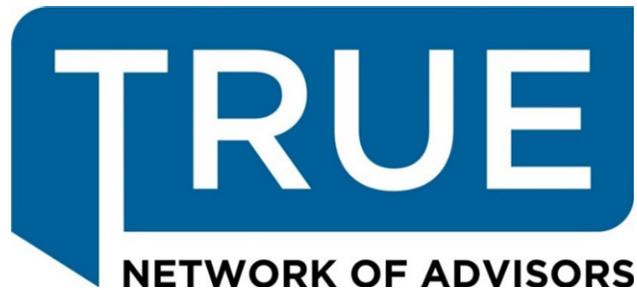


OSHA Vaccine ETS in the Workplace and the Courtroom: What Employers Need to Know



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End of Year 2021 Benefits Considerations	Deadlines / Expiration
Cafeteria Plan Amendments, including special grace period and carryover requirements	Employers who adopted any of the changes under the CAA and Notice 2021-15 must adopt an amendment by the end of the first calendar year beginning after the end of the plan year in which the amendment is effective.
HDHP Pre-deductible Coverage for Telemedicine	Expires December 31, 2021
COVID-19 Testing and Vaccination Coverage	Continues
CAA/TIC - Insurance Cards	Still effective for plan years beginning January 1, 2022 with “reasonable efforts” standard until additional guidance issued
CAA/TIC - Accurate Provider Directory Information	Still effective for plan years beginning January 1, 2022 with “good faith” standard until additional guidance issued (which will be after January 1, 2022)

End of Year 2021 Benefits Considerations	Deadlines / Expiration
One-year Outbreak Period Extension Rules	<ul style="list-style-type: none"> • Ongoing • Deadlines extended until the earlier of (1) one year from the date an individual is first eligible for relief, or (2) 60 days after the announced end of the COVID-19 National Emergency. • One-year extension runs from each deadline, including payment deadlines. • Notices to participants of coverage or deadlines and update plan materials
ARPA COBRA Subsidies	<p>Ended September 30, 2021</p> <p>Tax Credits: Obtain tax credit against Creditable Employer Medicare Taxes Employers may (1) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit, and (2) request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.</p>

More Court Action: Federal Contractor Vaccine Requirements & CMS Vaccine Requirements

- Louisiana Federal District Court issued a nationwide stay of CMS rules for healthcare employers
- Missouri Federal District Court

More Court Action: CMS Vaccine Requirements

- **ON HOLD**

- On November 29, 2021, a federal court in Missouri issued a preliminary injunction prohibiting CMS from implementing or enforcing its vaccine mandate for healthcare employers located in ten states: Arkansas, Alaska, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. Available at https://ago.mo.gov/docs/default-source/press-releases/cms-injunction.pdf?sfvrsn=ed822d9d_2
- On November 30, 2021, a federal court in Louisiana went a step further and issued a **nationwide** preliminary injunction against the CMS vaccine mandate Available at <https://www.alabamaag.gov/Documents/news/CMS%20Nationwide%20Injunction.pdf>
- The nationwide injunction issued by the federal court in Louisiana now makes clear that CMS cannot continue to implement or enforce its vaccine mandate anywhere, relieving employers from compliance obligations while the litigation moves forward.
- At this time, CMS has issued no public comment on the court orders, nor has it updated its guidance to healthcare employers.

More Court Action: Federal Contractor Vaccine Requirements

- ON HOLD (**at least**) in Kentucky, Ohio, and Tennessee
 - On November 30, 2021, a federal court in Kentucky issued a preliminary injunction against the enforcement of the federal contractor vaccine mandate subject to the guidance of the Safer Federal Workforce Task Force as implemented under Executive Order 14042. The result of the court's order is that the federal government is enjoined from enforcing the vaccine mandate against federal contractors and subcontractors in **Kentucky, Ohio, and Tennessee**. Available at <https://htv-prod-media.s3.amazonaws.com/files/dn-50-opinion-and-order-granting-pi-1638314388.pdf>
- Remains unclear whether federal contractor employers outside of Kentucky, Ohio, and Tennessee should move forward.
 - At this time, neither the Safer Federal Workforce Task Force nor the White House have issued any public comment on this ruling or otherwise signaled how they intend to comply with the court's order.

More Court Action: Federal Contractor Vaccine Requirements & CMS Vaccine Requirements

- What Now?
- State Law Considerations

OSHA *Vaccine or Testing* Emergency Temporary Standard (“ETS”)

- Finally issued, including **FAQs**
 - <https://www.osha.gov/coronavirus/ets2/faqs>
- Requires large employers to implement policies requiring employees to be vaccinated or provide weekly negative test results.
- Immediate court action enjoins enforcement.

Legal Challenges to OSHA ETS

- **History: Only Nine issued by OSHA since 1970 / Six have been challenged / One or Two upheld (1978)**
- **2021 ETS: No surprise here – Legal challenges already underway.**
 - **Fifth Circuit Court of Appeals issued a stay on effectiveness of the ETS – OSHA may not enforce.**
 - **Judicial Panel of Multidistrict Litigation – Consolidated cases to the Sixth Circuit Court of Appeals**
 - **Stay remains in place at least until December 10, 2021**
 - **Will likely end up in the United States Supreme Court**

Legal Challenges to OSHA ETS

- Where does this leave employers?
 - Develop vaccine strategy (regardless of the ETS)
 - Evaluate how strategy fits with ETS
 - Prepare and position for compliance with ETS
- OSHA maintains that the ETS will take effect as soon as litigation is resolved
- ***GOOGLE WARNING***

ETS Basics

- Covered employers must either:
 1. Mandate employees be fully vaccinated against COVID-19, or
 2. Require employees that are not fully vaccinated to produce a “verified” negative test on a weekly basis AND wear face coverings in the workplace.
- Employers must pay employees for time taken to get vaccinated, and, if needed, recover from any side effects.
- Duration: 6 Months (expires May 2022)
- **Penalties:** OSHA Penalties generally determined based on willfulness of the violation.
 - Negligent Violations: Up to \$13,653 per offense
 - Violation is willful and the employer deliberately disregarded OSHA’s direction: Up to \$136,532, per offense.

Covered Employers

- ETS covers any “large” employer with 100 or more employees.
- Exclusions
 1. Employers subject to the federal contractor vaccine requirements, OR
 2. Employers subject to the Healthcare ETS or CMS Rule.

Who is a “large” employer?

- Definition includes all employees across all of U.S. locations, regardless of where they perform work.
- Part-time employees count.
- Independent contractors do not count.
- What if the employee count fluctuates?
 - Key Date: **November 5, 2021**

Examples

- If an employer has 150 employees, 100 of whom work from home full-time + 50 who work in the office at least part of the time, the employer would be within the scope of this ETS because it has more than 100 employees.
- If an employer has 200 employees, all of whom are vaccinated, that employer still would be covered.
- Remote workers count, but may not be subject to vaccine/testing requirements.

Related Entities

- Employees of all entities making up the integrated single employer must be counted.
- “Single Employer Doctrine” – Two or more related entities may be regarded as a single employer if they handle safety matters as one company.
- OSHA likely will decide coverage on a fact-specific basis, considering:
 1. Degree of interrelatedness in handling workplace safety issues.
 2. Whether entity is considered a joint employer for purposes of other employment laws.

Covered Employees

- ETS vaccine/testing requirements do not apply to employees who:
 1. Do not report to a workplace where there are other humans (including customers);
 2. Work From Home (remotely); or
 3. Work exclusively outdoors.

Key Dates

- November 5, 2021
 - December 6, 2021*
 - January 4, 2022
-
- **BUT Court action certainly impacts these dates**

Key Dates	Dec. 6	Jan. 4
Establish <u>policy</u> on vaccination	X	
Determine <u>vaccination status</u> and obtain acceptable proof of vaccination	X	
Provide paid leave for employees to obtain vaccine	X	
Ensure employees who are not fully vaccinated are <u>tested</u> for COVID-19 at least weekly		X
Ensure employees who are not fully vaccinated <u>wear face coverings</u> when indoors or when occupying a vehicle with another person for work purposes	X	
Provide each employee <u>information</u> about the ETS	X	

Employer Policy on Vaccination

- Employers must
 - Develop, implement, and enforce a mandatory COVID-19 vaccination policy
 - Unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work.
- **Deadline:** Dec. 6, 2021

Determination of Employee Vaccination Status

- Employers must obtain and maintain records of vaccination status, including a roster of employee vaccination status.
- If no proof of vaccination is provided, you must treat such employees as unvaccinated.
- Acceptable proof of vaccination status includes:
 - Record of immunization from a health care provider or pharmacy;
 - COVID-19 Vaccination Record Card; and
 - Medical records documenting the vaccination.

What if an employee is unable to submit proof of vaccination?

- Obtain a signed and dated employee attestation.
- Attestation must state their vaccination status and that they have lost and are otherwise unable to produce proof.
- Employees must declare that the statement of their vaccination status is true and that they understand providing false information may subject them to criminal penalties.
- Use Caution

Roster Requirements

- Create and maintain a roster of employees and their vaccination statuses for the duration of the ETS.
- Keep separate as confidential employee medical records.
 - Best Practices
 - **Related:** Recordkeeping for Accommodation Requests

Paid Leave Requirements

- **Employees have the right to take paid time off to:**
 1. **Obtain the vaccine; and**
 2. **Recover from any side effects.**

Time Off to Obtain the Vaccine

- Provide employees reasonable paid time, including up to four hours of paid time, to receive each primary vaccination dose.
- Not obligated to reimburse employees for transportation costs.
- Cannot be offset by any other leave that an employee has accrued (e.g., paid sick leave, vacation time, PTO, etc.).
- **During Work Time v. Outside of Workday**
 - Outside of Workday – Employer is not required to pay an employee for obtaining the vaccine outside the workday.
 - During Work Time – Generally paid

During Work Hours

- Employer must pay the employee up to four hours of regular pay for each primary shot.
- Four hours is **not automatic**.
- OSHA assumes that 55 minutes is a reasonable period of time to be compensated.
- Employer cannot require that an employee use accrued paid leave, such as sick leave or vacation leave, to obtain the vaccine.

Time Off for Recovery from Side Effects

- Offset option may be available.
- First, look to an employee's accrued sick bank.
 - Single or separate buckets of PTO?
 - Cannot require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects.
- Second, if the employee does not have any sick leave available, the employer still must provide reasonable paid time off to recover.
 - Employers may set a cap on the amount of paid sick leave available to employees to recover (2 days presumed reasonable).

Testing Option

- Employees must elect either to get vaccinated or to undergo regular COVID-19 testing AND wear a face covering at work.
- **Deadline:** Jan. 4, 2022.
- Acceptable tests
 - FDA-approved (e.g., viral test).
 - Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- No antibody tests.

Paid Leave & Costs

- Employers are not required to pay for any costs associated with testing.
- Employers required to pay for time spent testing?
 - Open question; additional guidance forthcoming.

Positive COVID-19 Test and Removal

- Employer must immediately remove from the workplace any employee who receives a positive COVID-19 test.
- Keep the employee removed until the employee:
 1. Receives a negative test;
 2. Meets the return to work criteria in CDC's "Isolation Guidance"; or
 3. Receives a recommendation to return to work from a healthcare provider.
- No paid time off required.

Face Coverings

- **General Rule**
 - **Employees who are not fully vaccinated must wear a face covering when indoors or when occupying a vehicle with another person for work purposes.**
- **Exceptions**
 1. **When an employee is alone in a room with floor to ceiling walls and a closed door.**
 2. **For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.**
 3. **When an employee is wearing a respirator or face covering.**

Information Provided to Employees

- Provide information about:
 - Requirements of the ETS and workplace policies and procedures established;
 - Vaccine efficacy, safety, and the benefits of being vaccinated (by providing the CDC document [“Key Things to Know About COVID-19 Vaccines”](#));
 - Protections against retaliation and discrimination; and
 - Laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Reporting COVID-19 Fatalities and Hospitalizations to OSHA

- Employers must report work-related COVID-19 **fatalities** to OSHA **within 8 hours** of learning about them.
- Report work-related COVID-19 in-patient **hospitalizations** **within 24 hours** of the employer learning about the hospitalization

Availability of Records

- Employers must provide employees with access to their COVID-19 test records **by the end of the next business day after a request.**
- Employers must maintain and preserve records and vaccination rosters while the ETS is in effect.
- OSHA Right Access
 - Employers must provide, **within 4 business hours** of an OSHA request, the following:
 - Written policy;
 - Aggregate number of fully vaccinated employees at a workplace; and
 - Total number of employees at that workplace.

Looking Ahead

- Implications of court action.
- Possibility of expansion from large to smaller employers.
- Possible permanent standard.
- State Law Implications

State Law Implications

- Preemption
- Preemption in light of court action?
- How to proceed if we want to implement federal vaccine requirements (ETS, federal contractor, or CMS healthcare employers):
 - Move forward assuming preemption
 - Move forward with expanded exceptions/accommodations under state law (officially or unofficially) **in affected states**
 - Move forward with expanded exceptions/accommodations under state law (officially or unofficially) **in all states**
 - *Slow play* accommodation requests

WHAT NOW?

- **Develop vaccine strategy**
- **Evaluate how strategy fits with ETS & other federal vaccination requirements**
- **Prepare and position for compliance**
- **Stay tuned...**



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