



Federal Vaccine Rules: Implications for Institutions



Barbara Mistick
President
NAICU



Farnaz F. Thompson
Partner
McGuireWoods, LLC



John Moran
Partner
McGuireWoods, LLC

Agenda

- Introduction
- OSHA Emergency Temporary Standard (ETS)
- Federal Contracting Executive Order and Guidance
- Guidance on Reasonable Accommodations

Federal Vaccine Mandates

- OSHA Rule
 - Employers with 100 or more employees
 - Vaccine or testing mandate
 - Published on Nov. 4

- Federal Contracting Executive Order
 - Federal contractors and subcontractors
 - Vaccine mandate and other workplace safety protocols
 - Published on Sept. 9, with guidance issued on Sept. 24 and regularly updated FAQs

Occupational Safety and Health Administration

Emergency Temporary Standard

Employer chooses whether to require:

- 1) All employees to be fully vaccinated or
- 2) Allow employees to choose between:
 - Being fully vaccinated and
 - weekly testing and wearing a mask in the workplace.

Occupational Safety and Health Administration

Emergency Temporary Standard

| | |
|---|---|
| <p>Extent of coverage</p> | <p>Applies to schools with 100 or more employees.</p> <p>Part-time employees are included in a school's count, but independent contractors are excluded</p> |
| <p>Limits on Coverage</p> | <p>Does NOT apply to the following employees, although they contribute to the total employee count:</p> <ul style="list-style-type: none"> • Fully remote employees, • Employees who work exclusively outdoors, and • Employees who do not report to a workplace where others are present. |
| <p>Other Federal Vaccination Mandates</p> | <p>Does NOT apply if the Healthcare ETS, Executive Order regarding Federal Contractors and Subcontractors, or CMS ETS applies</p> |

Complex Business Structures

- ❖ Two or more related entities (such as universities and their foundations) may be regulated as a single employer if they handle safety matters as one entity.
- ❖ Employees of staffing agencies count toward the staffing agency's employee count, not the host employer's count.

OSHA ETS and Paid Time Off (PTO)

- ❖ Up to 4 hours of paid time off (PTO) is required for vaccination, if the employee receives the vaccination during work hours.
- ❖ A reasonable amount of PTO is required to recover from any side effects.
 - ❖ Employers may require employees to use accrued paid sick leave for such recovery.

Collect and Maintain Required Vaccination Records

- Acceptable documentation includes:
 - Immunization card from healthcare provider,
 - Vaccination card,
 - Medical records documenting vaccination,
 - Public health or government immunization records, or
 - Other official documentation containing complete vaccination information.
 - May accept a signed and dated attestation if employee is unable to produce required proof.
 - All documentation before release of ETS is acceptable except oral confirmation.

Process Requests for Accommodations

- ❖ ADA/Rehabilitation Act disability and Title VII religious accommodation requirements apply.
- ❖ Weekly testing option also serves as accommodation to vaccine mandate.
- ❖ Employees may pursue testing accommodations.

Religious Accommodations

- Title VII of the Civil Rights Act of 1964: Is the worker's belief, practice, or observance: 1) religious and 2) sincerely held.
- Religion includes “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate . . . Without undue hardship on the conduct of the employer's business.” 42 U.S.C. § 2000e(j).
- Belief in God is not necessary. The claimed belief must occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.
- Views that are essentially political, sociological, or philosophical do not qualify for the religious exemption under Title VII.
- Document accommodations requested and accommodations offered.
- [EEOC template form](#) for religious accommodation requests

Medical Accommodations

- Employers must offer qualified individuals with disabilities reasonable accommodations in order to ensure that applicants and employees have equal access to employment opportunities and benefits under both the Americans with Disabilities Act and the Rehabilitation Act.
- Always go through the Interactive Process and Document the Accommodations Requested as well as the Accommodations Offered
- An employer is NOT obligated to create or maintain “telework” programs.
- Factors to consider:
 - Employer’s ability to adequately supervise the employee,
 - Necessity and availability of equipment and tools,
 - Need for face-to-face interaction with customers, coworkers, or associates, and
 - Access to documents or information located in the workplace.

Compliance Deadlines

- ❖ December 6, 2021 – All requirements of the OSHA ETS must be fulfilled except for testing requirement for unvaccinated employees.
- ❖ January 4, 2021 – Employees must be fully vaccinated by January 4, 2021. Weekly testing requirement for unvaccinated begins but not for workers who have received their vaccinations and only need to wait two weeks to be “fully vaccinated.”

| Requirement | December 6, 2021 | January 4, 2022 |
|---|------------------|-----------------|
| Establish policy on vaccination | X | |
| Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status | X | |
| Provide support for employee vaccination | X | |
| Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis | X | |
| Remove any employee who received positive COVID-19 test or COVID-19 diagnosis | X | |
| Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes | 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 | X | |
| Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours | X | |
| Make certain records available | 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) | | X |

Penalties

- ❖ Penalties may range from \$13,653 per violation for serious violations or \$136,532 per violation for willful violations under OSHA's standard penalties.
- ❖ Criminal penalties for knowingly supplying false statements or documentation.

Duration

- ❖ OSHA ETS will be effective for 6 months, but it may become permanent.
- ❖ U.S. Court of Appeals for the Fifth Circuit has issued a stay which is in effect. All challenges will be heard by the Sixth Circuit.

Occupational Safety and Health Administration

Emergency Temporary Standard

State Plans

Must be as Effective as ETS and released within 30 days of the OSHA ETS

Contact a State Plan

Select a state/territory from the map to show that state/territory's State Plan contact information.

Legend:

- This state's OSHA-approved State Plan covers private and state/local government workplaces.
- This state's OSHA-approved State Plan covers state/local government workers only.
- This state (with no asterisk *) is a federal OSHA state.
- This state (with no asterisk *) is a federal OSHA state.

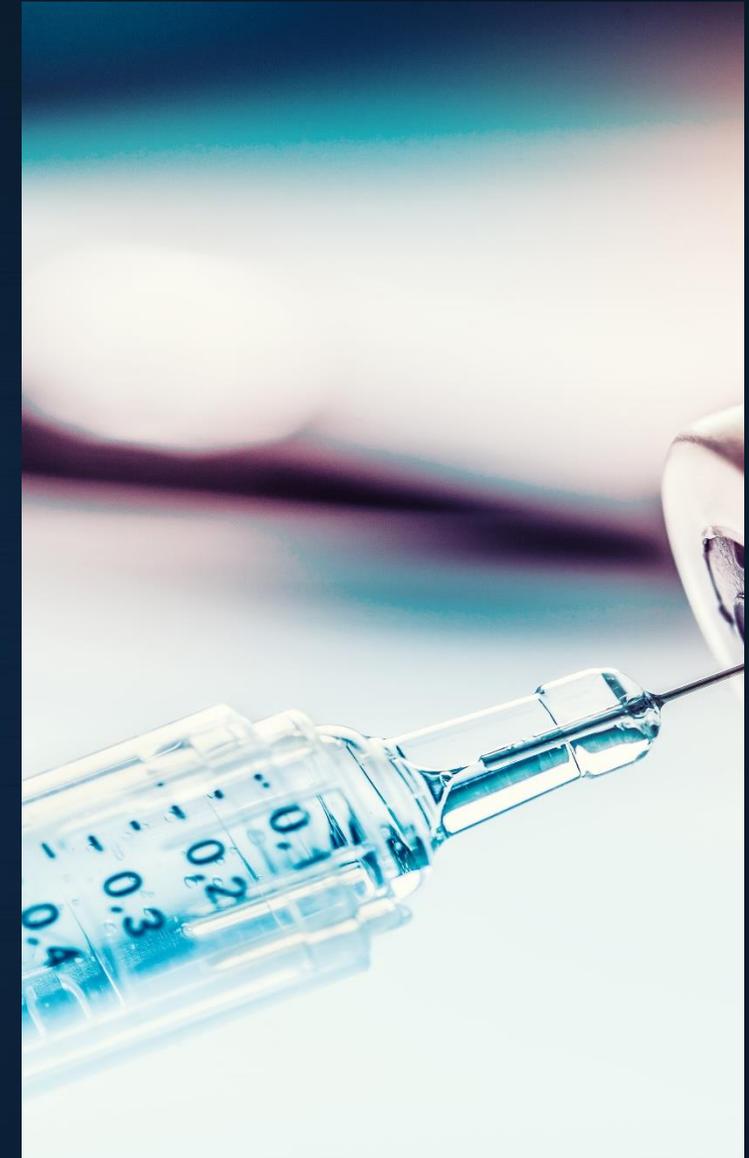
Resources

- OSHA ETS, <https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23643.pdf>
- OSHA's FAQs, <https://www.osha.gov/coronavirus/ets2/faqs>

Executive Order 14042

Federal Contractors and Subcontractors

- Employees without lawful accommodations must be fully vaccinated by ~~12/08/21~~ 01/18/22
 - No weekly testing alternative to vaccine mandate
- Compliance with CDC guidance for masking and physical distancing is required
 - In areas of high or substantial community transmission, fully vaccinated employees must wear a mask in indoor settings, except for limited exceptions



Executive Order 14042

Federal Contractors and Subcontractors

Designate Implementation Coordinator

- Contractors must designate an implementation coordinator for this Guidance and workplace safety protocols

Identify Covered Contractor Employees

- Employees working “on or in connection with” a covered contract are covered
- Wherever they work becomes a covered contractor workplace
- Additional employees in covered contractor workplaces will be covered as well

Distribute Required Information

- Distribute workplace safety protocols, including:
 - Employees without accommodations must be fully vaccinated by December 8, 2021.
 - Compliance with CDC guidance for masking and physical distancing is required.

Process Accommodation Requests

- Available for medical and religious reasons
- If the agency is a “joint employer” on a contract, then coordinate accommodations with the agency.

Executive Order 14042

Federal Contractors and Subcontractors

Collect and Maintain Vaccination Records

- Ensure that covered employees provide official vaccination records, according to requirements.
- Digital records are acceptable.
- Employee attestation to vaccination compliance and recent antibody test results are *not* sufficient.

Masking and Distancing Requirements

- Fully Vaccinated: No mask except indoors in “areas of high or substantial community transmission”
- Non-Vaccinated: Mask indoors and sometimes outdoors “regardless of ... community transmission”
- Certain reasonable exemptions may apply if approved in writing

Flow Down to Subcontractors

- Prime contractors must flow down the mandate clause to first-tier subcontractors, which must also flow down.
- Subcontracts solely for provision of products are generally exempt.
- Prime contractors *not* required to audit or enforce compliance directly.

Keep Up to Date

- Must follow any updates to Task Force guidance.
- Workplace protocols must be updated weekly based on CDC transmission tracking website.
- Stringent masking standards go into effect immediately, but out of effect on two-week delay.

Litigation

- ❖ APA challenges to the three new federal mandates:
 - ❖ OSHA: Petitions for review consolidated before the Sixth Circuit; Fifth Circuit stay.
 - ❖ Contractors: District court challenges around the country; at least one PI motion.
 - ❖ Healthcare: Recent district court challenge.
- ❖ Finality will take time; interim relief may vary.



Questions

Contacts

NAICU

Sarah A. Flanagan

*Vice President for Government Relations and Policy
Development*

Jody Feder

Director of Accountability and Regulatory Affairs
Jody@NAICU.edu

McGuireWoods

Farnaz Thompson

Partner

ftompson@mcguirewoods.com

John Moran

Partner

jmoran@mcguirewoods.com