



# Employer Takeaways from the OSHA and CMS Vaccination Mandate Rules

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Nelson Mullins Webinar

*Presented by  
Bret Cohen, Chris Eby, Colin Barnacle, Ginger Boyd,  
Kristin Ahr, Mitch Boyarsky and Rachel Hedley*



# Introductions

Chris Eby, Colin Barnacle, Kristin Ahr, Ginger Boyd,  
Rachel Hedley and Mitch Boyarsky

*Moderated by*

Bret Cohen

Partner, Chair the Labor and Employment Practice, Co-Chair Trade Secret and Employee  
Mobility group

[bret.cohen@nelsonmullins.com](mailto:bret.cohen@nelsonmullins.com)

Boston, MA

(617) 217-4617



## Overview

1. OSHA's Emergency Temporary Standard
2. CMS Vaccination Requirement
3. Federal Contractors and Subcontractors
4. The 5<sup>th</sup> Circuit
5. Accommodations in the Workplace



# The OSHA Emergency Temporary Standard (“ETS”)



*Presented by*

Colin Barnacle

Partner

[colin.barnacle@nelsonmullins.com](mailto:colin.barnacle@nelsonmullins.com)

Denver, Colorado

303.583.9918

Chris Eby

Partner

[chris.eby@nelsonmullins.com](mailto:chris.eby@nelsonmullins.com)

Denver, Colorado

303.583.9919





# Overview

- The Emergency Temporary Standard (“ETS”) requires employers with 100 or more full- and part-time employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy.
- Requires covered employers with 100 or more employees to:
  1. ensure that all employees are fully vaccinated, or
  2. require unvaccinated employees to undergo regular testing and wear a face mask at work.
- The ETS went into effect on **November 5, 2021**, with dates for compliance with all requirements set for **December 5, 2021**, in most states, with the exception of testing for unvaccinated employees, which is required as of **January 4, 2022**.



## Topics Covered

- The requirements of the ETS
- How to document vaccination status
- Who pays for testing and time off to receive and recover from mandated vaccination
- Procedures for testing and masking in lieu of vaccination
- What is required when an employee tests positive for COVID-19
- Important exceptions
- Interactions with other laws and collective bargaining agreements
- Guidance for preparing compliant policies



## What Is Required?

- The ETS **requires employers to ensure that their employees are fully vaccinated against COVID-19.**
- Alternately, employers may require employees who cannot (or choose not to) prove their vaccination status **may undergo weekly testing and use face coverings in the workplace.**
- Fines of up to \$13,653 per serious violation (and up to \$135,532 for willful violations).



## “Temporary” Standard

- The OSH Act permits OSHA to issue Emergency Temporary Standards.
- Does not follow formal rulemaking/notice-and-comment requirements.
- Remain in effect for six months.
- After six months, must be replaced by a permanent OSHA Standard (subject to formal rulemaking/notice and comment requirements).



## Slide 8

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**CE2**

COLIN: I'm comfortable moving this slide to the script and making a brief note.

Chris Eby, 11/9/2021

## Documenting Vaccination Status

- The ETS **requires employers to determine the vaccination status of each employee.**
  - This includes requiring each fully or partially vaccinated employee to provide **“acceptable proof”** of vaccination status.
  - Such proof generally shows: (i) the type of vaccine administered; (ii) the date(s) of administration; and (iii) the name of the administering provider(s) or clinic site(s).
- Employees who cannot prove their vaccination status should be treated as not fully vaccinated and therefore may be excluded from the worksite.

## Documenting Vaccination Status

- Forms of acceptable proof of full or partial vaccination status:
  - **COVID-19 Vaccination Record Cards;**
  - **Immunization records** from a healthcare provider or pharmacy, or from a public health, state, or tribal immunization information system;
  - **Other medical records or official documentation** of the vaccination; and
  - For employees unable to produce other acceptable proof, a **statement of vaccination status** (subject to specific requirements).
- **CAUTION:** Documentation should be:
  1. confidential, and
  2. maintained separately from employees' personnel files.

## OSHA Requests for Documentation

- Requests from OSHA Assistant Secretary -
  - Employers must provide copies of their **mandatory vaccination policy** within **4 business hours** of the request, and
  - Employers must provide **all other documentation required by the ETS** by the **next business day** after the request.
- Requests from Employee -
  - Employees may request information related to vaccination status of entire workplace.
  - Employers must provide employees with their own vaccination documentation and test results by the next business day following a request.



## Paid Time Off for Vaccination and Recovery

- The ETS imposes requirements of paid sick leave to get vaccinated and to recover from vaccination.
  - **Reasonable time** to receive each vaccine dose, and **up to four hours of pay** for the appointments and travel to and from such appointments; and
  - **Reasonable time** and **paid sick leave** to recover from side effects from any vaccination dose.
- Employers may not require employees to use stand-alone vacation time (as opposed to sick leave or generic “PTO”).
- State law and collective bargaining agreements may impose additional requirements—check with counsel.

## Testing in Lieu of Vaccination

- A **limited exception** from the mandatory vaccination requirement:
  - Employers may require employees who are not fully vaccinated to provide proof of regular testing for COVID-19 and wear a face covering at work.
- Rules for employees on site at least once per week:
  - COVID-19 testing **at least once per week**, and
  - **Documentation** of most recent test result **at least every 7 days**.
  - Note: self-administered tests generally **do not** satisfy the ETS requirements.
- Rules for employees on site less than once per week:
  - Provide documentation on return of COVID-19 testing from the week before the date of return.

## Implications of Testing in Lieu

- Paying for tests:
  - The ETS **does not** require employers to cover weekly test costs;
  - But state wage and hour laws may require employers to cover these expenses; and
  - Federal or state law may require employers to also cover time and travel to get tested.
- Records and documentation:
  - Employers must maintain testing documentation as a medical record, keeping these records confidential and separate from employees' personnel files.
  - Records only retained while ETS remains in effect.



## Face coverings or Masks

- Employer must ensure that all unvaccinated employees wear face masks:
  - Indoors
  - Occupying a vehicle with another person
- Exceptions- Face coverings **not required** when the employee is:
  - Alone in a room with a closed door and floor-to-ceiling walls;
  - Eating or drinking; and
  - Working in a role where a face covering would create a greater hazard (*e.g.* where the face coverings or masks presents a risk of injury or death”).
- **CAUTION:** Employees that cannot wear a mask or face covering based on: (1) a disability, or (2) the employee’s sincerely held religious beliefs may be entitled to a reasonable accommodation.





## Dealing with COVID-19 Cases Under the ETS

- The ETS requires employers to **exclude employees** who test positive for COVID-19 or who are diagnosed with COVID-19 by a healthcare provider from the worksite until:
  - The employee tests negative for COVID-19;
  - Meets the return-to-work criteria under the CDC's "Isolation Guidance," or
  - Receives a documented recommendation to return to work from a licensed healthcare provider.
- No requirement for an employee who has returned to work to continue to test until **90 days** after the date of the first positive test or diagnosis.
- The ETS also requires employers to report COVID-19 related fatalities and in-patient hospitalizations to OSHA.

## Notice Requirements

- Employers must:
  - **Inform** employees about the ETS.
  - **Educate** employees about the COVID-19 vaccine.
  - **Remind** employees that they cannot be retaliated against for reporting work-related injuries or otherwise exercising their rights under the ETS.
  - **Advise** employees that knowingly providing false statements or documentation may subjects the employee to criminal penalties.
  - **Provide** employees a copy of “Key Things to Know About COVID-19 Vaccines.”



## Exceptions to the ETS

- The ETS does not apply to:
  - Employees working remotely;
  - Employees reporting to a workplace where no other people; present or who work exclusively outside of the employer's workplace; and
  - Either federal contractors and subcontractors covered under the pre-existing mandate for federal employees or certain healthcare service providers and workplaces covered by the CMS Rule.



## Interactions Between the ETS and Other Laws

- The ETS establishes a minimum federal standard and is intended to **preempt** any inconsistent state law or regulation, **including any law or regulation that purports to ban or limit an employer's authority to require vaccination**, face coverings, or COVID-19 testing.
- The ETS does not interfere with rights under the Americans with Disabilities Act, as amended, or Title VII of the Civil Rights Act of 1964 to request reasonable accommodations due to a disability or sincerely held religious belief.

## Unionized Employees

- The ETS does not preempt more protective provisions of collective bargaining agreements:
  - Provisions for paid time off to get tested or to recover from COVID-19 after a positive test,
  - Requirements that employers provide face coverings or paid time off for weekly testing,
  - Provisions requiring the employer to pay for testing, or
  - Any other additional protective measures included as part of a collectively negotiated deal will all remain in effect.



## Drafting Compliant Policies

- The ETS **requires** employers to implement and enforce a **written policy** on vaccination, testing, and face coverings.
- Given the extreme fines and extensive regulatory framework, **employers are encouraged to prepare these policies with guidance from experienced labor and employment Counsel.**
- Key Policy Provisions:
  - Vaccination Requirement
  - Testing Procedures
  - Face Covering Requirements

## Drafting Compliant Policies

- Additionally, policies should:
  - Outline the paid leave available for mandatory vaccinations (up to four hours of paid time for each primary dose of the vaccine and reasonable paid time for paid sick leave for side effects.)
  - Provide required OSHA documentation regarding vaccinations and the ETS.
  - Outline recordkeeping requirements.
  - Identify notice requirements when there is a positive COVID-19 case.

# CMS Omnibus COVID-19 Health Care Staff Vaccination Requirements

## THE CMS RULE

*Presented by*

Kristin Ahr

Partner

[kristin.ahr@nelsonmullins.com](mailto:kristin.ahr@nelsonmullins.com)

West Palm Beach, FL

(561) 366-8765







# Overview of the Omnibus COVID-19 Health Care Staff Vaccination The CMS RULE

- Centers for Medicare & Medicaid Services (CMS), a division of the Department of Health and Human Services, published its **Omnibus COVID-19 Health Care Staff Vaccination** requirements that most Medicare- and Medicaid-certified providers and suppliers must meet to participate the Medicare and Medicaid programs (the “CMS Rule”). This emergency regulation is effective as of November 5, 2021.
- The CMS Rule will cover approximately **17 million workers** at about **76,000 healthcare facilities** across the country.
- CMS issuing the Rule as an emergency regulation because any delay in implementation would result in additional deaths and serious illness among healthcare staff and patients, further worsening the ongoing strain on healthcare providers.
- Healthcare industry stakeholders are concerned that the mandate will further strain staffing shortages in the field.



## Covered Facilities/CMS Certified Providers

- The CMS Rule requires the staff to be vaccinated and applies to the following Medicare and Medicaid-certified provider and supplier types:
  - Ambulatory Surgery Centers
  - Community Mental Health Centers
  - Comprehensive Outpatient Rehabilitation Facilities
  - Critical Access Hospitals
  - End-Stage Renal Disease Facilities
  - Home Health Agencies
  - Home Infusion Therapy Suppliers
  - Hospices
  - Hospitals
  - Intermediate Care Facilities for Individuals with Intellectual Disabilities
  - Clinics
  - Rehabilitation Agencies, and
  - Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services, Psychiatric Residential Treatment Facilities (PRTFs) Programs for All-Inclusive Care for the Elderly Organizations (PACE), Rural Health Clinics/Federally Qualified Health Centers, and Long Term Care facilities



## CMS RULE DOES NOT APPLY TO:

- Physician Offices
- Assisted Living Facilities
- Religious Nonmedical Health Care Institutions (RNHCIs)
- Organ Procurement Organizations (OPOs)
- Portable X-Ray Suppliers
- Medicaid home care services, such as Home and Community-based Services (HCBS) since these providers receive Medicaid funding but are not regulated as certified facilities

HOWEVER, ALL HCPs MUST CONTINUE BE COMPLIANT WITH **OSHA ETS for Healthcare Employers**, if applicable.



# CMS RULE REQUIREMENTS: STAFF VACCINATION

- Covered Entities Must Establish or Incorporate into **Written Policies, including for Exemptions (Religious and Medical)**.
- **ALL Staff (both existing and new)** at all Covered Facilities must have received, at a minimum, the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine by the deadlines, or prior to providing any care, treatment, or other services for the facility and/or its patients.
- **CMS Rule did not include a testing requirement/alternative for unvaccinated staff: CMS RULE requires staff vaccination.**
- **ALL Staff must be “fully vaccinated” by January 4, 2022** (Phase 1 - 30 days/Phase 2 - 60 days).
- **Only exception:** Individuals who provide services 100% remotely and who do not have any direct contact with patients and other staff, such as fully remote telehealth or payroll services, are not subject to the vaccination requirements.



# EXEMPTIONS AND ACCOMMODATIONS

## Medical or Religious Reasons

- CMS RULE allows for **EXEMPTIONS** for staff with recognized medical conditions for which vaccines are contraindicated (as a reasonable accommodation under the Americans with Disabilities Act (ADA)) or religious beliefs, observances, or practices (established under Title VII of the Civil Rights Act of 1964)

### ACCOMMODATIONS:

- Establish a process for additional precautions for any staff who are not vaccinated, in order to mitigate the transmission and spread of COVID-19, Covered Facilities are directed to EEOC website for guidance.
- In granting accommodations, employers must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals, in keeping with their obligation to protect the health and safety of patients.



## ENFORCEMENT, REMEDIES AND PENALTIES

- CMS to work directly with the State Survey Agencies to regularly review compliance with Medicare/Medicaid regulations across multiple health care settings to conduct **onsite compliance reviews**.
- All CMS certified facilities are expected to comply with all requirements, and CMS has a variety of **established enforcement remedies**:
  - For nursing homes, home health agencies, and hospice (beginning in 2022), enforcement includes **civil monetary penalties, denial of payment, and even termination** from the Medicare and Medicaid program.
  - Remedy for non-compliance among hospitals and certain other acute and continuing care providers is **termination**; however, CMS's goal is to bring health care facilities into compliance.
  - Termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance.



# Interaction with State Law and Other Federal Vaccine Mandates

- **PREEMPTION:** In anticipation of State legal challenges or legislative prohibitions on vaccine mandates, CMS expects a Covered Facility to follow its requirements: under the Supremacy Clause of the U.S. Constitution, this regulation pre-empts any state law to the contrary. (U.S. Const. art. VI § 2)
- **PRIMACY:** The CMS rule takes priority above other federal vaccination requirements. CMS's oversight and enforcement will exclusively monitor and address compliance for the provisions outlined in the CMS Rule
- **PARALLEL PROTOCOLS:** Situations where the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors or the OSHA COVID-19 Healthcare Emergency Temporary Standard may apply to staff who are not subject to the vaccination requirements outlined in the CMS Rule
  - Facilities should review the inclusion criterion for all other regulations and comply with all applicable requirements.



# Executive Order 14042 – Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors

*Presented by*

Ginger Barry Boyd

Partner

[ginger.boyd@nelsonmullins.com](mailto:ginger.boyd@nelsonmullins.com)

Tallahassee, Florida

(850) 855-0662





# OVERVIEW

September 9, 2021, President Biden issued Executive Order 14042

## Purpose:

- To ensure that parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers.

## Requires:

- Beginning September 9, 2021, all federal contracts must contain a provision requiring the contractor or subcontractor comply with guidance published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance) for any workplace in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.



## Published Task Force Guidance

Federal contractors and subcontractors with a covered contract are required to conform to the following workplace safety protocols:

Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation.

Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces.

Designation of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.



## DEADLINE FOR COMPLIANCE

~~December 8<sup>th</sup>~~

January 4<sup>th</sup>



# Legal Challenge to Regulation

*Presented by*

Rachel Hedley

Partner

[rachel.hedley@nelsonmullins.com](mailto:rachel.hedley@nelsonmullins.com)

Columbia, SC

(803) 255-5565



## Legal Challenges

- So far, lawsuits challenging the regulation have been filed in the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals.
- Parties challenging the regulation are individual states, private employers, individual employees working for companies subject, industry member organizations, private schools, etc. subject to regulation.
- Challenges attack the ETS as exceeding OSHA's authority under its enabling statute and an unconstitutional attempt to delegate to OSHA non-delegable powers of Congress.
- Parties challenging seek a permanent, nationwide injunction against enforcement.

## Legal Lottery

- 28 U.S.C. § 2112 creates a “legal lottery” to choose the reviewing Circuit court.
- If petitions for review are filed in two or more Circuit courts within 10 days of agency action, the agency shall “promptly” notify the judicial panel on multidistrict litigation.
- The judicial panel “shall” designate one Court of Appeals to hear all pending petitions.
- Designation is by random selection.
- All other petitions for review filed within 10 days will then be consolidated.



## *BST Holdings, L.L.C. v. OSHA*, No. 21-60845 (5th Cir.)

- November 5, 2021: Petition for review filed.
- Original Petitioners: management company, 15 locally owned supermarkets, and 6 individual employees from Texas and Louisiana.
- Other Petitioners joined suit, including the States of Texas, Utah, South Carolina, and Mississippi.
- November 6, 2021: Stay Order, “Because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this Court.”
- Expedited briefing ordered on motion for permanent injunction.

## Impact for Employers – For Now

- Stay does not affect ability of employers to voluntarily mandate vaccination.
- Stay does not invalidate the regulation.
- Court designated by the “legal lottery” has power to modify, revoke, or extend the stay.
- Continue to plan and prepare for enforcement on January 4<sup>th</sup>.





# Employer's Legal Consideration for Accommodations in the Workplace

*Presented by*

Mitch Boyarsky

Partner

[mitch.boyarsky@nelsonmullins.com](mailto:mitch.boyarsky@nelsonmullins.com)

New York, New York

(646) 428-2619



# EEO Laws/Issues Implicated by COVID-19 Vaccine Program

- Americans with Disabilities Act (ADA)
  - Disability-Related Inquiries
  - Medical Exams
  - Confidentiality of Medical Information
  - Reasonable Accommodation, including pregnancy-related condition
  - Retaliation
- Title VII of the Civil Rights Act of 1964
  - Religion
  - Retaliation

# ADA - Disability-Related Inquiries and Medical Exams

- No requirement to satisfy the “job-related and consistent with business necessity” requirement.
  - **Optional and voluntary vaccine program.**
  - **Require written certification of vaccination as part of a required vaccine program.**





## Title VII – Religious Accommodations

- Religious Accommodation Requirements under Title VII;
  - Does your company already have a policy and procedure for handling religious accommodation requests?
  - General obligation to accommodate an employee's... "***Sincerely held religious beliefs, practices, and observances.***"
  - What does this mean?
    - Generally?
    - In the context of a COVID-19 vaccine?



# Accommodations

- Potential accommodations to consider:
  - Telework;
  - Implementing enhanced social distancing, personal protective equipment (PPE) (i.e., masks, face shields, gloves, etc.), additional sanitation requirements for employee/workplace;
  - Changing job duties to allow for telework and/or enhanced social distancing, etc.





# Questions & Answers

and

*Thank You for Attending*