

2022  
**BUSINESS IN 2021**  
WEEKLY WEBINAR SERIES  
2020  
2019  
2018

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## Introduction



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## Update on State Healthcare Worker Vaccine Mandate



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## OSHA ETS Update



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## OSHA's ETS

- Access blog post at this link

<https://www.bsk.com/news-events-videos/osha-rsquo-s-vax-or-test-emergency-temporary-standard-ets-is-here>

- Access last week's presentation at this link

<https://www.youtube.com/watch?v=BbuXI5zx1PU>

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## The Lifecycle of OSHA's ETS Standard

**September 9**

President Biden announces OSHA will issue an emergency COVID Rule

**November 5**  
OSHA publishes Rule

**November 12**  
Fifth Circuit affirms its decision to stay the ETS

OSHA ordered to take no steps to implement/enforce the ETS until further court order. Nationwide impact.

**November 4**  
OSHA announces rule will be published the next day in the Federal Register

**November 6**  
Fifth Circuit stays the rule, citing "grave statutory and constitutional issues"

**November 16**  
JPML will hold lottery to draw Circuit Court that will hear the consolidated cases

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## The Future is Uncertain...

### OSHA's Statement on website

"On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation."

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## Today is the Day! November 16

- Who gets picked? Luck of the draw
  - First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuit Courts
  - Cases will be consolidated and heard by a single U.S. Circuit Court of Appeals
  - Judicial Panel on Multidistrict Litigation (JPML) will pick circuit court "from a drum containing an entry for each circuit wherein a constituent petition for review is pending."

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- OSHA could request that the stay be lifted. The Court may choose to vacate the stay or not...
- Supreme Court of the United States could be asked to weigh-in
- Stay tuned!

## Should We Keep Preparing for the ETS?



## Federal Contractor Vaccination Mandate



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## Federal Contractors – Executive Order 14042

- September 9, 2021 → President Biden signed Executive Order 14042 “Ensuring Adequate COVID Safety Protocols for Federal Contractors”
- September 24, 2021 → Safer Federal Workforce Task Force issues guidance
  - **Updated November 10, 2021**



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## Federal Contractor Guidance Requirements

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation (medical or sincerely held religious beliefs);
2. Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.



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## “Phase-In”

- The Executive Order directs federal agencies to incorporate the new clause as follows:
  - in new contracts awarded on or after Nov. 14, 2021;
  - in new solicitations issued between Oct. 15, 2021 and Nov. 14, 2021;
  - in extensions or renewals of existing contracts and orders awarded on or after Oct. 15, 2021; and/or
  - in options on existing contracts and orders exercised on or after Oct. 15, 2021.



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## Coverage

- Applies to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:
  1. it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
  2. it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
  3. it is a contract or contract-like instrument for concessions; or
  4. it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.



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## “Contract or Contract-Like Instrument”

- Broad definition, follows USDOL’s proposed rule “Increasing the Minimum Wage for Federal Contractors”
- “[A]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law...includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them...”
  - Includes all contracts and any subcontracts of any tier thereunder (except those solely for provision of products)
  - Procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement...purchase orders, notices of awards, awards, job orders...



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## Coverage

- Executive Order clearly states that it **does not apply** to:
  1. grants;
  2. contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
  3. contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (which is currently \$250,000);
  4. employees who perform work outside the United States or its outlying areas; or
  5. subcontracts solely for the provision of products.
- **Note:** Agencies encouraged to exercise their discretion to incorporate clause even before they are required to do so.



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## Broad and Sweeping

- **Caution:** Executive Order and Guidance provide federal agencies and contractors with discretion to incorporate new clause into contracts and contract-like instruments that are not directly covered by the Order



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## Vaccine Mandate

- **What is required?** Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19
- **Who must be vaccinated?** “All covered contractor employees”
  - Guidance defines “covered contractor employee” as “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. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.”



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## Vaccine Mandate

- **By when?**
  - ~~December 8, 2021~~ **January 4, 2022** **January 18, 2022**
  - After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.
  - Note: Other safety protocols in the guidance must also be adhered to (masking, social distancing, etc.)
  - Note: Contractors working at federal worksites will be required to comply with safety protocol.



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## Vaccine Mandate

- Is there a testing opt out?
  - No
- Does the federal contractor guidance recognize accommodations?
  - Yes, but only for those recognized under law such as for medical/disability, and sincerely held religious beliefs
  - Guidance does recognize that there may be legitimate and medically recognized reasons for delay of vaccination
  - Must be evaluated on an individualized basis
- Do contractors have to flow down the new clause into subcontracts?
  - Yes, until the subcontract is solely for the provision of products
- Do employers have to immediately terminate employees who are not fully vaccinated by January 18, 2022?
  - Not a cliff; guidance seems to allow some flexibility for education, counseling, followed by discipline



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## Don't Forget!

- Guidance also includes safety measures
  - Must ensure all individuals and visitors comply with published CDC guidance for masking and physical distancing at covered contractor workplace
    - Areas of high or substantial community transmission, all must wear masks in indoor settings (limited exceptions)
    - Fully vaccinated individuals do not need to physically distance
    - Must check CDC COVID-19 Tracker at least weekly to determine proper workplace safety protocol
      - Even if the transmission reduces from high/substantial to moderate/low, level must remain at the lower level for at least 2 consecutive weeks before reducing safety protocols



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## Don't Forget!

- Designate a person (or persons) to coordinate implementation and compliance
  - Must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and other individuals likely to be present at covered contractor workplaces
  - Can be communicated by email, websites, memoranda, flyers, or other means, and posting signage in workplaces
    - Includes communicating workplace safety protocols and requirements related to masking/physical distancing to visitors and others present at the workplace
  - Ensure guidance and protocols are complied with (including showing proper vaccination documentation)



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## Legal Challenges

- The Federal Contractor mandate has been challenged by ~19 states...
  - Currently no stay in place
  - ...Wait and see



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## Update from Albany



**Caitlin A. Anderson**

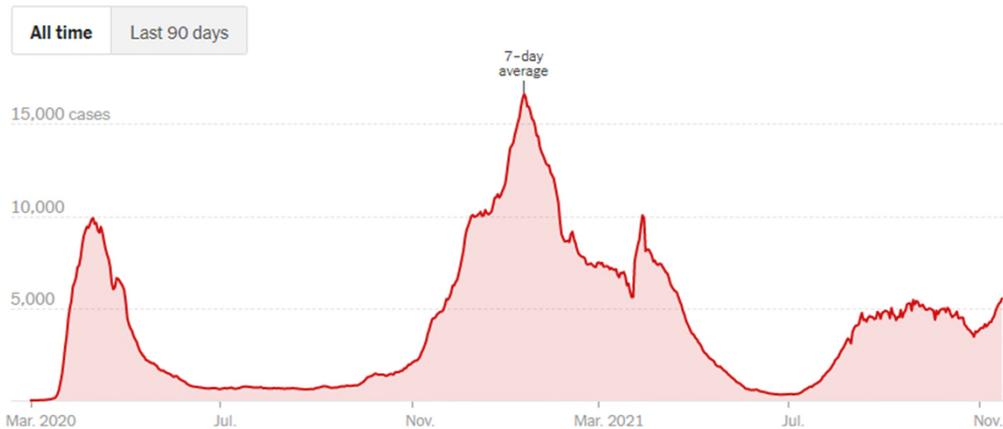
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The New York Times

### New reported cases



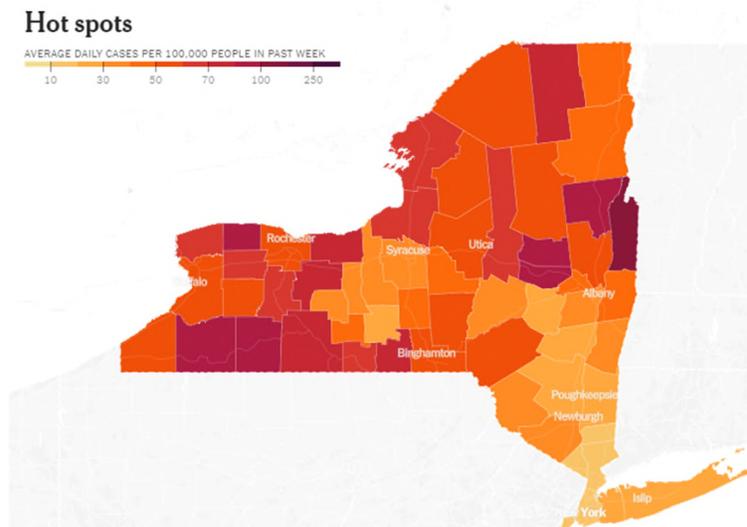
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	DAILY AVG. ON NOV. 8	14-DAY CHANGE
Cases	4,248	+11%
Tests	138,498	+1%
Hospitalized	2,177	-12%
Deaths	34	-5%

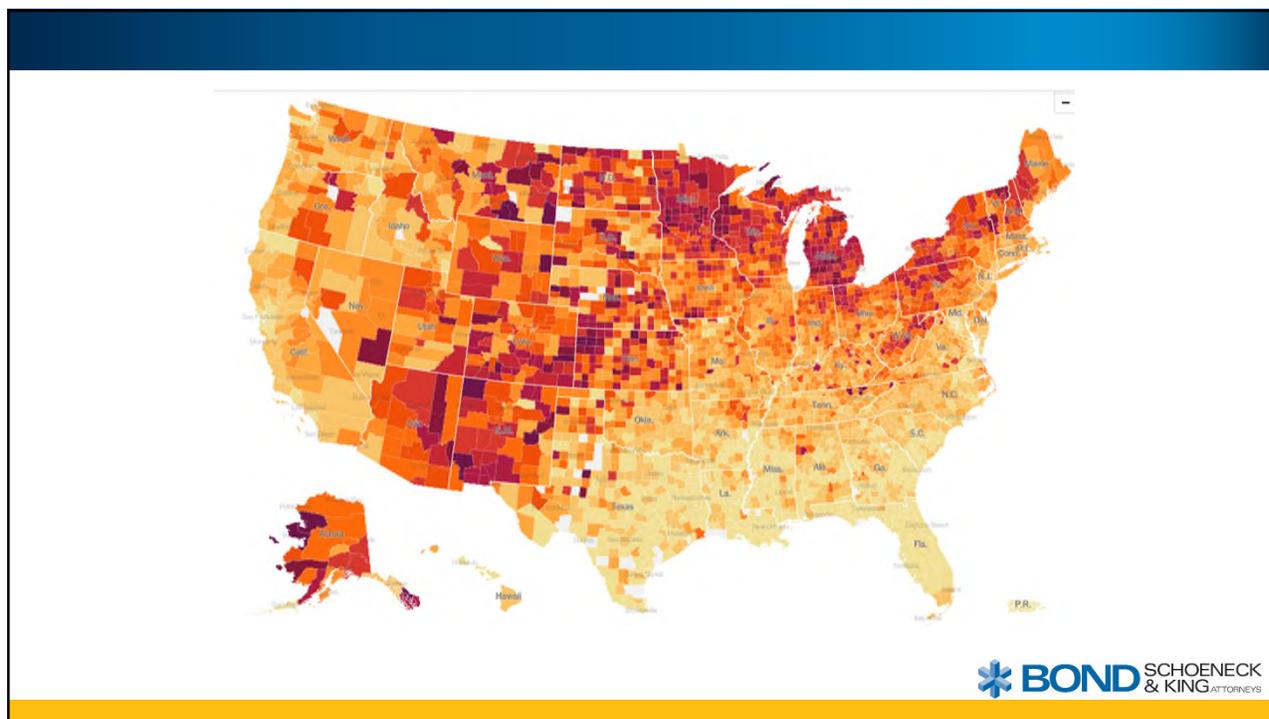
	DAILY AVG. ON NOV. 15	14-DAY CHANGE
Cases	5,519	+42%
Tests	136,828	+2%
Hospitalized	2,048	-12%
Deaths	33	-4%



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## Vaccination progress

- All New Yorkers:
  - 68% fully vaccinated
  - 76% one dose
- 12 and older:
  - 79% fully vaccinated
  - 88% one dose

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## Booster Shot News

- NYC: Any adult who wants a booster can receive a booster.
- Governor Hochul: Any adult who “feels they are at risk” should receive a booster.
- Erie County:

## Bills Signed by the Governor in the Past Week

- S.2628/A.430: Written notice of electronic monitoring
  - Effective Date: May 7, 2022.
  - Requires PRIVATE employers engaging in electronic monitoring of employees to issue prior written notice to new hires AND to post a conspicuous notice to all employees re: electronic monitoring.
    - Electronic monitoring: monitoring/intercepting: telephone calls, emails, internet usage by employee on any electronic device.
      - Does not apply to processes designed to manage the type/volume of calls, emails, or internet usage for the purposes of security/computer maintenance
    - Notice must say which communications are monitored, how monitoring occurs, and how the information will be collected, stored, and used.
  - Attorney General enforcement: \$500 for first offense, \$1,000 for second, \$3,000 for subsequent

## Bills Signed by the Governor in the Past Week

- S.4704-A/A.1108-A: Public bodies must post minutes
  - Public entities subject to the Open Meeting Law must post the minutes from a public meeting within 2 weeks, and minutes from an executive session within 1 week.
    - Only applies if public body (1) maintains a regularly updated website and (2) utilizes a high-speed internet connection.
    - Unabridged video or audio recordings, or unabridged written transcripts are all considered meeting minutes under the law.
  - Takes effect **immediately** (signed on 11/8).



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## Bills Signed by the Governor in the Past Week

- S.6267-A/A.268-A: Blocking Robocalls
  - Phone providers must block calls from (1) invalid numbering plans, (2) valid numbers but not allocated to a provider, and (3) valid allocated numbers that are unused.
  - Takes effect immediately.



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## Bills Signed by the Governor in the Past Week

- S.4817-A/A.1141-A: Non-profit donor disclosure protections
  - 501(c)(3)s filing an annual financial statement with the Charities Bureau no longer need to file the same statement with the Department of State.
  - 501(c)(3)s are prohibited from publishing financial disclosure records including the name, addresses, or telephone numbers of donors and the amount donated.
    - Does not apply to lobbying/political activities.
  - Takes effect immediately.



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### Update from Albany

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