



# The Biden Vaccine Agenda

Charles B. Palmer  
Kurt A. Meyer

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### **Charles B. Palmer**

Partner  
Sub-Practice Leader, Workplace Safety & Health  
[cbpalmer@michaelbest.com](mailto:cbpalmer@michaelbest.com)  
T. 262.956.6518



### **Kurt . Meyer**

Best Workplace Solutions - Managing Consultant  
[kameyer@bestworkplacesolutions.com](mailto:kameyer@bestworkplacesolutions.com)  
T. 262.956.6593

## **President's Executive Orders to Vaccinate**

- Federal Workers and Federal Executive Branch Workers
- Employees of Federal Contractors, including contractors of the Department of Defense, Department of Veteran Affairs, the Indian Health Service and National Institute of Health
- CMS – Health Care
- OSHA – ETS

## Douglas L. Parker – Assistant Secretary of Labor for OSHA

- Sworn in on November 3, 2021
- Prior positions
  - Deputy Asst. Secretary for Policy, Department of Labor MSHA (Obama Administration)
  - Member of Biden-Harris transition team focused on worker health and safety issues
  - Senior policy advisor to Department of Labor
  - Special Assistant at Department of Labor
  - Chief of California's Division of Occupational Safety and Health (Cal/OSHA)



# Executive Order 14042 and the Safer Federal Workforce Task Force Guidance

## Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042)

- Companies that subcontract on a prime contract for the procurement of services from Executive Branch agencies >\$250,000 must amend their contracts to be in compliance
  - Every employee working on a contract or “in connection with” a contract, must be fully vaccinated, even if working remotely
  - “in connection with” defined as performing duties necessary to the contract, but not directly engaged in performing the specific work under the contract (such as HR, billing, legal review)
  - Currently, booster shots are not required

## Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042)

- Employees in the same workplace as Covered Contract Employees working must also be vaccinated, unless Employer can prove no contact between two groups
- Required to make vaccination reasonable accommodations for employees with medical/disability reasons or who have sincerely held religious belief
- Contractors with a covered clause in their contracts by ~~December 8<sup>th</sup>~~ <sup>January 4<sup>th</sup></sup>, must be in compliance with the vaccination requirements by that date

## **Risks of Noncompliance & Challenges**

- False Claims Act
- Reduced payments, contract cancellation
- State laws restricting vaccination mandates
- Individual suits from harm cause by the vaccinations



# Centers for Medicare and Medicaid Services Interim Final Rule

On November 5, 2021, the Centers for Medicare and Medicaid Services published in the Federal Register an interim final rule requiring Medicare and Medicaid certified providers and suppliers ensure that all “applicable staff” be vaccinated for COVID-19, including:

- Ambulatory Surgical Centers
- Hospices
- Psychiatric residential treatment facilities
- Programs of all-inclusive care for the elderly (“PACE”)
- Hospitals
- Long term care facilities
- Intermediate care facilities for individuals with intellectual disabilities
- Home health agencies
- Comprehensive outpatient rehabilitation facilities;
- Critical access hospitals
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services
- Community mental health centers
- Home infusion therapy suppliers
- Rural health clinics/federally qualified health centers
- End-stage renal disease facilities.

## What does the CMS rule require?

- By December 5, 2021 –
  - Develop and implement policies and procedures under which staff are vaccinated for COVID-19
  - Effects all current staff as well as any new staff, who provide any care, treatment, or other services for the facility and/or its patients, including facility employees, licensed practitioners, students, trainees, and volunteers; and individuals who provide care, treatment, or other services for the facility and/or its patients under a contract or other arrangement
  - All staff, at a minimum, will have received the first dose of the primary series or a single dose of vaccine
- By January 4, 2022 –
  - All staff must be fully vaccinated
  - Unless granted an exemption or who are delayed due to antibodies or plasma issues

# OSHA COVID-19 Vaccination and Testing; Emergency Temporary Standard

## **OSHA's COVID-19 Vaccination and Testing; Emergency Temporary Standard**

- Interim final rule published November 5, 2021
- To protect employees of large employers from the risk of contracting COVID-19 by strongly encouraging vaccination
- Initial determination on whether employer falls within the scope based on number of employees as of November 5, 2021 (effective date)
- If additional workers hired after that date and employer hits 100-employee threshold, employer must come into compliance with standard
- Once employer falls within scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of the size of the employer's workforce

## **All employers with 100 or more employees (corporate-wide) – Within 30 days (December 5, 2021)**

- Establish policy to:
  - Require vaccination or
  - Require unvaccinated to produce a negative test result at least weekly (Starting January 4, 2022)
- Collect each employee's vaccination status
- Require unvaccinated employees to wear masks
- Educate employees on and promote the benefits of the COVID-19 vaccine
- Require employees who are COVID-19 positive to quarantine and set protocols for dealing with same
- Support vaccination by providing:
  - Up to 4 hours paid time to obtain primary vaccination dose(s)
  - Reasonable time/paid sick leave to recover from side effects experiences from primary vaccination dose(s)

## **All employers with 100 or more employees (corporate-wide) – Within 60 days (January 4, 2022)**

- Ensure testing of employees who are not fully vaccinated
  - An employee who reports at least once every 7 days to a workplace with other individuals
    - Must be tested at least once every 7 days; and
    - Provide documentation no later than 7 days after last provided test result
  - Employee who does not report 7 days or more to a workplace
    - Must be tested 7 days prior to returning to the workplace; and
    - Must provide documentation of test result upon return to workplace
- Employers not required to pay for testing

## Vaccine Timeline

Moderna      1<sup>st</sup> dose → 28 days → 2<sup>nd</sup> dose → 14 days = 42 days

Pfizer        1<sup>st</sup> dose → 21 days → 2<sup>nd</sup> dose → 14 days = 35 days

J&J          1<sup>st</sup> dose → 14 days = 14 days



## Mask Requirements / Unvaccinated Employees

An employee received first dose of a two-dose vaccination on November 9, 2021. Will that employee be required to wear a face covering/mask on December 5, 2021 ?

☒ Yes

☐ No

☐ Maybe

## To determine if employer has 100 or more employees

- Employee threshold counted at company-level, not by worksite
- Threshold count includes:
  - Employees who work from home
  - Part-time, temporary and seasonal employees
- Threshold count does not include:
  - Independent contractors
  - Leased employees

## OSHA – Emergency Temporary Standard (November 5, 2021)

- Staffing Agency employees
  - Staffing agency counts employees for purposes of threshold
  - Host employer would be covered under ETS if it has 100 or more employees not including temporary employees
  - Host employer with less than 100 employees (not including temporary employees) would not be covered
  - Host employer may require staffing agency to ensure
- Employer discipline policies will be outside of ETS

## Multi-Employer Worksite

Is the general contractor on a worksite required to include the employees of its sub-contractors in its employee count to determine if it is a Covered Employer?

- ☒ Yes
- ☐ No
- ☐ Maybe

## Remote Workforce

Do employers need to count employees who are working exclusively from home?

☒ Yes

☐ No

☐ Maybe

## Reporting COVID Cases

Hospitalization	Within 24 hours of learning
Fatality	Within 8 hours of learning

## Reporting hospitalization or fatality

Do employers have to report a hospitalization where employee is hospitalized 30 days after contracting COVID and dies 5 days later?

☒ Yes

☐ No

☐ Maybe

## OSHA – Emergency Temporary Standard (November 5, 2021)

- OSHA's key requirements to issue for an ETS
  - Determine employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards
  - Determine emergency standard is necessary to protect employees from such danger
- ETS is effective for 6 months, or as soon as Final rule is adopted
- Fines of \$13,653 per serious violation
- Fines of \$136,532 per willful violation



## **OSHA – Emergency Temporary Standard (November 5, 2021)**

- No comment process before issuance
- Comment process will begin after issuance of ETS
  - Comments on if the ETS should be a final rule ends 30 days after publication in the Federal Register
  - Comments on the information collection determination must be submitted within 60 days of publication

## OSHA – Emergency Temporary Standard (November 5, 2021)

### VACCINATION

- Will not apply to employees only working remotely
- Verification process addressed in rule
- Employers can require vaccination instead of testing
  - Subject to reasonable accommodation
    - Medical
    - Religious
- Only “Fully Vaccinated” satisfies requirements

## Comments on ETS

- Has been challenged:
  - Federal OSHA preempts state regulation of workplace safety
  - Regardless of What OSHA does employers can move forward

## Challenges

*BST Holdings, L.L.C., et al vs. Occupational Safety and Health Administration, et. al.*  
U.S. Court of Appeals, 5<sup>th</sup> Circuit, Case 21-60845

*Steven Church, et al. vs. Joseph R. Biden, et. al.*  
U.S. District Court, District of Columbia, Case 21-2814

## Topics to consider when establishing Vaccination Policy

- Availability of testing
  - Rapid kits vs. PCR at clinic
- Masking
- Cost
- Time spent
  - during work (must be paid)
  - Outside of work (unclear)
- False positives
- Employee pushback / leaving

## **Legal Principals that Will be in Play**

The Emergency Use Authorization (EUA)

State Law Restrictions

The Occupational Safety and Health Act - Preemption

The Occupational Safety and Health Act – Mandate or Universal Masking?

The Equal Employment Opportunity Commission (EEOC)

The Americans with Disabilities Act (ADA)

Title VII – Religious Discrimination and Pregnancy

Genetic Information Nondiscrimination Act (GINA)

Unemployment Compensation

Lawful Products Nondiscrimination Statutes

The National Labor Relations Act (NLRA)

Public Sector Constitutional Challenges and Vaccine Mandate Prohibitions

Fair Labor Standards Act and State Other Wage Laws



## Disclaimer

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