

# Vaccines in the Workplace

December 16, 2021

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# Mandatory Vaccinations and the Accommodation Process

# Agenda

- Overview of status of mandates
- Implementing a vaccine policy
- Requests for Accommodation and Evaluation of the Request
  - Disability, religious, personal/political positions, undue hardship
  - Interactive process, potential accommodations, undue hardship
- Questions

# CMS COVID-19 Vaccine Mandate

- On September 9, 2021, President Biden announced that the Centers for Medicare & Medicaid Services (CMS) would be taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement.
  - *“If you’re seeking care at a health facility, you should be able to know that the people treating you are vaccinated. Simple. Straightforward. Period.”*
- On November 5, 2021, CMS issued an interim final rule requiring vaccination of staff at certain facilities subject to health and safety standards known as Conditions of Participation (CoPs) and Conditions for Coverage (CfCs).
  - Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555

# CMS COVID-19 Vaccine Mandate: The Highlights

- The mandate is expected to apply to over 17 million staff members at over 76,000 health care facilities across the country.
- The original implementation deadline was December 6, 2021, with full vaccination of all staff required by January 4, 2022.
- As of November 30, 2021, federal courts temporarily halted implementation and enforcement of the mandate in all 50 states.
  - **Breaking News:** Yesterday, December 15, the 8<sup>th</sup> Circuit Court of Appeals allowed the mandate to move forward in 26 states.

# CMS COVID-19 Vaccine Mandate: The Details

Access our December 8, 2021, Health Law Webinar for a deeper dive on the CMS COVID-19 Vaccine Mandate, available on demand [here](#) (no cost). Topics include:

- What facilities are covered and notable exclusions
- Requirements for covered facilities
- Definition of “staff”
- Required policies and procedures
- Consequences of noncompliance

# CMS COVID-19 Vaccine Mandate: Status of Legal Challenges

On November 29, 2021, the U.S. District Court for the Eastern District of Missouri issued a preliminary injunction enjoining the federal government from implementing and enforcing the CMS Vaccine Mandate in ten states.

- The district court was sympathetic to plaintiffs' arguments that (1) CMS exceeded its authority, (2) CMS improperly bypassed noticed and comment requirements, and (3) the mandate is arbitrary and capricious.
- On December 1, the district court denied the Biden administration's request for a stay on the preliminary injunction pending an appeal to the 8<sup>th</sup> Circuit.
- On December 13, the 8<sup>th</sup> Circuit also denied the administration's motion for a stay pending appeal.

# CMS COVID-19 Vaccine Mandate: Status of Legal Challenges, Cont.

On November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a similar preliminary injunction that applied to the rest of the country, even though only 14 states were plaintiffs in the case.

- On December 1, the district court denied the Biden administration's request for a stay on the preliminary injunction pending an appeal to the 5<sup>th</sup> Circuit.
- **Breaking News:** Yesterday, on December 15, the 5<sup>th</sup> Circuit denied the administration's motion for a stay pending appeal with respect to the 14 plaintiff states but granted a stay with respect to all other jurisdictions covered by the district court's preliminary injunction.
- The 5<sup>th</sup> Circuit's December 15 order means that there is no longer a judicial barrier to implementation and enforcement of the CMS Vaccine Mandate in 26 states.
- As we went to press, CMS had not yet issued a statement in response to the December 15 order.



# CMS COVID-19 Vaccine Mandate: Status of Legal Challenges, Cont.

- States where the mandate is enjoined:
  - Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Iowa, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming
- States where the mandate is not enjoined:
  - California, Colorado, Connecticut, Delaware, (District of Columbia), Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin

# Federal Contractor/Subcontractor Mandate

- Mandatory vaccination for “covered employees” on “covered” contracts and subcontracts
- Covered contracts
  - Just those for services or above \$250,000?
  - Practically: could be any federal contract or subcontract
- Incredibly broad definition of covered employees.
  - Not just direct workers
  - Could be HR, administration etc.
- Currently enjoined

# OSHA ETS: Background

- September 9: announcement of plan to issue COVID-19 ETS
- OSHA's authority to issue an ETS
  - Employees exposed to grave danger
  - ETS is necessary to protect employees
- OSHA has issued 10 ETSs in its history
  - 6 challenged in court
  - Only 1 survived
- November 5: COVID-19 ETS published in the Federal Register

# OSHA ETS: Requirements

- 100 or more employees at any time while ETS is in effect
- Requires (1) mandatory vaccination policy or (2) policy requiring vaccination or weekly testing + masking
- Paid time off for vaccination and recovery time
- Does not apply to workers who are remote, 100% outdoors, or work alone
- Preempts contradictory state and local laws
- Compliance dates: December 6, 2021, except testing requirement takes effect January 4, 2022

# OSHA ETS: Legal Challenges

- Multiple legal challenges across circuit courts
- Basis for challenges:
  - Exceeds OSHA's statutory authority
  - Both overbroad and underinclusive
  - Constitutional concerns
- November 6: Fifth Circuit issued initial temporary stay
- November 12: Fifth Circuit order extending stay
- November 16: cases consolidated; Sixth Circuit selected pursuant to lottery system

# OSHA ETS: Current Status

- OSHA suspended enforcement
- November 23: OSHA emergency motion to dissolve stay
- December 7: Oppositions to emergency motion filed
- December 10: OSHA's reply in support of motion filed
- Currently pending Sixth Circuit ruling on OSHA's motion
- Potential outcomes:
  - Fifth Circuit stay dissolved – ETS goes into effect
  - Fifth Circuit stay upheld
- Initial compliance deadlines will not take effect

# Implementing the Policy

- Written policy
  - Content (explanation of why, deadlines, process)
  - Request for exemptions/accommodation process
  - Consideration of legal requirements – Human rights laws, federal vaccine mandates, state laws
- Accommodation process
- Communication
  - Executives and management
  - Employees at large
  - Resources and open lines of communication for employee inquiries, etc.

# Requests for Exemptions: Overview

- The big three
  - Disability/Medical
  - Religious
  - Personal/political positions and beliefs



# Accommodation Process: Disability/Medical Exemption

- Interactive process
  - Additional information
    - Completion of exemption forms
    - Dialogue with employee
    - Information from provider(s)
- Undue hardship standard
  - High threshold if ADA-covered disability
    - Nature/cost of the accommodation
    - Overall financial resources of employer, size of business, type of operation
    - Total number of employees
    - Impact on expenses and resources, impact on operations

# Accommodation Process: Disability/Medical Exemption, Cont.

- Health and Safety
  - Individual poses a direct threat to the health or safety of the individual or others
  - Direct threat = significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation
  - Based on an individualized assessment of an individual's ability to perform the essential functions of a job
- Potential examples
  - Undue hardship
  - Health and safety

# Accommodation Process: Disability/Medical Exemption, Cont.

- Importance of clear documentation of process and outcomes
- Communications with employee
- Consistency/consequences of inconsistent application of policy and process
- Maintain confidentiality of information and documentation

# Accommodation Process: Religious Exemption

- Interactive Process
  - Additional information – completion of exemption forms, dialogue with employee, information from pastor/religious leader, religious writings/sources
- Sincerely held religious belief
  - Must be religious
    - Does not need to be shared by all members of a religious sect
    - Personal or moral beliefs are not religious
    - Need not be an established or mainstream religion
  - Must be sincerely held

# Accommodation Process: Religious Exemption, Cont.

- Undue hardship
  - More than minimal cost or burden
  - Includes financial and non-monetary costs (e.g., health and safety risks)
  - Lower standard than disability standard but where is the threshold
- Potential examples – undue hardship

# Accommodation Process: Religious Exemption, Cont.

- Importance of clear documentation of process and outcomes
- Communications with employee
- Consistency/consequences of inconsistent application of policy and process
- Maintain confidentiality of information and documentation

# Accommodation Process: Personal/Political Positions and Beliefs

- Consider approach you wish to take
- Interactive process to understand employee's concern?  
Opportunity to influence/persuade and/or to explore alternatives?
  - Additional information
    - Completion of exemption forms, dialogue with employee
    - Exchange of information
- Impact on accommodation process and decisions in relation to religious and medical/disability exemptions

# Potential Accommodations

- Potential accommodations
  - Remote work
  - Compliance with COVID-19 protocols, including masking, social distancing
  - Periodic testing
  - Alternative work arrangements
  - Testing
  - New position/adjustment of work duties
  - Transfer
  - Leave
  - Other? Combo?



# Potential Outcomes

- What if employee does not qualify for an exemption?
- What if employee qualifies for an exemption but accommodation is not possible/creates an undue hardship?
- Should you terminate the employee? Or place the employee on an indefinite unpaid leave? Pros and cons.
- Have you considered in advance of the selected outcome (in anticipation of legal challenges):
  - Strength of the legal defenses, quality of documentation, and
  - Overall strength of company's position

# Takeaways

# Takeaways

- Importance of evaluation of legal requirements affecting company's approach
- Written policy and consistent process of evaluating exemption requests
- Clear communication of policy
- Resources and opportunity for ongoing dialogue
- Deliberate consideration and evaluation of outcomes
- Ensure adequate documentation of process and outcomes

# Q&A

# Presenters



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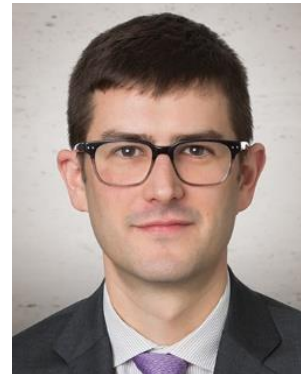


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