

Federal and New York City Workplace Vaccination and Testing Mandates: A Primer

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Takeaways

- Conflicting rulings and a patchwork of injunctions have made it difficult for employers to know how or whether to comply with federal vaccination mandates.
- The Supreme Court stayed OSHA's vaccinate-or-test order, the broadest of three federal COVID-19 mandates, but it allowed another covering health care workers to go into effect for now. A third mandate for federal contractors is enjoined pending a circuit court appeal.
- The mandates for health care workers and federal contractors, including federally funded educational institutions, like New York City's mandate, do not allow for a testing option; employees must be vaccinated unless they fall within limited exceptions.
- A TRO against New York City's order was denied in a suit filed after the mandate took effect, and it may be less vulnerable to challenge because of the broad powers state and local governments have to protect citizens.

At President Biden's urging, in late 2021, different arms of the federal government issued three high-visibility vaccine mandates to private employers, applying to federal contractors, many health care workers, and mid-sized and large employers. Those were followed by a sweeping order in New York City requiring businesses there to verify that their on-site employees have been vaccinated.

On January 13, 2022, in *National Federation of Independent Business v. Dept. of Labor*, the U.S. Supreme Court stayed the broadest of the three federal orders, an emergency temporary standard (ETS) issued by the Occupational Safety and Health Administration (OSHA), holding that the ETS exceeded the agency's statutory authority. However, in a second case decided the same day, *Biden v. Missouri*, the Court allowed the Department of Health and Human Services' vaccination mandate for health care workers to take effect. That requirement applies to workers at Medicare- and Medicaid-certified hospitals, nursing homes and other facilities.

The third federal mandate, covering federal contractors and subcontractors, including educational institutions receiving federal funding, was not before the court, but it has been enjoined while a circuit court appeal is pending.

All three federal mandates required employees to be fully vaccinated by January 4, 2022, or, in some cases, as an alternative, that employers have testing programs in place. The federal government said it would not enforce the mandates while the litigation was pending, but there is now nothing to bar enforcement of the rules for health care workers.

It is important to note that the health care worker and government contractor mandates are stricter than OSHA's: They and the New York order do not permit employees to choose testing in lieu of vaccinations, except in limited cases.

Note, too, that the Court has refused to hear several challenges in recent months to vaccine mandates by state and local governments, which traditionally have broader powers to ensure public welfare.

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In the wake of the Supreme Court's decision, here is a guide to the scope and requirements of the federal actions and their legal status at the time this article is published. (For a more detailed explanation of the mandates' terms, see our January 3, 2022, client alert "[Status of Recent Federal and NYC Workplace Vaccination and Testing Mandates](#).")

The New York City mandate, first announced on December 6, 2021, by Mayor Bill De Blasio, took effect December 27, 2021, without any court challenges, according to the city's law department. It applies to all private employers in the city, regardless of size, requiring them to verify that their on-site employees are vaccinated.

An Overview: Which Mandates Apply to Which Employers

The three federal mandates and the New York City order differ in their requirements and legal foundations, and employers may need to comply with more than one:

- **Federal contractors and subcontractors, including educational institutions receiving federal funding (enjoined while appeal is pending):** [Executive Order 14042](#), issued September 9, 2021, by the White House, and later guidance issued by the [Safer Federal Workforce Task Force](#).
- **Midsized and large employers (enjoined by the Supreme Court while appeal is pending):** [Emergency Temporary Standard](#) (ETS), issued November 4, 2021, by OSHA
- **Health care workers at Medicare- and Medicaid-certified facilities (allowed to go into effect by the Supreme Court):** [Omnibus COVID-19 Health Care Staff Vaccination plan](#), issued November 4, 2021, by the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS).

- **New York City private employers:** [Order of the Commissioner of Health and Mental Hygiene](#), issued December 13, 2021, and [New York City guidance](#), issued December 15, 2021.

Details and Status of Federal and New York City Mandates

Federal Contractors (Executive Order)

- **Who is covered:** almost all employees who (1) work in facilities that perform services under a covered government contract, (2) perform administrative and back-office work supporting a contract, or (3) work at a location where employees performing such services also work. Also applies to educational institutions receiving federal funding. No minimum number of employees.
- **Employee mandates and deadline:** receive all vaccinations by January 4, 2022. No option to be tested in lieu of vaccination.
- **Exceptions:** exemptions for disability (including medical conditions) and sincerely held religious beliefs.
- **Status of legal challenges:** The Eleventh U.S. Circuit Court of Appeals refused to stay a national injunction issued by a district court in Georgia against the executive order, so the injunction remains in effect in all 50 states. The government has appealed. Final briefs are due January 24, 2022. No date for oral arguments has been set. Separately, a Kentucky district court enjoined the mandate in Kentucky, Tennessee and Ohio. There is no final adjudication on the merits and no appeal to date.

Midsized and Large Employers (OSHA)

- **Who is covered:** by far the widest-reaching mandate: private sector employers with 100 or more employees total at all locations, estimated

to encompass 83 million workers. Explicitly excludes federal contractors covered by Executive Order 14042 and health care facilities covered by the CMS mandate. Employers must provide paid time off for vaccinations and recovery from any side effects.

- **Employee mandates and deadline:** receive all vaccinations by January 4, 2022, or wear masks on the job and be tested weekly.
- **Exceptions:** does not apply to employees who work outside or remotely at home; exemptions for disability (including medical conditions) and sincerely held religious beliefs.
- **Status of legal challenges:** In National Federation, the Supreme Court granted a stay of the ETS while the litigation is pending, holding that the ETS exceeded OSHA's statutory authority.

Health Care Workers at Medicare- and Medicaid-Certified Facilities (CMS)

- **Who is covered:** Medicare- and Medicaid-certified providers and suppliers, including hospitals, hospices and home health agencies, ambulatory surgical centers and outpatient rehabilitation facilities. No minimum number of employees. In practice, most health care facilities are Medicare/Medicaid-certified because that is a requirement for reimbursement under those programs.
- **Employee mandates and deadline:** receive all vaccinations by January 4, 2022. No option to be tested in lieu of vaccination.
- **Exceptions:** exemptions for disability (including medical conditions) and sincerely held religious beliefs.
- **Status of legal challenges:** In *Biden v. Missouri*, on January 13, 2022, the U.S. Supreme Court stayed injunctions issued by district courts in

Louisiana and Missouri against the CMS rules while those cases are on appeal, saying the Secretary of Health and Humans Services acted within his authority in issuing the rules.

New York City Employees

- **Who is covered:** all private employers in New York City, no matter their size — estimated to be 184,000 businesses.
- **Employee mandates and deadline:** receive at least one vaccination by December 27, 2021. Those who have received just one Pfizer or Moderna vaccination must submit proof of a second dose within 45 days. Employees who do not comply will not be permitted in the workplace.
- **Exceptions:** reasonable accommodation required for “disability, pregnancy, childbirth, lactation, religious beliefs or observances, or status as a victim of domestic violence, stalking, or sex offenses.”
- **Status of legal challenges:** the only challenge, filed in the Eastern District of New York after the mandate took effect, alleges that the rules violated a business’s federal due process rights; a temporary restraining order was denied. Mayor Eric Adams, who assumed office January 1, 2022, left the mandate in place.