OSHA’s COVID-19 Vaccination Mandate Standard for Large Employers

This guidance provides brief responses to a series of questions concerning the federal Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS) regarding COVID-19 employer vaccine mandates issued on November 5, 2021. The ETS establishes minimum requirements for select workplace mandatory vaccination policies affecting employers with more than 100 employees (with some key exceptions noted below). Additional questions concerning the purpose, scope, applicability dates, and other key issues are addressed in detailed FAQ responses on OSHA’s website.

What is the projected scope of OSHA’s COVID-19 employer mandate standard?

The standard requires all covered employers to ensure that their employees either receive the COVID-19 vaccine(s) (subject to medical exemption and religious- or disability-based accommodations) or submit to weekly COVID-19 testing. Individuals who are not fully vaccinated must wear face coverings indoors, subject to certain exceptions. The standard also requires employers to provide up to 4 hours of paid time off for vaccination doses, including travel time, as well as paid sick leave for employees experiencing side effects.

Who does OSHA’s standard principally apply to?

The standard applies to all private employers with more than 100 employees and to state and local government employers with more than 100 employees in states with OSHA-approved state-based occupational safety plans. The standard does not apply to public employers in states without state-based plans. OSHA’s standard does not apply to employees who are (a) not reporting to a workplace where other persons are present; (b) working exclusively from home; or (c) working outdoors (where the risks of COVID-19 spread are significantly reduced).

OSHA’s ETS also does not apply in certain workplaces, including the following settings:

(1) federal agencies or contractor workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors;
(2) health care or support entities subject to OSHA’s previously promulgated Healthcare ETS.

CMS’ ETS, issued officially as well on November 5, 2021, sets stricter vaccination standards for Medicare and Medicaid providers in that it does not include a testing option. Health care providers must still provide for medical exemptions and reasonable accommodations for religious or disability-based objections to vaccination. If a provider falls under both its standard and OSHA’s ETS (or other federal mandates), it should look to CMS’ ETS first. Whether testing may be pursued in providing such accommodations is not specifically elucidated by CMS, but its FAQs explain that employers granting accommodations “must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals.” CMS recommends that providers review the Equal Employment Opportunity Commission’s (EEOC’s) guidance on accommodations for additional information.

Which states currently prohibit vaccine mandates?

According to the National Academy for State Health Policy, many states have implemented legislation or executive orders limiting COVID-19 vaccine mandates. As of November 30, 2021, 21 states have instituted bans on vaccine passports. Six states ban health care worker vaccine mandates, 10 states ban state government employee vaccine mandates, 2 states ban private employer vaccine mandates, and 8 states ban school faculty/staff vaccine mandates.

Are these states’ laws preempted by OSHA’s ETS?

As applied to private employers, OSHA’s standard expressly preempts adoption and enforcement by state or local governments of workplace requirements relating to vaccination, face coverings, and COVID-19 testing unless a state has its own OSHA-approved workplace agency. Approximately half of the states have such programs that include private sector employees. States with their own plans have 30 days from the date of publication to adopt their own standard that is at least as effective as the federal standard. Some states which currently prohibit vaccine mandates do not have OSHA-approved state plans. OSHA expressly addressed preemption of these kinds of laws in its guidance FAQs, explaining that it “intends for the ETS to preempt and invalidate any State or local requirements that ban or limit an employer’s authority to require vaccination, face covering, or testing.”

Does OSHA’s ETS apply to local or state government employers?

OSHA’s ETS does not apply to state and local governments, as the OSH Act’s definition of “employer” excludes states and political subdivisions of states. The standard therefore does 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 approval a separate state plan which is at least as effective as the OSH Act. State-based plans cover state or local government employees.

Pursuant to 29 C.F.R. § 1953.5(b), OSHA-approved state plans have 30 days from publication of the standard to update those plans to ensure that they are at least as effective as OSHA’s standards. Some states may choose to incorporate OSHA standards into state-based plans verbatim to ensure matching efficacy, while other states may choose to adopt more protective requirements.
What if state workplace safety agencies do not comply with OSHA's ETS?

States with federally-approved workplace agencies that do not satisfactorily meet OSHA requirements may have their regulatory powers removed or limited. OSHA previously issued a standard in June 2021 related to COVID-19 workplace safety measures. In October 2021, OSHA declared that Arizona, South Carolina, and Utah, states with federally-approved workplace safety agencies, had failed to appropriately implement the measure or an equivalent state standard. Consequently, OSHA initiated a process to potentially strip these states of their workplace safety authority.

On October 19, 2021, Arizona Governor Doug Ducey stated federal attempts to strip Arizona of its workplace safety authority, as discussed above, were “nothing short of a political stunt and desperate power grab,” potentially foreshadowing similar future arguments against additional OSHA measures. After OSHA publishes its findings in the Federal Register, a 35-day comment period will follow, with the possible eventual rescission of either partial or full state workplace safety authority. Similar measures may be considered if states do not comply with the vaccination standard.

What is OSHA’s jurisdictional authority to implement the ETS 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 issued an 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.” Such standards 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 on asbestos in 1983.

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

To bypass administrative rulemaking consistent with the Administrative Procedures Act and principles of procedural due process to issue this standard as an ETS, OSHA must establish that COVID-19 presents a grave danger to covered workplaces which necessitates the standard to protect employees. Opponents are likely to challenge these findings. OSHA’s broad regulatory authority raises additional constitutional questions concerning non-delegation and separation of powers, and whether OSHA has the authority to mandate COVID-19 vaccines under the Commerce Clause.

What legislative or executive objections have arisen from state or local governments related to OSHA’s ETS?

Several state-based lawmakers adamantly opposed the standard prior to its issuance. South Dakota Governor Kristi Noem called the standard “unconstitutional” and promised legal action. Texas Governor Greg Abbott called the standard an “assault on private businesses” and emphasized his Executive Order preventing vaccine mandates. Promising a legal battle, Missouri Governor Mike Parson declared the anticipated standard an “insult to our American principles of individual liberty and free enterprise.” Wyoming Governor Mark Gordon directed
the state attorney general to “take all actions to oppose this administration’s unconstitutional overreach of executive power.” On September 16, 2021, 24 state attorneys general issued a letter to President Biden challenging the federal government’s authority to promulgate the standard, alleging constitutional and other violations, and positing that the standard would be an ineffective public health measure.

On November 12, Tennessee Governor Bill Lee signed COVID-19 legislation that takes effect immediately. It restricts employers’ ability to require proof of vaccination and limits business’ adverse actions against non-vaccinated workers. Public employers, including public schools, are prohibited from mandating vaccination or requiring masks unless certain conditions are met. Finally, the law provides that workers may collect unemployment benefits following any job loss resulting from failure to obtain the vaccine. Also on November 12, North Dakota Governor Doug Burgum signed House Bill 1511, which bans state-level government-ordered vaccine mandates. The bill however allows private companies to require workers be vaccinated, but greatly expands the list of permissible exemptions to include “morals,” proof of antibodies over the past six months, or a doctor’s note, and exempted higher education, health care, and prison workers from vaccine requirements. Similarly, Florida Governor Ron DeSantis on November 18 signed a legislative ban on private employers mandating COVID-19 vaccination unless medical, religious, and other exemptions are offered. The new vaccine mandate law will be enforced by the state Department of Legal Affairs in the Attorney General’s office.

At the federal level, on December 8, the U.S. Senate voted to dissolve the Biden administration’s vaccine mandates, but to date there is no comparable passage of a similar bill in the House of Representatives.

Not all governments oppose the OSHA standard. On November 15, Puerto Rico Governor Pedro Pierluisi issued an executive order requiring private sector employers with 50 employees or more to adopt vaccine or testing requirements, which expands the scope of OSHA’s ETS to a wider swath of employees.

What litigation have states or localities raised brought related to OSHA’s ETS?

After President Biden announced OSHA’s forthcoming vaccine mandates, but before the standard was released, Arizona Attorney General Mark Brnovich filed a lawsuit on September 14 arguing that federal government vaccine mandates which are inapplicable to undocumented immigrants violate equal protection principles, among other claims.

Upon the actual release of the standard on November 5, a deluge of additional legal challenges arose in several states. On November 6, the Fifth Circuit Court of Appeals in New Orleans temporarily blocked OSHA’s standard, claiming it raised “grave statutory and constitutional issues.” This order was upheld on November 12. In a terse decision, the Fifth Circuit characterized the standard as a “one-size-fits-all sledgehammer” which was simultaneously over- and under-broad. By November 15, more than half the states and multiple private entities filed suits in all the 12 Circuits. On November 16, a Judicial Panel on Multidistrict Litigation announced that the Sixth Circuit Court of Appeals based in Cincinnati, Ohio was selected via lottery among all the Circuit Courts to hear and initially decide the consolidated cases.

While OSHA announced initially that it would temporarily suspend enforcement of the standard after the Fifth Circuit issued its opinion, after the lottery process lodged the cases in the Sixth Circuit, the Biden administration petitioned the Sixth Circuit on November 23 to immediately dissolve the Fifth Circuit’s stay. The Department of Justice argued that “Congress charged OSHA with addressing grave dangers in the workplace, without any carve-out for viruses or dangers that also happen to exist outside the workplace.” On December 3, the Sixth Circuit denied OSHA’s petition for expedited review. On December 15, the court denied several petitions for
initial hearing en banc of the consolidated challenges to the OSHA standard. According to the court's order, "less than a majority of the active judges" voted in favor of initial hearing en banc.

Consequently, the challenges were heard by a three-judge panel on the Sixth Circuit. On December 17, in a 2-1 decision, the court lifted the Fifth Circuit's stay, upholding and reinstating OSHA's authority to promulgate rules to respond to evolving public health threats. Construing OSHA's statutory authority to include all physically harmful agents, including viruses, the court determined that the Fifth Circuit's stay was wrongly granted based on incorrect and limited interpretations. Longstanding precedent underscored OSHA's authority to protect "against infectious diseases that present a significant risk in the workplace," and OSHA demonstrated "the pervasive danger" posed by COVID-19 to employees (particularly the unvaccinated) in the workplace. Thus, OSHA's ETS is not a "novel" or "enormous expansion of [OSHA's] regulatory authority," noted the Sixth Circuit panel, but rather an "existing application of [the OSH Act] authority to a novel and dangerous worldwide pandemic."

On December 18, OSHA moved forward with the ETS while noting it would not issue citations for (1) noncompliance before January 10, 2022, or (2) testing requirement violations before February 9, 2022, so long as the employer is making reasonable, good-faith efforts to comply.

While the Sixth Circuit lifted the prior stay, the court had not fully decided the case on the merits, including determining whether the ETS overrides state or local laws via federal preemption. This Sixth Circuit case currently sets the baseline for other cases across the U.S., though additional developments are anticipated in early January from the U.S. Supreme Court.

Following numerous requests for emergency relief from enforcement of the ETS, on December 22, the Supreme Court agreed to hold a special hearing on January 7, 2022 to assess the legality of the OSHA ETS, as well as the Centers for Medicare and Medicaid Services (CMS) vaccine mandate for health care workers. In agreeing to hear these consolidated challenges, the Court is returning to the bench slightly early from holiday break, and 2 weeks before OSHA enforcement will go into effect on January 20.

Although the Supreme Court has historically upheld the federal government's powers in the interest of protecting public health, changing attitudes still raise the possibility of limiting federal authorities to require vaccines.

What legal objections or litigation have arisen via the private sector related to OSHA's standard?

After OSHA released its standard on November 4, several organizations immediately filed suit to block its enforcement. As of November 15, numerous private sector lawsuits have been brought. Construction industry trade groups have filed cases in the Fourth Circuit and elsewhere claiming the standard "forces employees to choose between their jobs and getting vaccinated." Multiple labor unions have sued claiming OSHA's mandate is too narrow in scope and should be expanded to include workplaces with under 100 employees and require employers to financially cover testing and mask requirements. Additional lawsuits are anticipated.

After the Department of Justice petitioned the Sixth Circuit to dissolve the Fifth Circuit's stay of OSHA's standard (see above), an advocacy group called The Jobs Creators Network sued to oppose the request, arguing that the stay was necessary to protect companies from incidental costs and employees from potential job losses. On November 29, the Heritage Foundation filed suit the U.S. Court of Appeals for the D.C. Circuit, alleging that the standard represents a "gross abuse of power" and "clearly encroaches on the police power of states expressly reserved by the Tenth Amendment." The Foundation argues that the mandate "exceeds the federal government's authority under the Commerce Clause" and "impermissibly" compels citizens "to act as the Government would have them act."
For additional updates on current pleadings and case, check the following link, and look for regular updates to this memo.

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