

# Employers Could Feel the ‘Sting’ of COVID Vaccine Mandates

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# Federal Contractor Mandate



**Vaccine mandate not currently in effect, awaiting a decision at the appellate court level.**

- 12/7/21: A federal district judge in Georgia issued a nationwide preliminary injunction preventing enforcement for federal contractors.
- 12/17/21: The Eleventh Circuit denied the administration's request to dissolve the nationwide preliminary injunction.
- The Eleventh Circuit set an expedited schedule for briefing on the merits of the appeal extending into late January.

**The requirements relating to masking, social distancing, and designation of an individual to coordinate COVID-19 safety protocols at covered workplaces have not been enjoined**

# Federal Contractor Mandate



The Safer Federal Workforce Task Force announced that the Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”).

# CMS Vaccine Mandate



**Upheld by U.S. Supreme Court on January 13, 2022**

Employers who are covered by the CMS mandate must enact mandatory vaccination policies by **January 27, 2022** and ensure that all staff have completed the primary series of the Covid-19 vaccine by **February 28, 2022**.

# CMS Vaccine Mandate

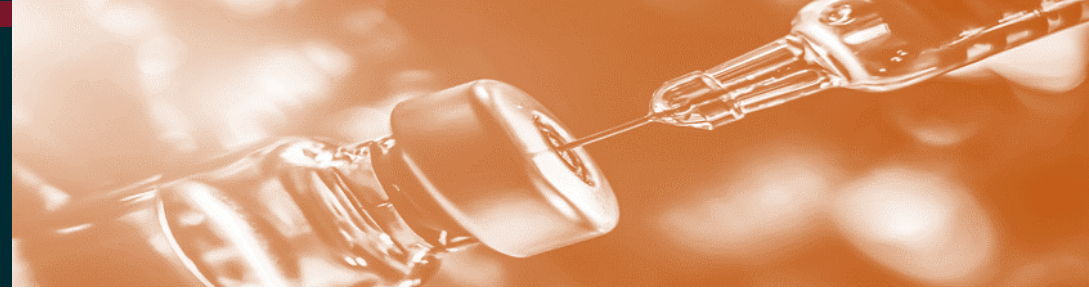


## CMS Vaccine Mandate

Applies to the following Medicare and Medicaid-certified provider and supplier types:

- Ambulatory Surgery Centers
- Community Mental Health Centers
- Comprehensive Outpatient Rehabilitation Facilities
- Critical Access Hospitals
- End-Stage Renal Disease Facilities, Home Health Agencies
- Home Infusion Therapy Suppliers
- Hospices
- Hospitals
- Intermediate Care Facilities for Individuals with Intellectual Disabilities
- Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services
- Psychiatric Residential Treatment Facilities (PRTFs)
- Programs for All-Inclusive Care for the Elderly Organizations (PACE)
- Rural Health Clinics/Medicare Federally Qualified Health Centers
- Long Term Care facilities

# OSHA Vaccination or Testing ETS



- The U.S. Department of Labor’s Occupational Safety and Health Administration is withdrawing the vaccination and testing emergency temporary standard issued on Nov. 5, 2021, to protect unvaccinated employees of large employers with 100 or more employees from workplace exposure to coronavirus. The withdrawal is effective January 26, 2022.
- Although OSHA is withdrawing the vaccination and testing ETS as an enforceable emergency temporary standard, the agency is not withdrawing the ETS as a proposed rule. The agency is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard.
- OSHA strongly encourages vaccination of workers against the continuing dangers posed by COVID-19 in the workplace.

# OSHA Vaccination or Testing ETS



## Statement from U.S. OSHA following USSC loss:

*We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation.*

*Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the Covid-19 National Emphasis Program and General Duty Clause.*



# OSHA's General Duty Clause

**Section 5(a)(1) of federal OSHA and NCGS 95-129(1) (N.C. OSHA) requires an employer to furnish to its employees:**

- “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees...”
- Unlike the ETS, this duty applies to employers of any size

**Employers can be cited for violation of the General Duty Clause if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard. The General Duty Clause is used only where there is no standard that applies to the particular hazard.**





# OSHA's General Duty Clause

**N.C. is a “Plan State,” so federal OSHA does not directly apply to N.C. workplaces**

## **N.C. OSHA also has a General Duty Clause**

The following elements are necessary to prove a violation of the General Duty Clause:

- The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- The hazard was recognized;
- The hazard was causing or was likely to cause death or serious physical harm; and
- There was a feasible and useful method to correct the hazard.



# OSHA's General Duty Clause

**Even before the ETS, OSHA complaints and lawsuits were filed by employees claiming safety standard violations, retaliation for complaining about safety.**

**Most of N.C. OSHA's enforcement activity has been service of Letter Complaints.**

- Employers should factually respond to an employee complaint and be able to show NC OSHA that they have an infections disease response plan

# Can an employer mandate the vaccine ?



**The Equal Employment Opportunity Commission released guidance in May 2021 stating that employers have the right to mandate that all employees must be vaccinated in order to enter the workplace**

**The caveat--the employer must evaluate accommodations for employees who are unable or unwilling to get the shot due to:**


- Disabilities
- Religious beliefs
- In some cases, pregnancy



# Can an employer mandate the vaccine?

**11 states have enacted laws about vaccine mandates. These laws primarily provide broad exceptions to any employer mandates (broader than just ADA or Title VII exceptions):**


- Alabama, Arkansas, Florida, Iowa, Kansas, Montana, North Dakota, Tennessee, Texas, Utah, West Virginia



# Should An Employer Mandate the Vaccine?

## Reasons to Mandate:

- Belief in the policy
- Reduce the potential for business disruption from increased absences of staff
- Concern about potential for state mandates or congressional action (seems unlikely in NC)
- Concern about OSHA's general duty clause based on workplace risk assessment



# Should An Employer Mandate the Vaccine?

## **Before implementing mandates, consider:**

- What percentage of workforce is unvaccinated
- Type of workforce
  - Service vulnerable populations?
  - Remote?
- Alternatives to mandating vaccination
- Location risk
- Historical data of COVID in your workplace or similar workplaces
- Administrative availability to process accommodation requests



# Designing a Policy

- Mandate vaccination for all jobs, or only certain positions?
- New hires?
- Vaccine or test option?
- Who will pay for:
  - Time spent getting tested
  - Cost of tests
  - Time out of work if sick (either because of vaccine, Covid exposure, or Covid illness)

# COVID-19 Testing

- Can require COVID-19 viral tests before allowing employees to come to work
- Tests administered by employers consistent with CDC guidance will meet “business necessity” standard
- Screen employees consistently, unless you have a reasonable belief based on objective evidence that the person might be sick
- Cannot ask employees if they have family members with COVID-19



# COVID-19 Testing

- Employer must pay for time spent by the employee getting tested (when being tested under an employer mandate)
- If employer is administering tests themselves, must provide disclosure about the test and obtain informed consent. See [CDC website](#) on obtaining informed consent.
- Note that employees can now obtain free rapid tests (not PCR).
- Cannot require antibody tests



# Wage and Hour Considerations

**7. If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?**

Yes, under the FLSA, your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.



# Wage and Hour Considerations

**8. My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?**

It depends, under the FLSA, your employer is required to pay you for all hours that you work, including for time on your vacation day if the task you are required to perform is necessary for the work you are paid to do. For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

# Confidentiality and Vaccines



- EEOC says that asking an employee if they are vaccinated is not a medical inquiry under the ADA
- Therefore, in the absence of a local prohibition, an employer can ask employees if they are vaccinated
- EEOC says that an employer can make employees provide proof of vaccinated status
- If the employer obtains a copy of the vaccine card or a screenshot of the State Health Department vaccine portal, those documents must be treated as confidential medical information and stored in a locked file which is separate from the personnel file.

# Confidentiality and Vaccines



## **Disclosure of employee vaccination status to:**

- Customers
- Vendors / Service Recipients
- Co-workers



# Accommodating ADA Requests

- Employers are Not Required to Provide a Particular Accommodation if It Poses an “Undue Hardship”
  - Significant difficulty: consider the facts of the job/workplace; it may be more difficult to acquire certain items for teleworking employees, etc.
  - Significant expense: sudden loss of some, or all, of an employer’s income stream due to COVID-19 as well as amount of discretionary funds available is relevant
  - If an accommodation poses undue hardship, employer/employee should work together to find alternative



# Accommodating Religious Objections

- *While a court can inquire into the sincerity of a person's beliefs, it may not judge the truth or falsity of those beliefs.* Molko v. Holy Spirit Assn., 762 P.2d 46, 56 (1988)
- *This court has cautioned that judicial inquiry into the sincerity of a person's religious belief “must be handled with a light touch, or judicial shyness.” “[E]xamin[ing] religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread.” Indeed, “the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged,” and “claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions.”* Davis v. Fort Bend Cty., 765 F.3d 480, 486 (5th Cir. 2014).



# Accommodating Religious Objections

- What accommodations are a sufficient alternative to vaccination (PPE, temperature checks, COVID tests)?
- Does the accommodation create an undue hardship for the employer?
  - The Supreme Court has held that requiring an employer to bear more than a “de minimis,” or a minimal, cost to accommodate an employee’s religious belief is an undue hardship. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer’s business – including, in this instance, the risk of the spread of COVID-19 to other employees or to the public.





# Accommodating Religious Objections


- Courts have found Title VII undue hardship where, for example, the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.
- Factors demonstrating the accommodation would impair workplace safety:
  - Type of workplace
  - Nature of employee's duties
  - the number of employees who are fully vaccinated
  - how many employees and nonemployees physically enter the workplace, and
  - the number of employees who will in fact need a particular accommodation.



# Accommodating Religious Objections

**L.6. If an employer grants a religious accommodation to an employee, can the employer later reconsider it? (10/25/21)**

The obligation to provide religious accommodations absent undue hardship is a continuing obligation that takes into account changing circumstances. Employees' religious beliefs and practices may evolve or change over time and may result in requests for additional or different religious accommodations. Similarly, an employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances. As a best practice, an employer should discuss with the employee any concerns it has about continuing a religious accommodation before revoking it and consider whether there are alternative accommodations that would not impose an undue hardship.



# Can An Employer Incentivize the Vaccine?

Yes—may provide incentives to encourage vaccination

The caveat--the employer must evaluate accommodations for employees who are unable or unwilling to get the shot due to:

- Disabilities
- Religious beliefs
- In some cases, pregnancy

**How much of an incentive?**

- It depends....



# How Can An Employer Incentivize the Vaccine?

## **Awards and Cash Incentives – No Limits**

- Gift cards
- Prizes
- PTO
- Etc.

## **Health Plan Discounts/Incentives - Limits**

- Lower premiums
- Lower copays/deductibles



# Vaccination-related Premium Discounts/Surcharges

## **Premium discount/surcharge for obtaining COVID-19 vaccination is a wellness program**

- Subject to various nondiscrimination requirements

### **Three main types of wellness programs:**

- Participatory. No conditions to obtain reward
  - Ex. Reimbursement for gym membership
- Activity-based. Do something to obtain reward
  - Ex. Participate in exercise program
- Outcome-based. Get a result to obtain reward
  - Ex. Get certain results on biometric screenings; quit smoking



# Vaccination-related premium discounts/surcharges

## Requirements for COVID-19 Vaccination Premium Discount:

- Program must be reasonably designed to promote health or prevent disease
- Must provide a reasonable alternative standard to qualify for discount
  - Example: Offer a waiver or the right to attest to following other COVID-19-related guidelines to individual if it would be unreasonably difficult due to medical condition or medically inadvisable to obtain COVID-19 vaccination
- Must provide notice of availability of the reasonable alternative standard
- Discount can't exceed 30% of total cost of employee-only coverage
- Must give eligible individuals opportunity to qualify for the discount at least once per year



# Vaccination-related Premium Discounts/Surcharges

## Affordable Care Act Consideration:

- Cost assuming no vaccine is what is used for ACA affordability
  - Ex. If premium contribution is normally \$100/month for vaccinated and \$200/month for unvaccinated, cost for determining affordability under the ACA for everyone is calculated at \$200/month
- Need to balance potential penalty with incentive
  - Penalty (assuming coverage is offered to 95% of FT employees) generally will be \$250 per month for any FT employee who declines coverage, goes to Exchange, and qualifies for a subsidy




# Vaccination-related Eligibility For Health Insurance Coverage

## **Any restriction on plan benefits:**

- Must apply uniformly to all similarly situated individuals
- Cannot be directed at individuals based on a health factor (e.g., vaccination status)

**Group health plan cannot condition eligibility for benefits or coverage on being vaccinated**





Searching for  
answers to  
your questions?

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