



## COVID-19 Guidance

# OSHA's Forthcoming Rule and COVID-19 Vaccination Mandates

This guidance provides brief responses and corresponding links to a series of initial questions concerning a forthcoming Rule from the federal Occupational Safety and Health Administration (OSHA) regarding employer vaccine mandates for COVID-19 as announced by President Biden on September 9, 2021. Specific updates related to ongoing development of this Rule are anticipated.

### What is the projected scope of OSHA's forthcoming COVID-19 employer mandate rule?

President Biden directed OSHA to develop a [rule](#) requiring all employers with 100 or more employees to ensure that their employees either receive the COVID-19 vaccine or submit to weekly COVID-19 testing. OSHA's rule is anticipated to also require [paid time off](#) for vaccination and post-inoculation rest. This rule is projected to reach over [80 million](#) workers in the private sector. Non-compliant private sector businesses may be fined up to [\\$14,000](#) per violation. Note – via separate Executive Orders President Biden has also mandated COVID-19 vaccines for federal employees and contractors.

### What is OSHA's jurisdictional authority to impose such requirements under the Occupational Safety and Health Act of 1970?

The [Occupational Safety and Health Act of 1970](#) authorizes the federal government to enact workplace standards to ensure employee health and safety. To implement the COVID-19 vaccination requirement, [OSHA will issue an Emergency Temporary Standard](#) (ETS) pursuant to [Section 6\(c\)](#) of the Act. This law authorizes the Secretary of Labor to temporarily bypass administrative rulemaking procedural requirements if the Secretary determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." Resulting rules can remain in effect for up to [6 months](#) without going through standard rulemaking processes. OSHA's use of this emergency authority has been [rare](#) since the courts struck down an ETS rule on asbestos in 1983.



## Has OSHA ever issued extensive vaccine mandates impacting employers previously?

OSHA has not previously issued extensive vaccine mandates impacting employers. In June 2021, however, OSHA used its ETS authority for the first time since 1983 to issue an [emergency rule](#) requiring health care employers to provide adequate protective equipment, ventilation, social distancing measures, and reasonable time and paid leave for obtaining COVID-19 vaccinations. Aside from the COVID-19 vaccine, OSHA has issued workplace standards for the Hepatitis B (Hep B) vaccine, but not to mandate its use. Rather, under OSHA's [Bloodborne Pathogens](#) Standard, employers with workers who may be exposed to blood or other infectious materials must *make available* free Hep B vaccinations to their employees. If employees choose not to receive the Hep B vaccine, they may be obliged to execute a form acknowledging their abstention.

## Which states currently have prohibitions of vaccine mandates in place?

Many states have implemented [legislation](#) or executive orders limiting COVID-19 vaccine mandates. As of October 5, 2021, 21 states have instituted bans on [vaccine passports](#). Six states ban [health care worker](#) vaccine mandates, 8 states ban state [government employee](#) vaccine mandates, 1 state bans [private employer](#) vaccine mandates, and 8 states ban [school faculty/staff](#) vaccine mandates.

## Will these states' laws be preempted by OSHA's rule as applied to private employers?

As applied to private employers, OSHA's standard would preempt existing rules by state governments [unless a state has its own OSHA-approved workplace agency](#). Approximately half of the states have such programs that include private sector employees. Once OSHA issues the rule, these states will likely have [30 days](#) to adopt their own standard that is [at least as effective](#) as the federal rule. Some states which currently prohibit vaccine mandates also do not have OSHA-approved state plans. Laws in these jurisdictions that directly conflict with the OSHA Rule may be preempted.

## How will the OSHA rule apply to local or state government employers?

OSHA rules do not apply to state and local governments, as the [OSH Act's definition of "employer"](#) excludes states and political subdivisions of states. The newly anticipated rule therefore will not apply directly to state or local government employers. However, as discussed above, states may directly follow the OSH Act's requirements, or submit for OSHA's approval a [separate state plan](#) which is [at least as effective as the OSH Act](#). These state-based plans [apply to state or local government employees](#).

When OSHA promulgated an [ETS applicable to health care workplaces in June 2021](#), it announced that OSHA-approved state plans would have [30 days to update those plans](#) to ensure that they would be at least as effective as OSHA's standards pursuant to [29 C.F.R. § 1953.5](#). The same 30-day requirement may arise upon issuance of the workplace COVID-19 vaccine rule. Some states may choose to incorporate OSHA standards into state-based plans verbatim to ensure matching efficacy.

In sum, OSHA's rule itself will not directly apply to state or local government employers, but could apply by virtue of state-specific plans approved by OSHA which must be at least as effective as the OSH Act, including updates within 30 days of issuance of a new ETS.



## What legal objections or litigation have arisen from state or local governments related to the rule?

Several state-based lawmakers have adamantly opposed the forthcoming rule. [South Dakota](#) Governor Noem called the rule “unconstitutional” and promised legal action once it is promulgated. [Texas](#) Governor Abbott called the rule an “assault on private businesses” and emphasized his [Executive Order](#) preventing vaccine mandates. Promising a legal battle, [Missouri](#) Governor Parsons declared the forthcoming rule an “insult to our American principles of individual liberty and free enterprise.” [Wyoming](#) Governor Gordon directed the state Attorney General to “take all actions to oppose this administration’s unconstitutional overreach of executive power.” On September 14, 2021, Arizona Attorney General Brnovich [filed a lawsuit](#) arguing that federal government vaccine mandates which are inapplicable to undocumented immigrants violate equal protection principles, among other claims. On September 16, 2021, 24 state attorneys general executed a [letter](#) to President Biden challenging the federal government’s authority to promulgate the rule, alleging constitutional and other violations, and positing that the rule would be an ineffective public health measure.

## Are there any specific potential or actual constitutional issues or objections to OSHA’s rule?

To bypass administrative rulemaking consistent with the Administrative Procedures Act and principles of procedural due process to issue this rule as an ETS, OSHA must establish that COVID-19 presents a grave danger to covered workplaces which necessitates the rule to protect employees. Opponents may challenge these findings. OSHA’s broad regulatory authority raises additional constitutional questions about [nondelegation](#) and separation of powers, and whether OSHA has the [authority](#) to mandate COVID-19 vaccines under the [Commerce Clause](#). If the forthcoming rule fails to expressly allow exemptions for medically-unfit persons, religious freedom, or account for other protections, constitutional challenges pursuant to substantive [due process](#), the [First Amendment](#), [Equal Protection](#), and [federalism](#) may arise, as well as implications under existing federal laws including [Title VII](#) of the Civil Rights Act of 1964 and the [Americans with Disabilities Act](#). Allowances for weekly testing of employees seeking to avoid COVID-19 vaccinations may help mitigate these claims depending on the degree to which employees seeking exemptions are burdened or limited by weekly testing requirements.

## What legal objections or litigations have arisen via the private sector related to the rule?


Private companies have questioned whether they will be tasked with [enforcing](#) the anticipated rule (as enforcement via OSHA inspections “[could prove difficult](#)”), as well as who will be [responsible for fines](#) resulting from violations. [Legal experts](#) posit the rule will “undoubtedly create additional administrative burdens, compliance obligations, and [expense](#) for [employers](#).” Employers may also face privacy concerns or other legal pitfalls when requesting [proof](#) for certain employee exemptions. [Challenges may arise](#) among private sector stakeholders arguing that OSHA lacks the authority to issue the rule, or that it should generate the rule through normal notice and comment processes, rather than [as an ETS](#).

## SUPPORTERS



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