Clause? Recall the Affordable Care Act individual mandate—Congress couldn't pass that under the Commerce Clause, had to be a tax. Here, requiring anyone working for a 100+ company (2/3 of workforce) to vaccinate or test.
 - Even if Congress has this power, did it delegate it to OSHA when it passed the OSH Act in 1970? Justice Scalia, writing for a unanimous Supreme Court decision, famously said that Congress “does not, one might say, hide elephants in mouseholes.”

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So...Is This Going to Happen?

- Does OSHA have the power to do this via emergency rulemaking, instead of “notice and comment” rulemaking? Only if there is a “grave danger” that necessitates an emergency rule. But –
 - OSHA acted very slowly. Eleven months since vaccinations out. Two months more until crux of rule go into effect. Is it an emergency?
 - Employees of <100 employees also in grave danger – but rule does not apply to them.
 - OSHA does not consider whether partially vaccinated employees in grave danger.
 - Etc.
- Does OSHA have the power to put testing costs on employees?
- Does OSHA have the power to create a paid time off benefit?

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What to do now?

- Stay current on the contractor mandate, with an eye towards being ready for January 4 for any current contracts. Has a much better chance of surviving litigation than the OSHA rule.
- Wait to see if OSHA rule is preliminarily enjoined – and if so, is it nationwide.

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Thank You

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