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# COVID-19 Vaccine Mandates

LARGE EMPLOYERS AND FEDERAL CONTRACTORS

KOLEY ■ JESSEN

ATTORNEYS

# Roadmap for Today's Webinar

- Topic 1: Impact of 5<sup>th</sup> Circuit Decision
- Topic 2: Large Employers
- Topic 3: Federal Contractors



# Topic 1: The 5<sup>th</sup> Circuit Decision



**Q. The United States 5<sup>th</sup> Circuit Court of Appeals released a decision over the weekend which “stays” the mandate. What does this mean for me?**




# Answer

- 5<sup>th</sup> Circuit Order issued with intent to be nationwide
- Each challenge to the OSHA standard (currently 4 of them) will be heard by a single circuit that is chosen at random among all the circuit's where a challenge is pending within 10 days of the agency action
- Once a single circuit is chosen (referred to as the "Panel"), that circuit (as the seat of the Panel) will have the authority to lift any stay issued by another circuit.
- So the challenges will all be handled by a single Panel that will have nationwide jurisdiction, and the Panel will have jurisdiction before the substantive provisions of the ETS are scheduled to go into effect.



**Q. I live in a state in which a state official has prohibited or limited employers' authority to require employees be vaccinated. How do I balance my obligations under state law with this new federal mandate?**

# Answer

- 
- Per OSHA, the ETS preempts States and political subdivisions of States from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally-approved State Plan.
  - OSHA 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.
  - Per the U.S. Supreme Court, "once OSHA promulgates federal standards addressing an occupational safety and health issue, States may no longer regulate that issue except with OSHA's approval and the authority of a Federally-approved State Plan."

**Q. What happens if I live in a state with its own OSHA State Plan? Does this change what I need to do under the federal OSHA's mandate?**





# Answer

- Currently 21 states and Puerto Rico have OSHA-approved State Plans that cover all employers in the state, including state and local government employees. AK, AZ, CA, HI, IN, IA, KY, MD, MI, MN, NV, NM, NC, OR, SC, TN, UT, VT, VA, WA, WY and Puerto Rico
- Five states and the U.S. Virgin Islands have State Plans that cover only state and local government employers, including school districts. CT, IL, ME, NJ, NY and U.S. Virgin Islands
- State Plans must have safety standards “at least as effective as federal OSHA requirements.”
- Adoption of an ETS at least as effective must be completed within 30 days and State Plans must notify federal OSHA of the action they will take within 15 days.

# Topic 2: Large Employers


Coverage = “employers with 100 or more employees”



**Q. What does “100 or more employees” mean?**



# Answer

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- Employers must include all employees across all of their U.S. workplaces, regardless of employees' vaccination status or where they perform their work
  - Part-time employees do count towards the total number
  - Independent contractors are not included
  - Employees working from home are counted; however, the standards would only apply to the 50 who work in the office around others
  - Temporary and seasonal employees employed by employer are counted
  - Employees who work exclusively outdoors are counted; however, the standard's protections would only apply to the employees working in indoor settings not to those working exclusively outdoors
  - Minors are counted

# **Q. By what date do we have to comply with the large employer mandate?**



# Answer

- The effective date for the ETS is November 5, 2021 which is the date it was published in the Federal Register.
- Compliance Dates are as follows:

**Table of effective dates**

<b>Requirement</b>	<b>December 6, 2021</b>	<b>January 4, 2022</b>
Establish policy on vaccination (paragraph (d))	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))	X	
Provide support for employee vaccination (paragraph (f))	X	
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j))	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))	X	
Make certain records available (paragraph (l))	X	
Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g))		X

**Q. Do employees who are vaccinated need to show proof of vaccination? If so, what “proof” is sufficient?**





# Answer

Yes – proof must be shown. The following are sufficient forms of proof:

- the record of immunization from a health care provider or pharmacy;
- a copy of the U.S. COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

## Answer (cont'd)

- No proof = signed and dated statement by the employee also works
- Required elements of attestation:
  - Statement by employee attesting to their vaccination status (fully vaccinated or partially vaccinated);
  - Statement that employee has lost or can't produce proof;
  - The employee's recollection of the type of vaccine they received and the date and location of the vaccine
  - 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."

**Q. We are a large employer who has opted to test employees as an alternative to mandatory vaccination for everyone. How do I conduct this testing program?**

# Answer

- Weekly testing of unvaccinated employees
  - Includes those unvaccinated due to religious or disability exemption
- MASKS
- Only those unvaccinated employees who are in person at the workplace at least once every 7 days must be tested
- Test once every 7 days prior to coming to work
- Fully remote: no testing
- Specific types of tests allowed
  - Limitation: cannot be both self-administered and self-read
  - No antibody tests
- Positive test result for unvaccinated employee = immediate removal
- If unvaccinated employee tests positive, no testing them for 90 days post-positive test

**Q. If we are testing employees, do we need to pay for these tests?**

## Answer

- No!
  - All testing is paid for by the employee
  - Employers CAN pay if they would like (or subsidize part of it)

**Q. What type of records do we need to keep on each employee per the ETS?**

# Answer

- Vaccine records
  - As discussed, the ETS requires that employers maintain a record containing the vaccination status of all employees
    - Records must include whether the employee is fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status.
    - Remember – need to include proof of vaccination as previously discussed.
- Testing records
  - Keep a record of every weekly test result for every employee (BUT only if the employer has chosen to allow for testing)



**Q. Under the ETS, are employees still allowed to request religious or disability accommodations?**

# Answer

- Yes
- Nothing in the ETS removes the employer's obligation to grant reasonable accommodations on account of an employee's sincerely held religious belief or disability under Title VII or the ADA.
  - Proceed as usual here ... and remember these employees are then lumped in with the rest of the unvaccinated people for testing and masking purposes.

## Topic 3: Federal Contractors

Applies to: “contracts and contract-like instruments ... with the federal government”

**Q. What federal *contracts* are subject to this mandate?**

# Answer

- Procurement contracts of all kinds, including, but not limited to, those for goods, services, construction, or leaseholds in real property
- Services contracts covered by the Service Contract Act, 41 U.S.C. §§ 6701, et seq.
- Concession contracts
- Contracts entered into in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public

**Q. Are there any exceptions to the categories of covered federal contracts?**

# Answer

- This will not apply if the federal contract:
  - Is a grant.
  - Is with an Indian Tribe.
  - Is a contract or subcontract that has a value that is equal to or less than the simplified acquisition threshold, as defined in Section 2.101 of the Federal Acquisition Regulation (generally, \$250,000).
  - Involves work exclusively performed outside the United States.
  - Is a subcontract solely for the provision of products (rather than services).

**Q. Which *employees* are subject to this mandate?**



# Answer

- Employees who perform work directly on the contract or who perform work in connection with the contract.
  - Broad interpretation → HR, billing, etc.
  - Related groups of entities?
- Process to determine which employees:
  - Once the applicable employees are identified per the above, then the mandate applies to all employees who work at a “covered contractor workplace” (i.e., the whole building)

**Q. When is the deadline for compliance?**

# Answer

- January 4, 2022

**Q. What are the major differences between the federal contractor mandate and the large employer mandate?**

## Answer

- No testing alternative
- No remote worker or outdoor worker exception
- The federal contractor mandate is contractually based
  - Contractors are not *automatically* subject to it; the contracting agency has to provide a COVID-19 deviation clause for inclusion in the underlying agreement

# Questions?

## Margaret C. Hershiser

Margaret.Hershiser@koleyjessen.com

PH: 402-343-3711



## Ryan J. Sevcik

Ryan.Sevcik@koleyjessen.com

PH: 402-343-3859



## Jackie N. Ryan

Jackie.Ryan@koleyjessen.com

PH: 402-343-3778

