



Best Practices for Compliance with Vaccine Mandates

GHILG Meeting
January 13, 2022



Littler[®]

Presented by



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Agenda

- **Timeline and Status of the Federal Mandates**
- Elements of the OSHA ETS
- CMS Interim Rule
- Action Items



September 9, 2021 – Federal Mandates Announced

★★★★★★

PATH OUT OF THE PANDEMIC: PRESIDENT BIDEN'S COVID-19 ACTION PLAN

SEPTEMBER 2021



1. Vaccinating the Unvaccinated
2. Furthering Protection for the Vaccinated
3. Keeping Schools Safely Open
4. Increasing Testing and Requiring Masking
5. Protecting Our Economic Recovery
6. Improving Care for Those with COVID-19



November 4, 2021 – OSHA Vaccine-or-Test ETS

The New York Times

The Biden administration sets a Jan. 4 vaccination deadline for private sector workers.

By Lauren Hirsch

Nov. 4, 2021, 8:46 a.m. ET

The Biden administration said on Thursday that large companies have until Jan. 4 to ensure that their workforces are fully vaccinated under a sweeping new coronavirus health measure that will cover 84 million private sector workers.

The plan was first announced in September by President Biden, who directed the Labor Department to invoke its emergency powers over the safety of workplaces to require businesses with 100 or more employees to mandate vaccinations for all employees. Workers who refuse to get vaccinated must undergo weekly testing.

Also on Thursday, the administration unveiled new emergency regulations for health care workers, including those at nursing homes caring for elderly and sick residents who are at high risk for infection. All 17 million workers at health care facilities receiving either Medicare or Medicaid funding must be vaccinated by Jan. 4.

Status of the OSHA Vaccine-or-Test ETS

- Nov. 6—Fifth Circuit ruling initially stayed ETS.
- 27 legal actions consolidated and in Sixth Circuit.
- Dec. 7—Sixth Circuit lifted the Fifth Circuit's Stay.
- Case went before SCOTUS, along with CMS rule.
- Jan. 7—Oral arguments on January 7, 2022, **with decision pending**.

November 4, 2021 – CMS Emergency Regulation Released

CMS.gov

Centers for Medicare & Medicaid Services

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Press release

Biden-Harris Administration Issues Emergency Regulation Requiring COVID-19 Vaccination for Health Care Workers

Nov 04, 2021 | [Home health agencies](#), [Nursing facilities](#), [Physicians](#), [Policy](#)

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The Biden-Harris Administration is requiring COVID-19 vaccination of eligible staff at health care facilities that participate in the Medicare and Medicaid programs. The emergency regulation issued by the Centers for Medicare & Medicaid Services (CMS) today protects those fighting this virus on the front lines while also delivering assurances to individuals and their families that they will be protected when seeking care.

CMS Issues Broad COVID-19 Vaccine Requirements

On November 4, 2021, the Centers for Medicare and Medicaid Services (CMS) at the Department of Health and Human Services (HHS) issued an interim final rule requiring healthcare worker vaccinations

- Employees and contractors at health care facilities receiving Medicare and Medicaid funding must be vaccinated by January 4, 2022
- The regulation is effective as of November 5, 2021.



Status of the CMS Emergency Rule

- November—Various federal courts hear cases, with split results.
 - Missouri, Texas courts issue preliminary injunctions.
 - Florida court rejected attempt to block CMS rule.
- Dec. 15—Fifth Circuit ruling upholding stay of CMS Rule.
- Country split—25 states (including Texas) under injunction, other 25 states and D.C. not under injunction.
- Jan. 7—Oral arguments on January 7, 2022, **with decision pending**.
- Enforcement deadlines have been deferred, with Phase 1 deadline now January 27, and Phase 2 deadline now February 28.

SCOTUS Oral Argument

- On January 7, the U.S. Supreme Court heard oral argument on OSHA ETS and CMS rule.
- The Court heard more than two hours of oral argument (well beyond the scheduled hour) as to whether to reimpose a stay of the ETS, which was scheduled to go into effect on Monday, January 10, 2022.
- Notably, Justice Thomas led off questioning which is a rare a very occurrence.
- Immediately following oral argument on the ETS, the Court heard argument on the CMS rule for healthcare workers.
- SCOTUS is plainly divided on this issue and decisions on both cases are likely to come in relatively short order.

September 24, 2021 – OFCCP Issues Rule

- Safer Federal Workforce Task Force issued its Guidance pursuant to EO 14042.
- Guidance requires all “covered contractors” to be fully vaccinated by December 8, 2021, unless they are “legally entitled to an accommodation.”
- The Guidance applies to all “newly awarded covered contracts” at any location where covered contract employees work and covers “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.”

Status of OFCCP Mandate for Federal Contractors

- By mid-December, numerous courts issued preliminary injunctions against enforcement of federal contractor mandate, resulting in nationwide injunction.
 - Cases in Georgia, Kentucky, Florida, and Eleventh Circuit.
- Because each court has reached the same result, there is presently no conflict for the Supreme Court to address.
- Federal contractor mandate not part of case before SCOTUS.
- OMB has stated it will not enforce the mandate in the U.S. and its outlying areas.

Agenda

- Timeline and Status of the Federal Mandates
- **Elements of the OSHA ETS**
 - **Scope**
 - **Vaccination Policy Considerations**
 - **Testing Policy Considerations**
 - **Accommodation Issues**
 - **Other Workplace Safety Considerations**
- CMS Rule
- OFCCP Rule
- Action Items





Federal OSHA ETS

OSHA ETS – Scope

- Implementation of all elements except for testing by January 10, 2022.
- Applies to employers with 100 or more employees.
- By February 9, 2022, employees that are not 100% remote must be vaccinated or submit to weekly testing (some exceptions apply)
- Covers over 84 million private-sector workers.
- Detailed FAQ available at <https://www.osha.gov/coronavirus/ets2/faqs>
- Enforcement will begin on February 9, 2022

ETS - What Is Required?

- By February 9, 2022, employees must be vaccinated or commence weekly testing.
 - Vaccinated = must receive the first shot of a one-dose vaccine, or the second dose of a two-dose vaccine (even though this is not “fully vaccinated” as that term is used elsewhere (14 days after last dose)).
- Employer must have a written COVID-19 vaccination policy.
- Requirement applies to all employees, including new hires.
- Employers must consider whether those with medical and religious exemption requests can be reasonably accommodated.

ETS – Who? Employers of 100+ U.S. Employees

- Count as of November 5, 2021 by employer, not by worksite.
 - If you had 100 or more U.S. employees on November 5, you are covered.
 - And you stay covered even if you drop below 100 in the future.
 - If you had less than 100 employees on November 5, and later you grow to 100, you then become covered.
- Includes part-time, temporary workers, seasonal workers, and minors.
- But not workers employed by other employers at the same location and not independent contractors.

ETS – State and Local Government Employers?

- ETS does not apply to state and local government employers in states without State Plans, because state or local government employers and employees are exempt from OSHA coverage.
- However, in states with OSHA-approved occupational safety and health programs (“State Plans”), state and local government employers with 100 or more employees will be covered by State occupational safety and health requirements.
- State Plans must adopt requirements for state and local employers that are at least as effective as federal OSHA’s requirements in this ETS.

ETS – Employees Working Exclusively Outdoors

- Employees working exclusively outdoors counted but exempted from vaccination requirement.
- Exclusively outdoors means:
 - Work outdoors on all days;
 - Must not routinely occupy vehicle with other employees; AND
 - Works outdoors for duration of every workday except for de minimus use of indoors spaces with others (e.g., restroom, admin office).



Interaction with Other Requirements - Federal

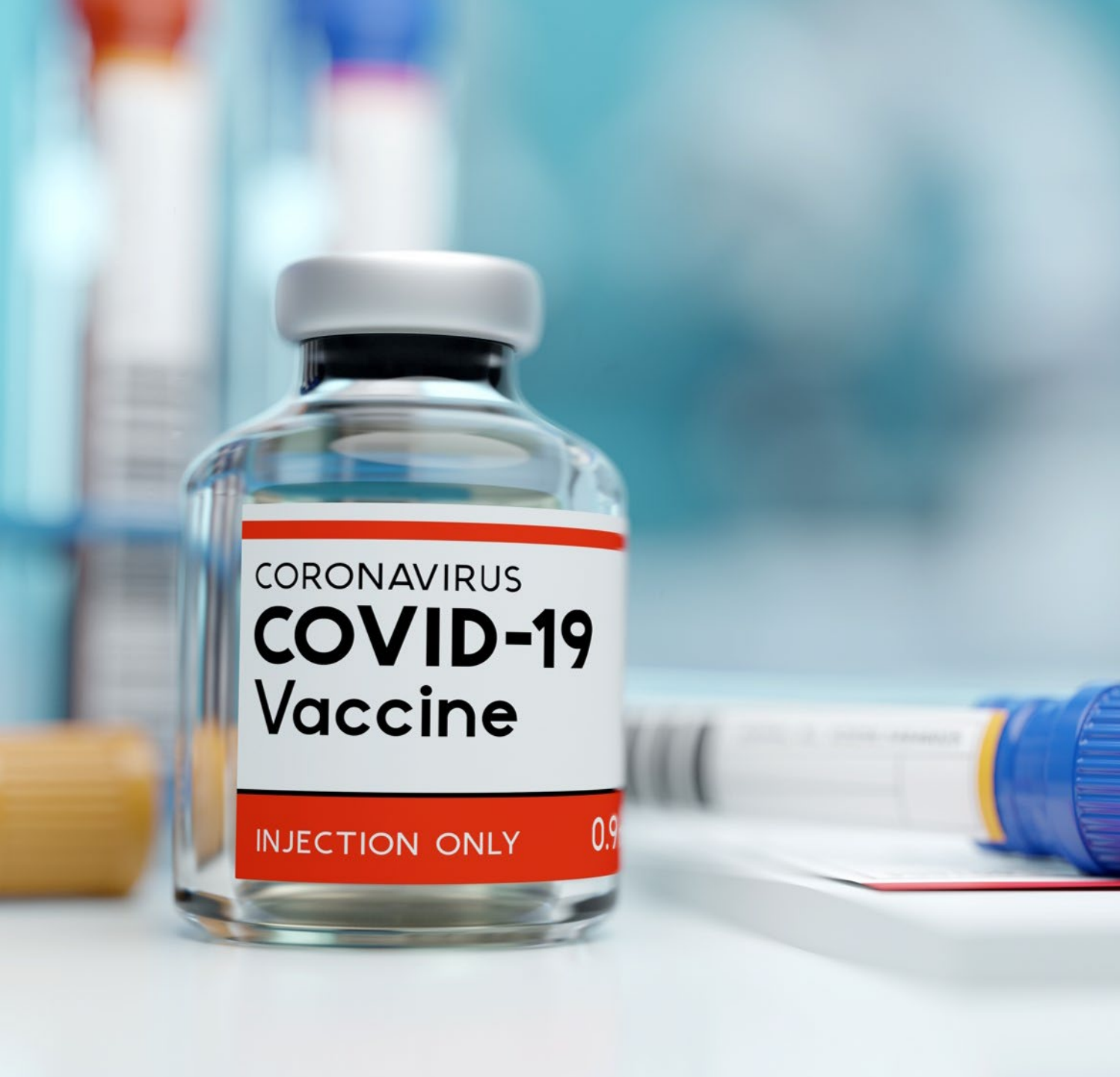
- The ETS does not overlap other federal mandates.
 - Healthcare employers covered by the CMS Guidelines, per CMS FAQs updated 12/28/21.
 - Federal contractors covered by Safer Federal Workforce Guidance
 - OSHA FAQ 2.G.
 - However, federal contractor mandate now enjoined.
 - Thus, federal contractors otherwise subject to OSHA ETS would likely need to comply.

Interaction with Other Requirements – State and Local

- Preemption of limits on employers' ability to mandate vaccines and impose other safety rules
 - FAQ 1.A
- BUT: Non-preemption of *more* protective rules
 - FAQ 1.B
- So what does this mean for states like TX that provides more protections for employees with “personal beliefs”?

Texas and Executive Order GA-40

- “No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”
- Maximum fine is \$1,000 penalty.
- TWC is issuing warning letters to Texas employers regarding mandates without notifying employees of exemptions and “processing those exemptions in good faith.”
- OSHA takes position that ETS preempts state law.



Vaccination Policy Considerations

Two Policy Options for Employers

- Mandate vaccination, except for those:
 - With a permanent medical contraindication
 - With a temporary medical contraindication (delay), or
 - Who are legally entitled to reasonable accommodation under federal EEO law based sincerely held religious belief, practice or occurrence that “conflicts with the vaccination requirement”
- OR
- Require unvaccinated employees (including exempted employees) to undergo weekly testing and wear face coverings while working.

29 CFR 1510.501 (c), (d), (g)

Choosing a Policy

- **Can I require vaccination for one portion of my workforce and vaccination-or-testing for another?** Yes. Employers can have different compliant policies for different portions of their workforce.
- Model policies are available from OSHA.
- Written policy due 30 days after publication of ETS
- New Compliance Dates: January 10 and February 9, 2022



How Does an Employee Prove Vaccination Status?

- An employer must determine each employee's vaccination status, including whether the employee is fully vaccinated, by collecting one of the following:
 - Written record of immunization from a healthcare provider or pharmacy.
 - Copy of the CDC COVID-19 Vaccination Record Card.
 - Copy of medical records documenting the vaccination.
 - Copy of immunization records from a public health, state, or tribal immunization information system.
 - Copy of any other official documentation verifying vaccination.
- Previous COVID-19 infection is **not** a basis for exemption.
- Records and roster of vaccination status = “medical records” under [29 CFR 1910.1020](#), with retention while ETS remains in effect.

What About Attestations? 29 CFR 1910.501(e)

- If you previously collected them, you don't need to re-verify status.
- If an employee is unable to produce any of the 5 acceptable documents, employee may sign the following statement:
 - “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.”



Producing Documentation

- Upon request, provide employees with their own vaccination documentation and test results by end of next business day.
- Unions entitled to deidentified data regarding the vaccination status of entire workplace.
- Upon request from OSHA assistant secretary:
 - provide copies of mandatory vaccination policy and aggregate number of fully vaccinated employees within four business hours;
 - provide copies of all other documentation required by the ETS by the next business day.

29 CFR 1510.501(j)



Time Off and Paid Time Issues Related to The Vaccine

Paid Time Off For the Vaccine

- *Up to* four hours of paid time at regular rate to receive each primary dose (not boosters), if received during working hours.
 - Additional time, if needed, is unpaid but protected
 - Existing paid leave/PTO cannot be used for this purpose
- State and local laws may impose different or additional requirements:
 - Specific COVID-19 vaccine laws (e.g., New York, which includes boosters)
 - General requirements for preventative care
- Vaccine time is required even where testing option is offered.

Paid Time Off for Recovery from Side Effects

- “Reasonable” paid sick time for side effects.
- The ETS preamble and FAQs state that up to two days per dose to recover from side effects would be reasonable.
- May run concurrently with existing sick leave, but not vacation.
- If employer does not distinguish between types of PTO, existing PTO can be used.
- Employee’s *accrued* sick time may be used; but employer cannot be required to accrue negative leave or borrow against future leave.
- If no sick leave is offered, or sick leave has been exhausted, employer must provide additional reasonable paid time for recovery.
- Recovery time is required even where testing option is offered.



Testing Policy Considerations

COVID-19 Testing Options

- Employers **must** mandate COVID-19 testing for unvaccinated workers.
 - This includes those who are excused from mandatory vaccination due to temporary or indefinite medical contraindication or sincerely held religious objections, unless they are also exempt from testing for a protected reason.
- Employer **may** mandate COVID-19 testing for vaccinated workers.
- COVID-19 testing is not the only safety protocol that will apply to unvaccinated workers, regardless of their reason for not being vaccinated.

OSHA ETS COVID-19 Testing Requirements

Workers who are not fully vaccinated **must** submit to weekly testing.

Weekly testing **not** required for workers working 100% remotely, apart from co-workers and customers.

- If such a worker comes to worksite with others present for specific occasion, must meet the testing requirements in advance of coming to the workplace

Unvaccinated workers who do not have the requisite tests **must** be excluded from the workplace: masking and social distancing alone is not compliance.

Exception: Employers should not test unvaccinated individuals who have been infected with COVID-19 within past 90 days. Testing resumes 90 days after infection following diagnosis or positive test. This is due to high probability individual will continue to test positive even when no longer contagious.

COVID-19 Testing Options

Q. Must the employer pay for COVID-19 tests?

- A. *Maybe.* The ETS allows employers to require employees to pay for COVID-19 tests that they elect instead of vaccination, BUT acknowledges that other laws may require the employer to pay. For example, an employer may need to pay:
- for tests offered as reasonable accommodations to individuals with disabilities or religious beliefs that prevent them from being vaccinated;
 - where state law requires employers to pay for employment-related medical examinations; or
 - if the employer has negotiated with employees or their representatives and has agreed to pay.

Must We Pay For the Cost Of The Test? State Laws Vary

- **State Law: Specific COVID Rules**

- California Emergency Standards Order: “Offer testing to an employee at no cost and during working hours in the event of a potential COVID-19 work-related exposure.”
- **Q:** Can employers send their employees to a free testing site for testing (e.g., run by their county) and is this considered to be “at no cost to employees?”
A: Yes, as long as employees incur no cost for the testing. Ensuring that an employee does not incur costs would include paying employees’ wages for their time to get tested, as well as travel time to and from the testing site. It would also include reimbursing employees for travel costs to the testing site (e.g., mileage or public transportation costs)
- Minnesota: “When an employer requires an employee or applicant to undergo a medical evaluation, including a COVID-19 test, in order to work, Minnesota law requires that the employer pay the cost of the test or medical examination.” (DLI FAQ)
- More!

- **State Law: Expense Reimbursement**

Should We Pay Employees For Time Taking The Test?



If the employee takes a test before work, and the testing time is compensable, what about their commute?

- “Continuous workday”
- Travel time issues

COVID-19 Testing Options

Q: Can we allow employees to conduct at-home COVID-19 tests?

A: No, not unless the employer can monitor the individual's administration of the test and verify that the individual conducted the test and accurately reported the result. However, a COVID-19 antigen test that is otherwise cleared by the Food and Drug Administration for self administration is acceptable if the employer arranges for a proctored testing process.

COVID-19 Testing Options

Q: Do we need special clearance to conduct COVID-19 tests at our place of business?

A: Assuming your workplace is not a clinical laboratory, you may need to comply with the Clinical Laboratory Improvements Act (CLIA) by obtaining a certificate of waiver essentially excusing your workplace test location from meeting laboratory standards protections while administering point-of-care tests for COVID-19. Over the counter self-tests are considered “CLIA waived,” meaning you do not need to comply with this CLIA requirement and you do not need to obtain a waiver, but you will need to ensure that a health care worker or employer representative observes the individual self-administering the test and confirms the results.

Testing - Summary

- Not vaccinated employee,
- Reports to a workplace,
- Must test weekly,
- **Must test negative!**
- If not, remove from the workplace, immediately.
- Not required to provide paid leave during removal periods.
- (But watch out for state and local wage and hour laws and paid sick leave laws.)



Other Workplace Safety Considerations

Hold On to Those Masks

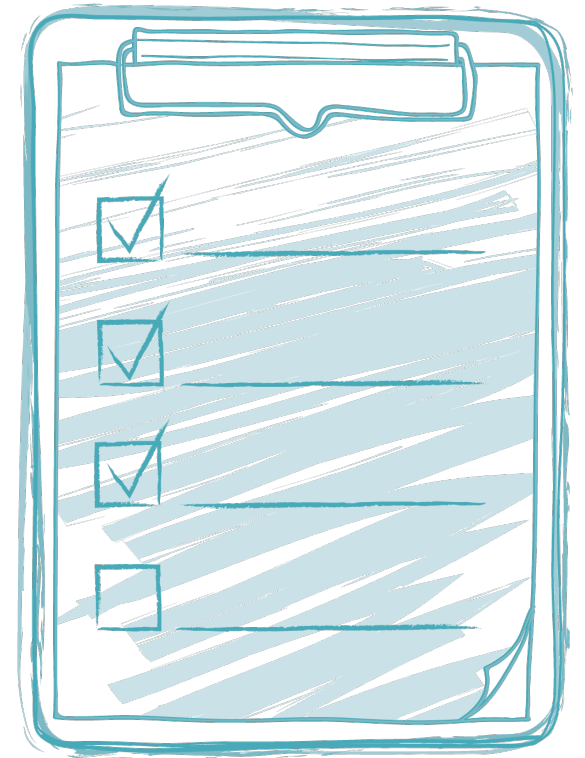


- Unvaccinated employees must wear a face covering while indoors or in a vehicle with another person.
- Exceptions for medical reasons and sincerely held religious beliefs.
- But also remember, face coverings still required for vaccinated employees when working indoors in areas of substantial or high transmission if CDC guidance is being applied.

Employee Notice Requirements

Employer must notify employees (in language and literacy level employee can understand):

- About the ETS.
- About vaccine efficacy, safety, and benefits.
- That there will be no discrimination for reporting work related injuries.
- There are criminal penalties for falsifying records.
- A copy of CDC's document: "Key things to know about COVID."





COVID-19



Your Health

Vaccines

Cases & Data

Work & School

Healthcare Workers

Health Depts

Science

More

🏠 Vaccines

Your Vaccination +

Types of Vaccines Available +

Possible Side Effects

After You're Fully Vaccinated +

Safety & Monitoring +

Effectiveness +

Myths & Facts

Frequently Asked Questions

About COVID-19 Vaccines -

Key Things to Know -

Talking about Vaccines

Key Things to Know About COVID-19 Vaccines

Updated Oct. 7, 2021 Languages ▾ Print

NOTICE: CDC now recommends that children between the ages of 5 and 11 years receive the Pfizer-BioNTech pediatric COVID-19 Vaccine. Learn more about [vaccines for children and teens](#).

What You Need to Know

- COVID-19 vaccines are effective at helping protect against severe disease and death, including from [variants of the virus](#) that causes COVID-19 currently circulating (e.g., Delta variant).
- [If you are fully vaccinated](#) you can resume activities that you did before the pandemic. However, you should wear a mask indoors in public if you are in an [area of substantial or high transmission](#). Being fully vaccinated and wearing a mask maximizes protection from the Delta variant and possibly spreading it to others.
- You may have [side effects](#) after vaccination. These are normal and should go away within a few days.



Isolation and Quarantine

- Dec. 27—CDC issues updated guidance.
- CDC shortens recommended isolation to “5 days and if they are asymptomatic or their symptoms are resolving (without fever for 24 hours), follow that by 5 days of wearing a mask when around others to minimize the risk of infecting people they encounter.”
- Quarantine period for those exposed who are unvaccinated or more than 6 months since vaccination is “5 days followed by strict mask use for an additional 5 days.”
 - If 5-day quarantine not feasible, “it is imperative that an exposed person wear a well-fitting mask at all times when around others for 10 days after exposure.”
 - “Individuals who have received their booster shot do not need to quarantine following an exposure, but should wear a mask for 10 days after the exposure.”

Isolation and Quarantine

- OSHA updated FAQs to allow employers to follow CDC guidance.
 - FAQ 7.J. Will OSHA permit employers to follow updated versions of CDC’s “Isolation Guidance” incorporated by reference in § 1910.501(h)(2)(ii)? (Added FAQ)
 - Yes. OSHA will exercise enforcement discretion where CDC’s isolation guidance has been updated and an employer is following the current updated guidance for return to work. Employers will also be in compliance if they follow the version of CDC’s “Isolation Guidance” that has been incorporated by reference in § 1910.501(h)(2)(ii).

A woman with blonde hair, wearing a light blue tank top, is holding up her right hand palm facing forward. On her palm, the words "NO VACCINE" are written in black, bold, sans-serif capital letters. The word "NO" is positioned above "VACCINE", and a horizontal line is drawn between them. The woman's face is partially visible in the background, looking directly at the camera.

**NO
VACCINE**

Accommodation Issues

Accommodations

Under ETS, employees may be entitled to an exemption/reasonable accommodation where:

- (1) Vaccine is medically contraindicated;
- (2) Medical necessity requires a delay in vaccination; or
- (3) Employee is legally entitled to a reasonable accommodation under federal civil rights laws because of a **disability** or a **sincerely-held religious belief, practice, or observance** that conflicts with the vaccination requirement.



Who is Entitled to an Accommodation Under the ADA?

KEY QUESTIONS:

- Employee must show that they have a covered disability (a physical or mental impairment that “substantially limits” one or more major life activities, including the operation of major bodily functions)
- Accommodation is necessary for them to perform the essential functions of their position
- Employer can accommodate without “undue hardship”



Accommodation of Religion Under Title VII

An employee may be eligible for reasonable accommodation if they have sincerely-held religious belief or practice which prohibits them from being vaccinated.

Key questions:

- Is the belief **religious**?
- Is the belief **sincerely held**?
- Would providing a reasonable accommodation impose an **undue hardship** on the employer?



Reasonable Accommodation: ADA & Title VII

- Even employees entitled to reasonable accommodation likely to be required to follow masking/testing protocols (except where disability or religion prevents employee from masking or testing).
 - If also requesting exemption from masking/testing, there may be no reasonable accommodation available, other than ...
 - 100% remote work, if possible.
- **Cost of testing as component of reasonable accommodation generally borne by employer.**

Reasonable Accommodation: ADA & Title VII

- Examples of reasonable accommodations:
 - Requiring an employee to continue to wear a mask and social distance while in the workplace.
 - Limiting contact with other employees and non-employees—e.g. modified shift.
 - Permitting continued telework if feasible.
 - Reassigning the employee to a vacant position in a different workplace.
 - “Unpaid leave” is the “accommodation of last resort”.

Denial of Accommodations and EEOC Action

- If a request to be excused from a mandatory vaccination policy based on disability or religious grounds is denied, leading to adverse action against an employee and an EEOC charge of discrimination, EEOC could initiate a broad based investigation regarding the employer's accommodation processes.
 - *See e.g. EEOC v Bloomin' Brands, Inc d/b/a Outback Steakhouse*, Case No. 1:21-mc-00035 (N.D. Ohio, Eastern Div, filed July 6, 2021) (EEOC expanded an individual charge of denial of religious accommodation based on employee's refusal of Hepatitis A vaccination imposed by employer and made broad based request for information)

What Mean You, “Undue Hardship?”

- ADA: relatively **high** standard
 - Employer must show “**substantial cost**” to prove undue hardship. Relevant factors include (1) nature and cost of the accommodation needed; (2) overall financial resources of the facility making the reasonable accommodation; (3) number of persons employed at this facility; (4) effect on expenses and resources of the facility; (5) the overall financial resources, size, number of employees, and type and location of facilities of the employer;
- Title VII / Religion: relatively **lower** standard
 - Employer must show “more than a *de minimis* burden” to prove undue hardship.
 - But don’t forget about state law; **certain states apply more rigorous definition under the ADA to religious exemptions as well!**

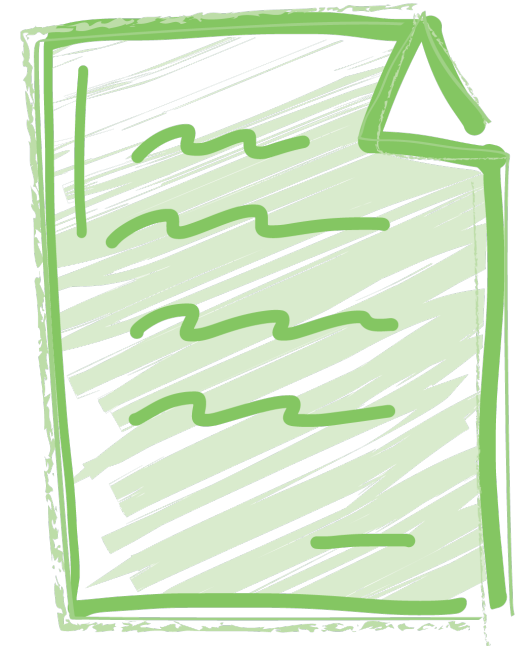
What about state laws that require additional accommodation?

- ETS provides that the only bases for which an employee may be granted an exemption are those recognized under federal civil rights laws.
- OSHA takes position that conflicting state laws which provide alternate grounds for exemption are preempted by the federal standard.
- ETS already subject to numerous legal challenges; whether the federal standard preempts conflicting state law may turn on the outcomes of these challenges in court.

Interactive Process Considerations

Where possible, preferred practices:

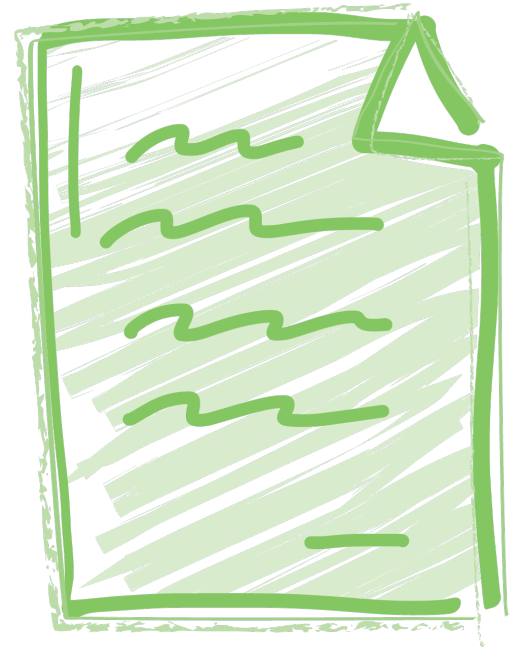
- Must engage in the interactive process to see whether there's a reasonable accommodation.
- No set formula – one size does not fit all.
- Good and consistent documentation is critical.
- Conversation – back and forth – exchange of ideas.
- Attempt to discover and provide reasonable accommodation.



Guidance on Reasonable Accommodation

EEOC issued and is updating COVID-19 guidance under ADA and Title VII:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>





CMS Rule

CMS Rule – Covered Employers

- Healthcare services, support or suppliers that are regulated under CMS standards.
- Affects only Medicare- and Medicaid-certified providers and suppliers, not other healthcare entities that are not regulated by CMS (e.g., doctor's offices).

- Hospitals
- Ambulatory surgery centers
- Dialysis facilities
- Home health agencies
- Clinics, rehabilitation agencies, and public agencies as providers of outpatient physical therapy and speech-language pathology services
- Psychiatric residential treatment facilities
- Long-term care facilities including nursing homes
- Programs of all-inclusive care for the elderly
- Home infusion therapy suppliers
- Rural health clinics
- End-stage renal disease facilities

CMS Rule – Covered Employees

- All current and future employees at covered facilities, regardless of whether the employee holds a clinical or non-clinical position.
- Not limited to staff who work in formal clinical setting.
- Includes students, trainees, volunteers, and those who are not involved in direct patient, resident, or client care.
- Also applies to home healthcare workers in patients' homes.

Testing and Accommodations

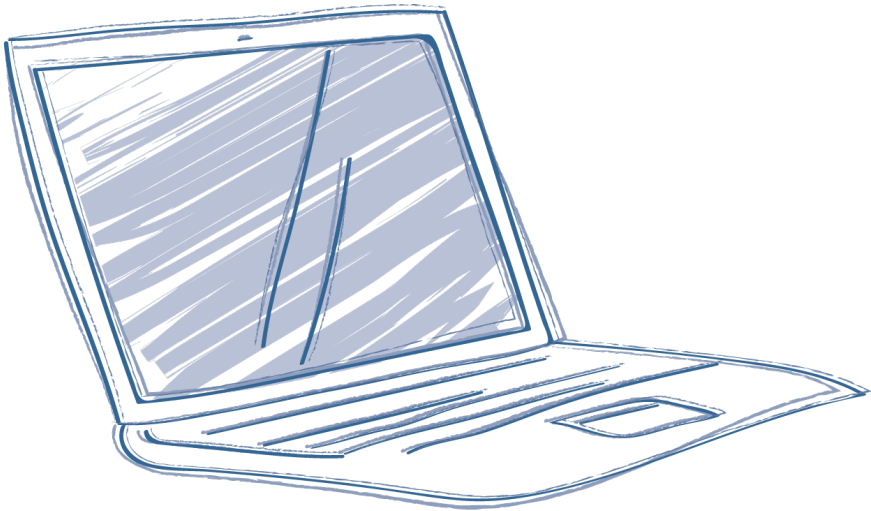
- CMS—no testing option allowed in lieu of vaccination (unlike OSHA ETS).
- However, medical and religious accommodations are still required, citing to federal law and EEOC guidance.
 - “CMS requires facilities to allow for exemptions to staff with (as [sic] a reasonable accommodation for a disability or a sincerely held religious belief, observance, or practice and for medical reasons. Providers and suppliers should establish exceptions as a part of its policies and procedures and in alignment with Federal law. CMS believes that exemptions could be appropriate in certain limited circumstances, but no exemption should be provided to any staff for whom it is not legally required or who requests an exemption solely to evade vaccination.”
- No exemption for prior infection.

Medical Accommodation

- “Facilities must ensure that all documentation confirming recognized clinical contraindications to COVID-19 vaccinations for staff seeking a medical exemption are signed and dated by a licensed practitioner, who is not the individual requesting the exemption and is acting within their respective scope of practice based on applicable state and local laws. This documentation must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications. Additionally, a statement by the authenticating practitioner recommending that the staff member be exempted from the facility’s COVID-19 vaccination requirements is also expected.”

Action Items!

Policies?



Model OSHA ETS policies are available:
<https://www.osha.gov/sites/default/files/covid-19-ets2-sample-mandatory-vaccination-policy.docx>

What Now?

- Stay tuned for the SCOTUS decision.
- Plan for compliance with OSHA ETS or CMS rule in event upheld.
- If you already have vaccine and testing policies, review them to ensure you are compliant.
- If you do not have policies, have them ready in case they are needed.
- Prepare for logistical challenges of testing.
- Prepare for accommodation process.

What Happens If SCOTUS Overturns Federal Mandates?

- Possibility of split decision on OSHA ETS and CMS Rule.
- If no applicable federal mandate, revert to state law and guidelines.
- Varies widely by state
 - CA: Cal/OSHA ETS requiring COVID-19 Prevention Program.
 - TX: SB 968 and multiple Executive Orders governing how public and private employers address vaccine and mask mandates.
 - Otherwise, follow CDC guidance (per DSHS) and GA-38 re masking and social distancing.

Texas Executive Orders

State Law / Executive Order	Public Employees	Private Employees
GA-38	No governmental entity “may require any person to wear a face covering or mandate that another person wear a face covering,” except state supported living centers and government owned & operated hospitals and TDCJ/jails.	“In areas where the COVID-19 transmission rate is high, individuals are encouraged to follow the safe practices they have already mastered, such as wearing face coverings over the nose and mouth wherever it is not feasible to maintain six feet of social distancing from another person not in the same household.”
GA-39 re Vaccination Mandates	“No governmental entity can compel any individual to receive a COVID 19 vaccine.” Prohibits state agencies and political subdivision from adopting or enforcing vaccination orders.	Prohibits private entities from receiving state funds from requiring consumers to provide proof of vaccination. *Excludes nursing homes, state supported living centers, assisted living, long-term care.
GA-40 re Vaccination Mandates	No “entity” can compel COVID-19 vaccine by employee or customer “who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” See TWC enforcement letter for insight into standard for exception.	
SB 968	N/A	Prohibits a “business” from requiring customers to provide vax documentation as condition of service. Does not prohibit masking and screening.

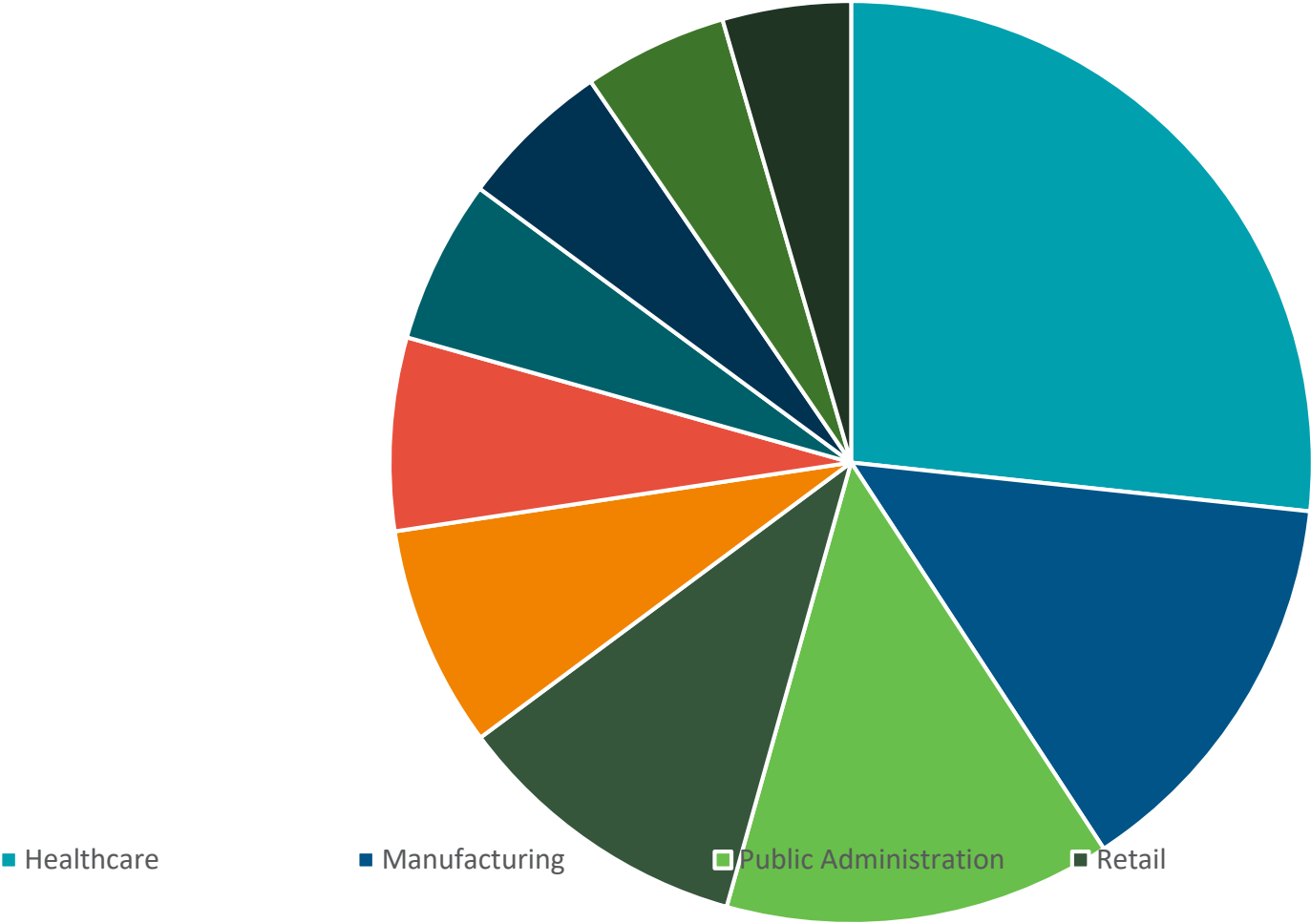


Covid Litigation Trends

Top 15 COVID-19 Filing Claims

1. Retaliation
2. Discrimination – Disability
3. Other Civil Litigation – Wrongful Termination
4. Workplace Safety
5. FMLA – Family and Medical Leave Act
6. FFCRA
7. Workplace Safety – PPE
8. Overtime
9. CA Labor Code
10. Whistleblower
11. Harassment
12. Wage Statements
13. Meal & Rest Breaks
14. Discrimination – Age
15. Minimum Wage

Top 10 Industries Targeted – As of January 7, 2022



Industry	Count
Healthcare	1,074
Manufacturing	567
Public Administration	546
Retail	422
Hospitality	313
Education	272
Transportation	231
Business Services	215
Construction	203
Finance	181

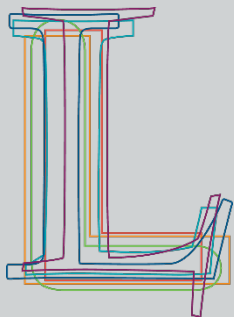
- Healthcare
- Manufacturing
- Public Administration
- Retail
- Hospitality
- Education
- Transportation
- Business Services
- Construction
- Finance

Texas Pandemic Liability Relief Act

- Creates legal protections from exposure liability for employers.
- For liability, plaintiff must show either:
 - Business knowingly failed to warn of a condition within the business's control, which caused the individual's infection; OR
 - Business knowingly failed to implement government safety protocols and standards, which caused individual's infection.
- Requires scientific proof at the outset (i.e. expert report) that Defendant's failure to act caused individual to contract COVID-19.

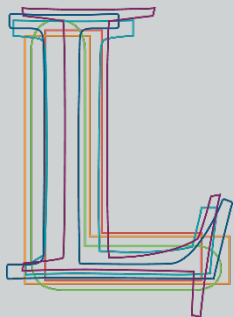
To close ...

- CDC recommends masks for unvaccinated in indoor public settings, and
 - *“If you are fully vaccinated, to maximize protection and prevent possibly spreading COVID-19 to others, wear a mask indoors in public if you are in an area of substantial or high transmission.”*
 - **All of Texas is at high transmission.**
- Texas: While private business can require masks, private business cannot require consumers to show proof of vaccination as condition of entry.



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

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