



## The Fast-Paced World of Vaccine Mandate Rules

November 8, 2021

Dear Friends!

What a week in the legal world! The Biden Administration issued a [Vaccination and Testing Emergency Temporary Standard](#) (ETS) on Thursday, November 4<sup>th</sup>, which the Fifth Circuit halted on Saturday, November 13<sup>th</sup>, the Administration also issued a rule for certain healthcare providers accepting Medicare and Medicaid funding and it pushed back the compliance date for federal contractors to comply with a third vaccination mandate. So where does that leave you? Glad you asked. Read on to learn more.

First, the much-anticipated Occupational Safety and Health Administration (OSHA) ETS for employers of 100 or more employees was published in the Federal Register on Friday. It requires covered employers to establish, implement, and enforce a written mandatory vaccination policy. Alternatively, it requires covered employers to establish, implement, and enforce a written policy allowing any employee not subject to a mandatory vaccination policy to choose either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a face covering.

The Fifth Circuit then issued a stay on Saturday, citing “grave statutory and constitutional” issues. Thus, for now, the pause button has been hit. The ultimate fate of the ETS, however, may depend on the federal appeals court that hears the merits of the legal challenge. I say this because lawsuits calling for the ETS to be scrapped have been filed in the Fifth, Sixth, Eighth, and Eleventh Circuits. As a result, there will be a lottery held to determine which court will hear a consolidated challenge to the ETS. The matter will then likely go to the Supreme Court. ***If you are interested in having your voice heard if this case goes to the supreme court, please let me know ASAP!***

If the ETS survives these legal challenges, the original dates for compliance will likely be pushed back. Originally, employers had to come into compliance with most of the Vaccination and Testing ETS by December 6, 2021, with the testing requirement having a later date of January 4, 2022. If the ETS goes into effect, the standard penalty for non-compliance is \$13,653 for a single violation and \$136,532 for willful violations.

One major exception to the Vaccination and Testing ETS that you should be aware of is for employers already subject to the June 2021 Healthcare ETS (29 C.F.R. § 1910.502). Employers with employees who both work in settings covered by the Healthcare ETS as well as employees who work outside such covered settings, however, should be aware that to the extent they have over 100 employees, those employees working outside the Healthcare ETS covered settings would be subject to the Vaccination and Testing ETS. Also, to the extent the Healthcare ETS is no

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longer in effect (it is currently scheduled to expire on December 21<sup>st</sup>, absent an extension), the Vaccination and Testing ETS would apply (if it passes legal scrutiny).

Another exception that is probably less relevant to you is the one for workplaces that are subject to the Safer Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors. Please note that it is our view that accepting clients from the Veterans Administration does NOT make you a federal contractor subject to this regulation. Thus, unless you are a government contractor through some other means (note accepting Medicare and Medicaid funds does not make you a federal contractor either), then you would not be covered by this rule in the first place. If you are interested in more information on the federal contractor vaccination rule, please see [this Polsinelli Blog](#) post.

Finally, many of you also probably are wondering about the Center for Medicare and Medicaid Services ([CMS](#)) [vaccine mandates](#) for staff working at facilities that participate in the Medicare and Medicaid programs. This rule applies to Medicare Certified Home Health Agencies, and Hospices. But, significantly, it does NOT apply to HCBS Medicaid Wavier providers for the most part. In other words, there is NO mandatory vaccination/testing requirement for an in-home care employer with less than 100 employees that provides services paid for by Medicaid. For more information on the CMS rule, please see [this Polsinelli Blog](#) post. Note, the deadline set forth in the CMS mandate is January 4, 2022.

As I am sure your head is spinning, please let us know how we can be of service to you. For example, we have several webinars planned in the near-term.