



Federal Workplace Vaccination and Testing: Are You Ready?

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The Legal Stuff

- Not Legal Advice
- Presented as of November 10, 2021
- Laws, regulations and guidance are continuously evolving

Agenda

- Introduction and Background
- Coverage
- Deadlines
- Requirement: Vaccine Status Inquiries
- Requirement: Vaccine Policies
 - Mandatory Vaccination
 - Vaccinate or Test
- Compensation and Time Off Considerations
- Vaccination and Testing Records
- Employee Information and Notice Requirements
- Recordkeeping and Disclosure Requirements
- OSHA Reporting Requirements
- Enforcement and Penalties for Noncompliance
- Questions

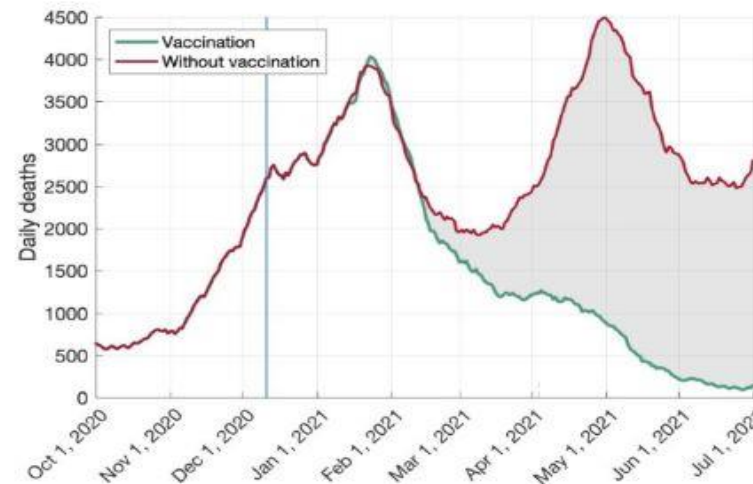
Introduction and Background

- With a **4th of July** goal for the U.S. to declare its Independence from COVID-19, the CDC declared in May 2021 that fully vaccinated individuals need not wear face coverings indoors or maintain social distance in most situations
 - The Pfizer-BioNTech COVID-19 Vaccine became available to those over 16 on *December 11, 2020*
 - The Moderna COVID-19 Vaccine became available to those over 18 on *December 18, 2020*
 - The Johnson & Johnson COVID-19 vaccine became available to those over 18 on *February 27, 2021*
- As of **July 2, 2021** the U.S. administered more than 328 million vaccine doses, with 67% of adults having received at least one dose. The number of cases fell from more than 300,000 per day at the apex of the pandemic in January 2021 to less than 20,000 per day in mid-June.

Delta Has Other Plans

- **BUT**, the Delta variant had other ideas, as illustrated below.

Estimated U.S. seven-day rolling average of daily deaths with and without vaccination



Source: Alison Galvani, Seyed M. Moghadas, and Eric C. Schneider, *Deaths and Hospitalizations Averted by Rapid U.S. Vaccination Rollout* (Commonwealth Fund, July 2021). <https://doi.org/10.26099/wm2j-mx32>

The Country Regroups and Rebounds

- As of *September 1, 2021*, the CDC said: “If you are fully vaccinated, to maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if you are in an area of substantial or high transmission.”
- On *September 9, 2021*, President Biden announced a targeted plan to eliminate COVID-19 to protect the nation’s health and the economic recovery reflected in the American Rescue Act passed in March 2021

Path out of the Pandemic

- Enact vaccine mandates through business to fortify our economic resurgence from the pandemic
 - ✓ The Vaccine Mandate for Federal Contractors (and Subcontractors)
 - ✓ The Centers for Medicare & Medicaid Services (CMS) vaccine mandate for most Medicare and Medicaid certified providers and suppliers
 - ✓ OSHA's Emergency Temporary Standard (ETS) for private companies with at least 100 employees
- Our purpose is to discuss how each mandate works, *i.e.*, the authority for each mandate, what is the potential impact for employers, and what, if any, are the current legal challenges to those mandates

“Large” Employer ETS Coverage

Which employers are covered?

- Private employers subject to OSHA
 - 100 or more employees (all employees count towards coverage)
 - When is 100 counted?
- Joint employer and affiliated business issues
- Certain public employers subject to state plans
- Overlapping requirements with other mandates
 - Federal contractors and subcontractors
 - Healthcare ETS

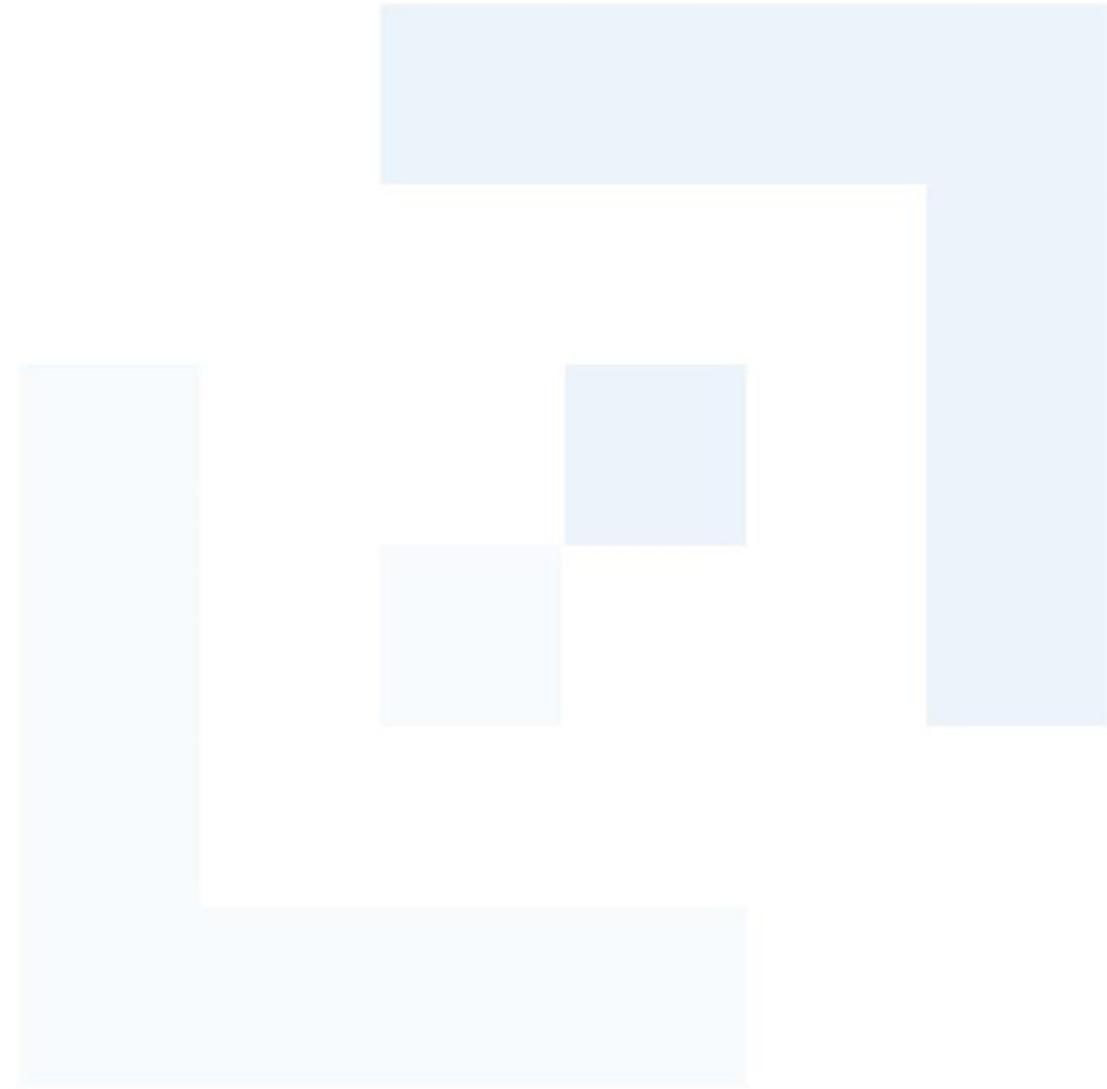
Applicability to Employee Groups

- Remote workers
- Newly hired employees
- Employees working outside
- Other excluded employees

State and Local Laws

- State and local requirements
 - State treats vaccination status as protected characteristic (MT)
 - State prohibits all or some employers from imposing a vaccine mandate (AZ, AR, GA, IN, TN, TX, UT)
 - Constantly evolving at state and local level
- What does OSHA temporary standard say?

Deadlines



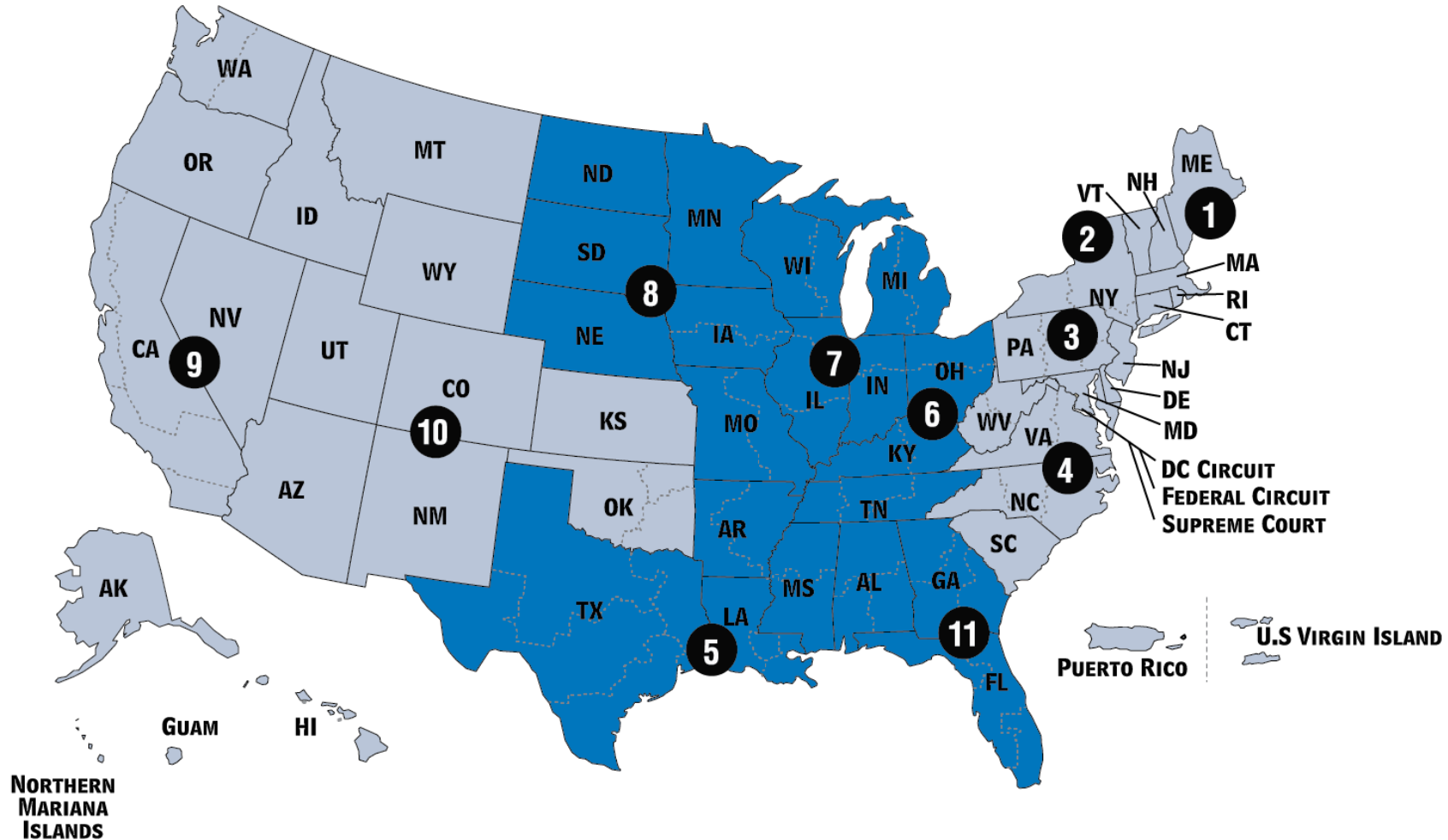
When to complete actions?

- December 5
 - Vaccination status collection (obtain now)
 - Policy implementation
- January 4
 - Full vaccination or testing for all covered employers
- Enforcement?
- Legal challenges...

Current List of Lawsuits Challenging the Mandate for Federal Contractors and Employees

- *Gregg Costin et al v Joseph R. Biden*, 1:21-cv-2484, U.S. District Court for the District of Columbia, September 23, 2021 (Air Force officers and a Secret Service officer suing the President)
- *Dan Altschuld et al v. Gina M. Raimondo*, 1:21-cv-02779, U.S. District Court for the District of Columbia, October 20, 2021 (federal employees suing various cabinet secretaries)
- *Steven Church, et al v. Joseph R. Biden*, 1-21-cv-02815, U.S. District Court for the District of Columbia, October 24, 2021 (civilian and active-duty military plaintiffs suing the President)

Mapping Current Legal Challenges of OSHA's ETS



Current List of Lawsuits Challenging the OSHA ETS

- *RNC v. OSHA*, case no. not yet assigned (D.C. Cir.)
- *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir.)
- *Bentley Services, LLC v. OSHA*, No. 21-4027 (6th Cir.)
- *Phillips Manufacturing & Tower v. OSHA*, No. 21-4028 (6th Cir.)
- *Commonwealth of Kentucky v. OSHA*, No. 21-4031 (6th Cir.)
- *Answers in Genesis, Inc. v. OSHA*, No. 21-4032 (6th Cir.)
- *Southern Baptist Theological v. OSHA*, No. 21-4033 (6th Cir.)
- *Tankcraft Corp. v. OSHA*, No. 21-3058 (7th Cir.)
- *Indiana v. OSHA*, No. 21-3066 (7th Cir.)
- *Job Creators Network v. U.S. Department of Labor*, No. 21-3491 (8th Cir.)
- *Missouri v. Joseph Biden, Jr.*, No. 21-3494 (8th Cir.)
- *Florida v. OSHA*, No. 21-13866 (11th Cir.)

Legal Challenges to Employer Mandates

- “A Judge Has Thrown Out A Lawsuit Brought By Hospital Workers Over A Vaccine Mandate,” *NPR*, June 13, 2021
- “Supreme Court rejects bid to block university vaccine mandate,” *Courthouse News*, August 12, 2021
- “New Mexico Judge Denies Lab Workers’ Claim in Vaccine Fight,” *Associated Press*, October 15, 2021
- “Federal Judge Rejects Southwest Airlines Pilots’ Request to Block Vaccine Mandate,” *CNBC*, October 26, 2021
- Appeals Court Upholds NY Vaccine Mandate for Health Care Workers,” *NBC New York*, October 30, 2021
- “U.S. Supreme Court Rejects Religious Challenge to Maine Vaccine Mandate,” *Reuters*, November 1, 2021
- “U.S. judge upholds United Airlines’ COVID-19 vaccine mandate for employees,” *Reuters*, November 8, 2021

ETS Requirements: Vaccine Status Inquiries

Requirements

- Vaccination status must be collected for all covered employees
- Obtain satisfactory proof of vaccination for all fully vaccinated employees
- Maintain employee roster with vaccination status
- Deadline: Theoretically, December 5.

Proof of Vaccination: Options

- Record of immunization from a health care provider or pharmacy
- CDC COVID-19 Vaccination Record Card
- Medical records documenting the vaccination
- Immunization records from a public health, state, or tribal immunization system
- Any other documentation that has (1) the type of vaccine administered, (2) date(s) of administration, and (3) name of provider administering vaccine
- Signed, sworn statement from employee, subject to criminal penalties, confirming (1) vaccination status, and (2) lost or unable to produce proof

Vaccine Status Inquiries

- Applicants
 - Ask if vaccinated?
 - Ask for proof?
 - Can employer reject applicant for not being vaccinated?
- Employee
 - Ask if vaccinated?
 - Can ask if intend to get vaccination and if so, by when?
 - Can ask for the reason employee is not vaccinated?

Disclosure Restrictions

- ADA Restrictions
 - Vaccination status and records = Confidential Medical Records
 - May only tell supervisor or manager if need to know of a specific accommodation
 - Safety and health personnel only if need to know in event of an emergency
 - Government official investigating compliance with or violations of ADA
- HIPAA (not typically applicable to employer-employee relationship)
- State Privacy Laws
- What if clients or customers demand disclosure in connection with onsite work?
 - Employee Voluntary Consent to Disclosure

Employer Policy Options



Option #1: Mandatory Vaccination

- Mandatory means mandatory
 - With exceptions:
 - Employees for whom vaccine is medically contraindicated
 - Employees for whom delay is required due to medical necessity
 - Employees for whom reasonable accommodations are in place
 - Disability
 - Sincerely held religious belief
 - Newly hired employees must be vaccinated “as soon as practicable”
- What happens to employees who refuse vaccination under such a policy?

Accommodation process

- Medical
 - CDC states limited number of conditions, not including pregnancy
 - Employee’s health care provider may make a specific recommendation
 - Address whether there is an effective accommodation that will mitigate risk
 - Mask and test
 - If no accommodation, consider leave
- Religious belief
 - Limited number of religions that prohibit vaccination, but standard is “sincerely held” religious belief (i.e., need not be associated with organized religion)
 - Inquire:
 - Has employee ever received other vaccines as adult?
 - Have minor children been vaccinated?
 - What is the belief, and how does it relate to other practices?
 - How long have you held such beliefs

Accommodation process

- Employees entitled to a reasonable accommodation are not exempt from testing and masking requirements
- OSHA anticipates testing and masking will be the “reasonable accommodation” in most circumstances
- But what if an employee also requests an exemption to the testing and/or masking requirements?
 - Engage in interactive process and explore alternative accommodations
 - Remote work
 - Extended leave
 - Social distancing

Option #2: Vaccinate or Test/Mask

- Testing at least once every seven days
 - May not be self-administered
- Provide documentation of test once every seven days
- Face coverings required with limited exceptions
 - Employee alone in a room
 - Limited time while eating or drinking
 - Limited time for identification or security purposes
 - Infeasible or creates a greater hazard (limited)
- Payment for tests?

Testing Requirements

- FDA approved / authorized to detect current COVID-19 infection, and
- Any of the following:
 - Processed by a lab
 - Administered at a doctor's office, urgent care, or pharmacy
 - Proctored by an authorized telehealth proctor
 - Administered and processed by the employer
 - Administered and processed with the employer observing
- Remember: Tests entirely self-administered by the employee are prohibited unless observed by employer or an authorized telehealth proctor

Pros and Cons

- Talent retention and employee relations issues
- Administrative burdens
- Costs

Compensation and Time Off Considerations

Time Off Requirements

- To get vaccinated:
 - If during the work day, “reasonable” time off, including up to **four hours** of paid time, for each vaccination dose.
 - Regular rate of pay
 - Cannot deduct the four hours from an employee’s existing paid leave benefits / available PTO
 - Covers time spent for travel, filling out paperwork, and obtaining vaccination
 - If employees need more than four hours, they must have the option to use accrued paid leave benefits. If no benefits available, leave can be unpaid (but it remains protected)
 - If outside the work day, no paid time off required.

Time Off Requirements

- To recover from side effects:
 - “Reasonable time” and paid sick leave
 - Ok to require employees to use accrued PTO or paid sick leave benefits
 - If employee has no available sick leave, “leave must be provided for this purpose”
 - Does such leave need to be paid?? Probably
- OSHA claims side effects “will rarely extend beyond a few days”
 - Two days presumed reasonable
- Don’t forget about state and local laws and collective bargaining agreements

Costs of Vaccination, Testing, and Masking

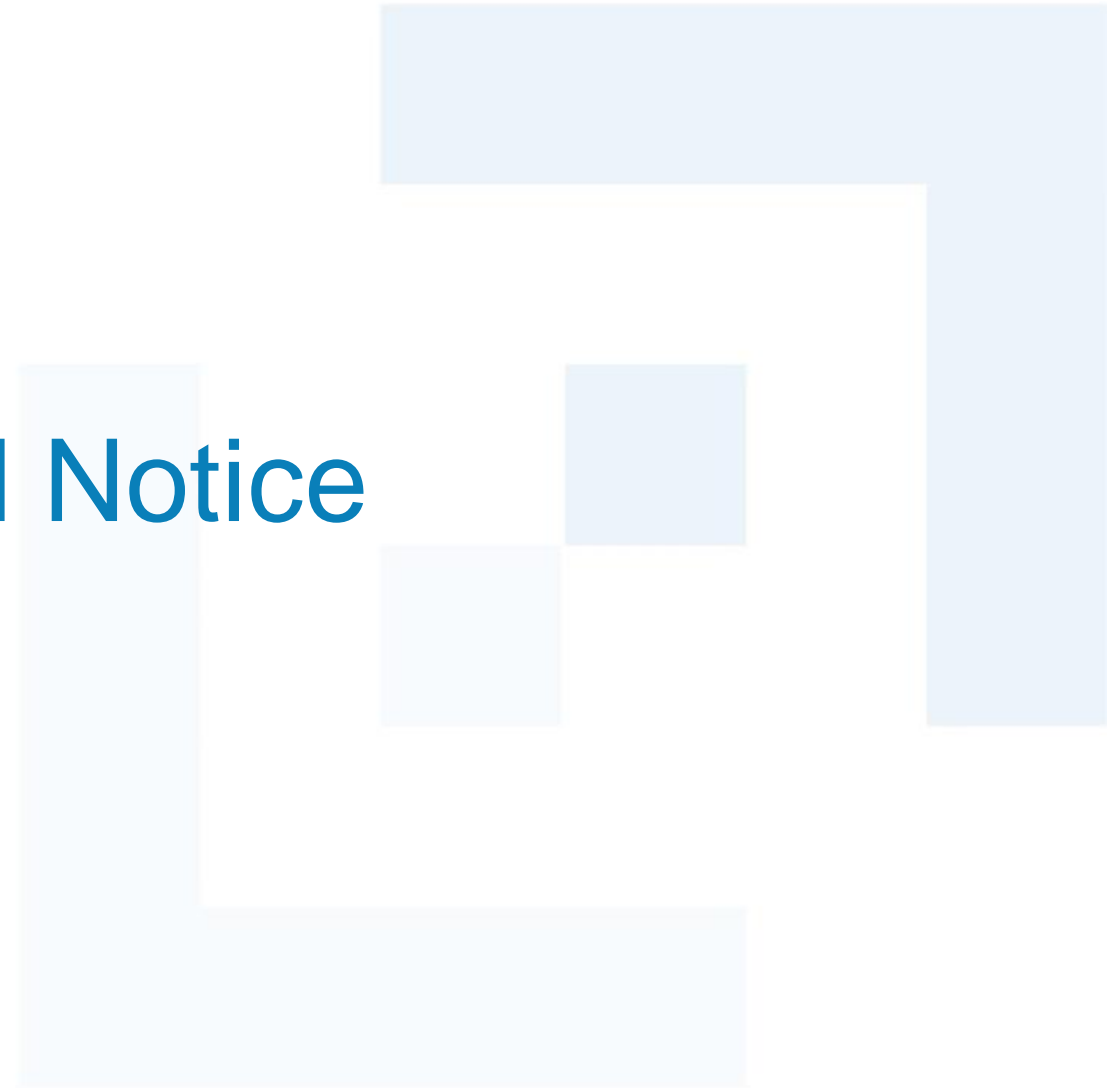
- OSHA presumes no costs to get vaccinated
- ETS expressly states that it does not require employers to pay for testing
- BUT that does not end the inquiry
 - State medical exam and testing laws
 - State unauthorized deduction laws
 - FLSA and state minimum wage concerns
 - Collective bargaining agreements
- Same analysis for required face coverings

Employee Vaccination and Testing Records

Requirements for Vaccination and Testing Records

- Again, treat as confidential medical information
- Keep in secure location separate from personnel files
- Do NOT have to maintain for 30 years, but...
- Do have to maintain for duration of ETS
- Keep up to date and ensure readily available

Employee Information and Notice Requirements



Information required to be provided to employees

- Four categories of information employers must provide under 1910.501(j)(4):
 - (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS;
 - (2) the CDC document “Key Things to Know About COVID-19 Vaccines”;
 - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - (3) information about protections against retaliation and discrimination; and
 - (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

OSHA's expectation regarding other information

- In addition to 1910.501(j)(4), OSHA expects the following to be provided:
 - the mandatory vaccination policy (1910.501(d));
 - how vaccination status is determined by the employer (1910.501(e));
 - the time and pay/leave employees are entitled to for vaccinations and any side effects experienced following vaccinations (1910.501(f));
 - the procedures an employee needs to follow to provide notice of a positive COVID–19 test or diagnosis of COVID–19 by a licensed healthcare provider (1910.501(h));
 - how employees can request records (1910.501(l));
- Unvaccinated employees
 - process of COVID testing (1910.501(g)) and face coverings (1910.501(i)).

Information provided to employees

- Language
- Literacy



The screenshot shows the top portion of the OSHA website. At the top is a dark red header with the OSHA logo on the left, the text "DEPARTAMENTO DE TRABAJO DE ESTADOS UNIDOS" in the center, and social media icons for Facebook, Twitter, Instagram, RSS, Email, and YouTube on the right. Below this is a white navigation bar with the text "Administración de Seguridad y Salud Ocupacional" and a menu of links: "CONTÁCTENOS", "PREGUNTAS FRECUENTES", "ÍNDICE DE LA A LA Z", "ESPAÑOL", and "INGLÉS". A secondary navigation bar contains dropdown menus for "OSHA", "ESTÁNDARES", "APLICACIÓN", "TEMAS", "AYUDA Y RECURSOS", and "NOTICIAS", along with a search box labeled "BUSCAR OSHA". The main content area features a large image of a person's arm being examined by a healthcare worker wearing blue gloves. A white text box is overlaid on the image with the headline: "OSHA emite una **norma temporal de emergencia** sobre vacunación y pruebas de COVID-19".

Recordkeeping and Disclosure Requirements



Records available for employees

- Employee entitled to:
 - Examine and copy her/his COVID Test Results
 - WHEN – by the end of the next business day after a request
 - WHO – Employee and to anyone having written authorized consent of that employee
 - Aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace
 - WHEN – by the end of the next business day after a request
 - WHO – Employee or an employee representative

Record Availability to OSHA upon Request

- Written mandatory COVID vaccination policy
 - Make available to OSHA within 4 hours of request
- Aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace
 - Make available to OSHA within 4 hours of request
- All other records to be maintained under the ETS
 - By the end of the next business day following the request

OSHA Part 1904 Recordkeeping for OSHA Recordable for COVID-19 Case

- Three key elements for OSHA 300 log:
 - (1) The case is a confirmed case of COVID–19 as defined by the Centers for Disease Control and Prevention (CDC);
 - (2) the case is work-related as defined by 29 CFR part 1904.5; and
 - (3) the case involves one or more of the general recording criteria in set forth in 29 CFR part 1904.7 (e.g., medical treatment beyond first aid, days away from work).

OSHA Reporting Requirements

Reporting of Work-Related Fatalities / Hospitalizations

- Fatalities
 - Within 8 hours of learning about the fatality
- In-Patient Hospitalization
 - Within 24 hours of learning about the “in-patient” hospitalization
 - Was employee just seen in ER, or was employee actually “admitted” to the hospital?
- Similarities and differences with general workplace reporting of fatalities and in-patient hospitalizations?
 - Under 1904.39, employers are only required to report fatalities that occur within 30 days of the work related incident and in-patient hospitalizations that occur within 24 hours of the work-related incident (see 1904.39(b)(6))

Reporting of Work-Related Fatalities / Hospitalizations

- Three ways to report:
 - Calling the OSHA Area Office that is nearest to the site of the incident (see www.osha.gov/contactus/bystate);
 - Calling the OSHA toll-free telephone number, 1-800-321-OSHA (1-800-321-6742); or
 - Submitting information through OSHA's website at www.osha.gov.



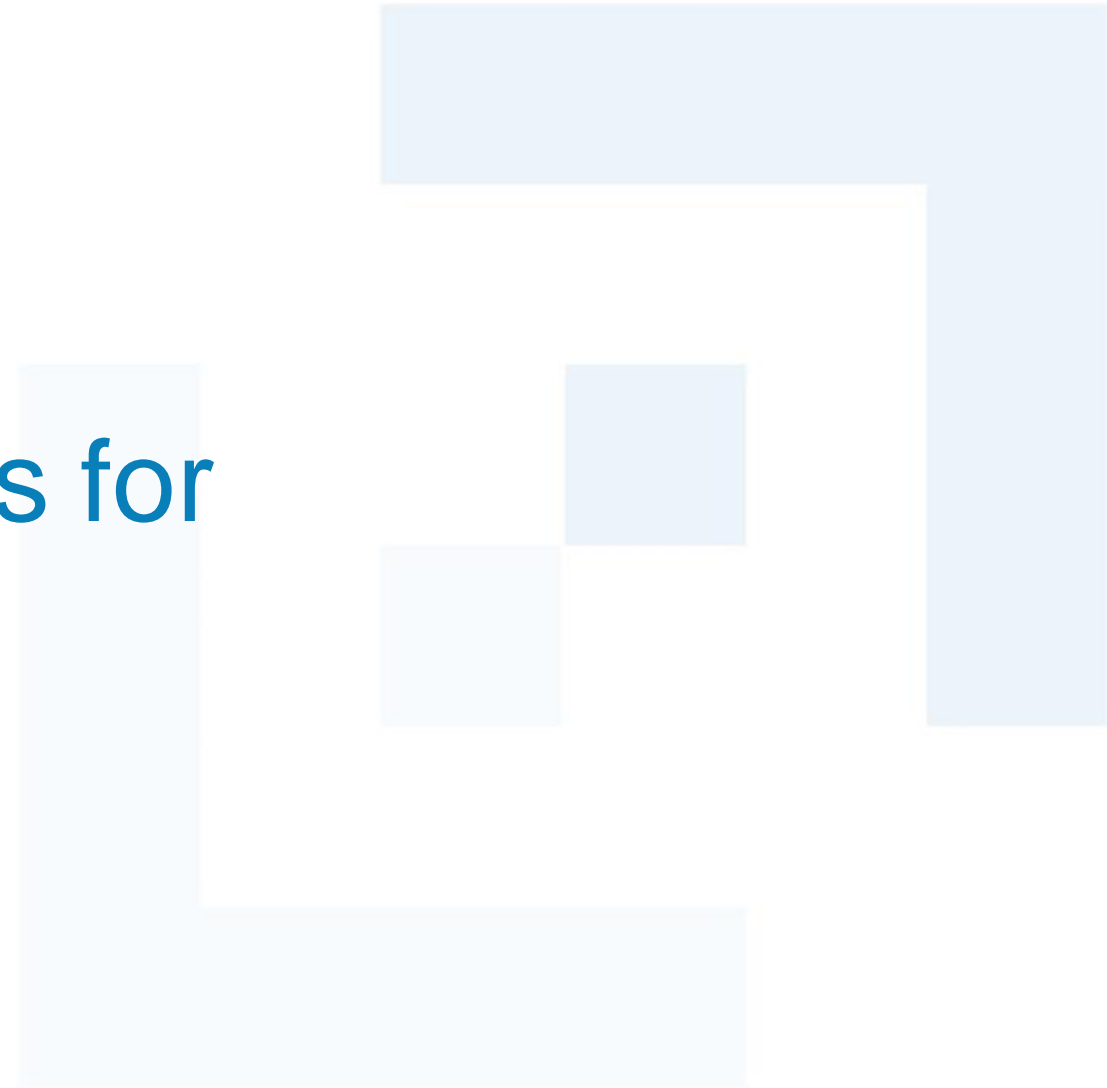
Was the Fatality or In-Patient Hospitalization Work-Related?

- Under 29 CFR 1904.5 Determination of work relatedness
- An employer must consider an injury or illness to be work-related if an event or exposure in the work environment **either caused or contributed** to the resulting condition.
- **If the COVID-19 exposure event likely occurred within the employee's work environment, and the subsequent illness led to either death or in-patient hospitalization**, reporting of this incident would be required.

Was the Fatality or In-Patient Hospitalization Work-Related?

- Considerations:
 - The type, extent, and duration of contact the employee had at the work environment with other people, particularly the general public;
 - Physical distancing and other controls that impact the likelihood of work-related exposure;
 - The extent and duration of time spent in a shared indoor space with limited ventilation; and
 - Whether the employee had work-related contact with anyone who exhibited signs and symptoms of COVID-19.
- OSHA's presumptions in certain cases

Enforcement and Penalties for Noncompliance



Current OSHA Penalty Authority

| Type of Violation | Penalty |
|---|--|
| Serious Other-Than-Serious Posting Requirements | \$13,653 per violation |
| Failure to Abate | \$13,653 per day beyond the abatement date |
| Willful or Repeated | \$136,532 per violation |

Adjusted annually for inflation since 2016

(On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 was enacted)

<https://www.osha.gov/memos/2021-01-08/2021-annual-adjustments-osha-civil-penalties>

OSHA Penalties

| Type of Violation | Statutory Penalty | New Maximum Penalty as of August 1, 2016* | Penalty Adjusted for Inflation as of January 15, 2020 |
|--------------------|------------------------|---|---|
| Serious | \$7,000 per violation | \$12,471 per violation | \$13,494 per violation |
| Other-than-serious | | | |
| Posting | | | |
| Failure to abate | \$7,000 per day | \$12,471 per day | \$13,494 per day |
| Willful or Repeat | \$70,000 per violation | \$124,709 per violation | \$134,937 per violation |

*78% increase, last adjusted in 1990, but going forward to be adjusted every year

http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=1168

OSHA Penalties Under “Build Back Better” Bill

- Serious
 - Increase from \$7,000 to \$70,000
- Failure to Abate
 - Increase from \$7,000 to \$70,000
- Willful
 - Increase from \$70,000 to **\$700,000**
 - Minimum penalty increased from \$5,000 to \$50,000
- Repeat
 - Increase from \$70,000 to **\$700,000**
 - Minimum penalty increased from \$5,000 to \$50,000

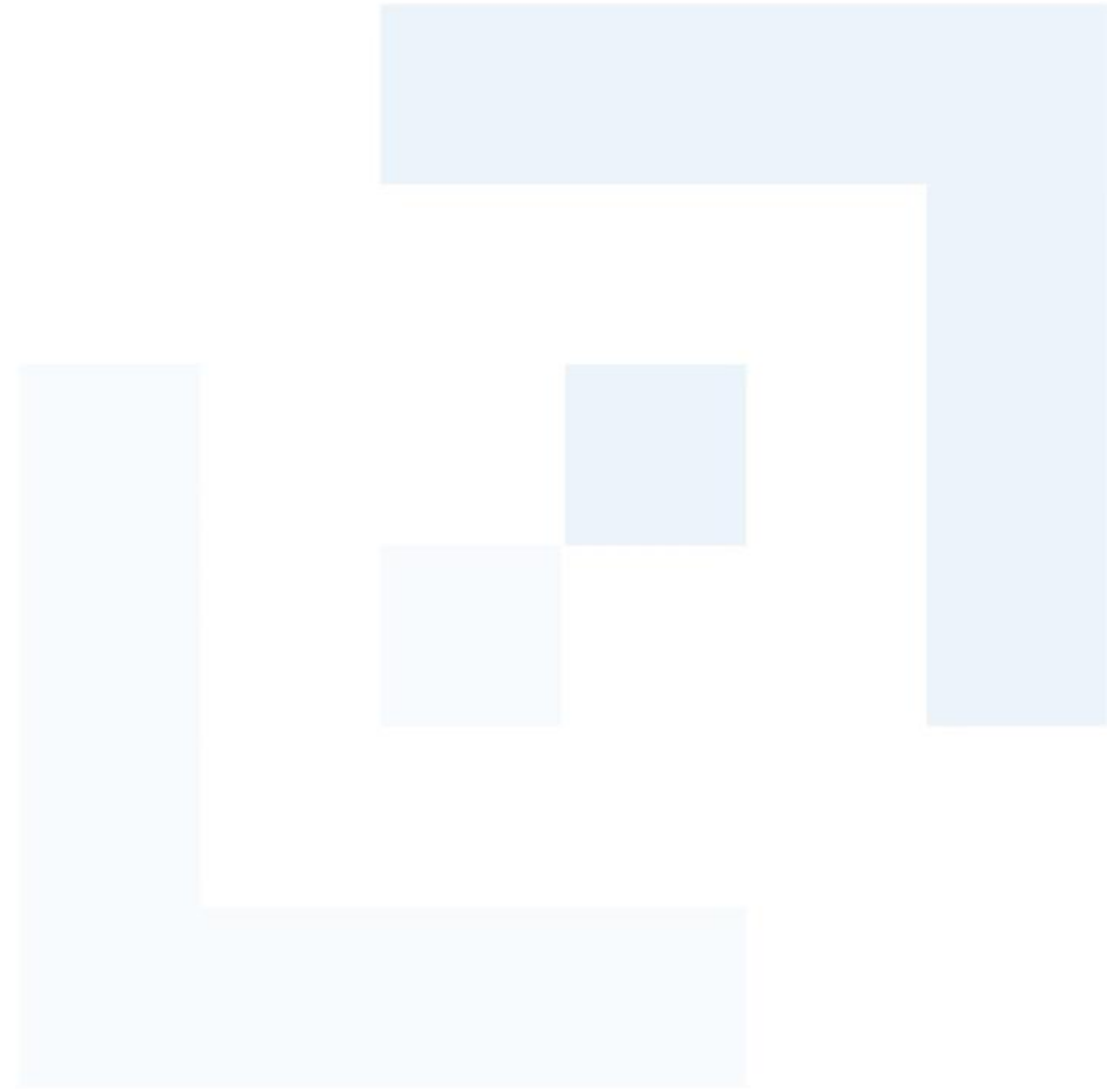
Resources

- ADA and Discrimination: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Job Accommodation Network (ADA Accommodations): <https://askjan.org/topics/COVID-19.cfm>
- Department of Labor
 - FMLA: <https://www.dol.gov/agencies/whd/fmla/pandemic>
 - OSHA: <https://www.osha.gov/coronavirus>
- CDC: <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>

Resources cont'd.

- Spencer Fane Blog: <https://www.spencerfane.com/blogs/worksmarts-workplace-solutions/>

Questions?



Thank You!



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