

# Status of Recent Federal and NYC Workplace Vaccination Testing Mandates

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At President Joe Biden's urging, three arms of the federal government issued high-visibility vaccine mandates over the last several months. On September 9, 2021, the Biden administration issued [Executive Order 14042](#), which applies to parties contracting with the federal government, and which prescribes COVID-19 protections for federal contractors and subcontractors. Among these requirements is a mandate for certain federal contractor employees to receive a COVID-19 vaccine by January 4, 2022, allowing for exceptions only as required by law. Soon after, on September 24, 2021, the Safer Federal Workforce Taskforce issued details on broad vaccine requirements for faculty, staff and students working on covered contracts.

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued much-anticipated [Emergency Temporary Standards \(ETS\)](#) establishing COVID-19-related protocols for private sector employers and employees. On the same day, the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS) issued a [vaccination requirement](#). The [OSHA ETS](#), which is expected to apply to more than 80 million workers, requires private sector employers with 100 or more employees to implement COVID-19 vaccination or weekly testing policies. The CMS rule is intended to perform a similar role, but specifically requires vaccination for health care workers at participating Medicare and Medicaid facilities. Notably, the OSHA and CMS rules do not apply to workplaces covered under Executive Order 14042.

Collectively, Executive Order 14042, the OSHA ETS and the CMS rules make up separate pieces of a multifaceted approach by the Biden administration to address the COVID-19 pandemic through workplace safety regulations. However, almost immediately after each of Executive Order 14042, the OSHA ETS and the CMS rule were issued, multiple lawsuits were filed seeking to enjoin them — with mixed results. Recently, the Supreme Court has scheduled two of the cases for a January 7, 2022, special hearing.

These federal approaches were followed by a December mandate issued by New York City's mayor requiring all businesses there to verify that their on-site employees have been vaccinated. According to the city's Law Department, no lawsuits have been filed challenging the mandate. With an effective date of December 27, 2021, it is the first mandate of its kind to be implemented by a municipality in the United States.

As the situation remains in flux, below we have provided an overview of the current landscape and discuss some of the pressing considerations employers now face.

## Agency Action

### OSHA ETS

The OSHA ETS expressly states that it preempts any state or local laws or mandates that ban or limit an employer's authority to require COVID-19 vaccination, masks or testing, creating a national standard. Under the [OSHA ETS](#), employers must choose to either require employees to get the COVID-19 vaccination, or require that unvaccinated employees wear a mask in the workplace and provide proof of a negative COVID-19 test on a weekly basis. For the vaccination requirement, all covered employers must ensure that employees have received the necessary shots to be fully vaccinated (either two doses of the Moderna or Pfizer vaccine, or one dose of Johnson & Johnson's vaccine) by January 4, 2022. The ETS does not address boosters.

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The ETS states that employers must provide employees with reasonable paid time off to get vaccinated and, if needed, to recover from side effects of vaccinations. Specifically, employers are required to provide up to four hours of paid time off for each vaccine dose, and at the employee's regular rate of pay. The four hours of paid time off cannot be offset by any other leave, such as sick leave or vacation leave, although the employer may require the employee to use any accrued sick leave when recovering from side effects. However, if an employee does not have sick leave available to them, such leave must be provided for this exact purpose.

The deadline for employers to ensure their employees are fully vaccinated against COVID-19 is January 4, 2022, although OSHA is exercising enforcement discretion with respect to this date.

## Who is Covered Under the OSHA ETS?

- The OSHA ETS applies to employers with 100 or more employees, the calculation of which is done at the employer level, and not at the individual location level. For single corporate entities with more than one location, all employees at all locations are counted for purposes of the 100-employee threshold.
- Employees who work exclusively outdoors are not subject to the OSHA ETS, although such employees still count towards an employer's 100-employee threshold. The [OSHA ETS FAQs](#) offers an example that if an employer has 125 employees, and 115 of them work exclusively outdoors, the employer would be covered by the ETS, but the protections of the ETS would only apply to the 10 employees working in indoor settings.
- Similarly, employees who work remotely or from home still count towards an employer's 100-employee threshold. The OSHA ETS FAQs state that if an employer has 150 employees, and 100 of them work full-time from their homes and 50 of whom work in the office at least part of the time, the employer would still be within the scope of the ETS. However, the standard's requirements would only apply to the 50 employees who work in the office around other individuals at least part-time, and not to those 100 employees working exclusively from their homes.

## Testing Requirements Under the OSHA ETS

- The OSHA ETS directs employers to ensure that each unvaccinated or not-yet-fully vaccinated employee get tested for COVID-19 at least weekly. While the ETS does not specifically forbid or require employers to bear the cost of COVID-19 testing for employees, certain employers may nonetheless be obligated to pay for testing costs by other laws or collective bargaining agreements. If any employee receives a positive

COVID-19 test, is otherwise diagnosed with COVID-19 by a licensed health care provider, or does not provide a required COVID-19 test result, they must be removed from and kept out of the workplace.

- Under the ETS, a COVID-19 test must be approved by the U.S. Food and Drug Administration (FDA), administered in accordance with authorized instructions, and cannot be both self-administered and self-read, unless observed by the employer or an authorized telehealth proctor. In practice, this means an over-the-counter test result must be independently confirmed to ensure the integrity of the test result.
- The OSHA ETS FAQs states that employees who cannot be tested due to a sincerely held religious belief may request reasonable accommodations from their employer. The deadline for employers to ensure their covered employees produce a negative COVID-19 test on at least a weekly basis is January 4, 2022, but OSHA has announced that it will not issue citations for noncompliance with testing requirements before February 9, 2022, so long as an employer is exercising reasonable, good faith efforts.

## Executive Order 14042

Executive Order 14042 (COVID-19 Safety Protocols for Federal Contractors) was promulgated on September 9, 2021, and directed executive agencies to modify contracts and contract-like instruments (together, contracts) in order to institute COVID-19 workplace safety measures. Pursuant to the executive order, on September 24, 2021, the Safer Federal Workforce Task Force [released guidance](#) (the Task Force Guidance) to clarify the requirements of the executive order. The Task Force Guidance implements a vaccination requirement for almost all employees who work in facilities that perform services under a covered contract, perform administrative and "back-office" work supporting a covered contract, or work at a location where employees who perform such services also work. Federal contractors and subcontractors must make a good faith effort to follow vaccination requirements, although exceptions are allowed as required by law, including for reasons related to disability or sincerely held religious beliefs.

## CMS Rules

The CMS issued a much-anticipated Interim Final Rule on November 4, 2021, requiring applicable health care facilities to implement a COVID-19 vaccination policy at certain health care facilities certified by CMS. Specifically, the CMS rule applies to Medicare and Medicaid-certified providers and suppliers, including hospices, hospitals, home health agencies, critical access hospitals, ambulatory surgical centers and outpatient rehabilita-

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tion facilities (among others). The CMS rule originally required covered health care facilities to have a policy requiring vaccines by December 5, 2021, and required covered employees to be fully vaccinated against COVID-19 by January 4, 2022. Failure to comply with this requirement could jeopardize an organization's Medicare funding. As discussed below, the deadline for the CMS vaccination requirements have been extended.

## Harmonized Rules and Deadlines

The OSHA ETS does *not* apply to workplaces covered by the CMS rule for health care workers at participating facilities, and does *not* apply to workplaces subject to Executive Order 14042 (the federal contractor mandatory vaccination requirement). Both the CMS health care rule and Executive Order 14042 are stricter than the ETS, as they do not offer a testing option for employees who choose not to get vaccinated. Additionally, both the CMS health care rule and executive order may apply to covered employers with fewer than 100 employees.

In the interest of harmonizing deadlines and making the vaccination process “easier” for businesses and workers to comply with, the [Biden administration announced](#) that it would consolidate the deadline for workers to receive their shots under the OSHA ETS, the previously announced federal contractor vaccination requirement, and the CMS rule. At this point in time, employees falling under the ETS, CMS or federal contractor rules will need to be *fully vaccinated* by January 4, 2022, — meaning they must have either their second dose of Pfizer or Moderna, or a single dose of Johnson & Johnson. Employers should note January 18, 2022, as a critical deadline: Since January 4, 2022, is the last day that a covered employee can receive a final COVID-19 shot, employees will need to be fully vaccinated by January 18, 2022, (given the two-week wait period to be fully vaccinated for Pfizer and Moderna). The [Biden administration also clarified](#) that the ETS will not be applied to workplaces subject to the federal contractor requirement or CMS rule, so employers will not have to track multiple vaccination requirements for the same employees.

## New York City's Recent Vaccine Mandate

On December 6, 2021, New York City Mayor Bill de Blasio announced that all private sector employees in the city would need to be vaccinated against COVID-19. On December 15, 2021, the city [published its guidance](#) and [FAQs on the mandate](#), outlining that, as of December 27, 2021, businesses could not allow unvaccinated employees to enter the workplace. A workplace is defined as “any location — including a vehicle — where

you work in the presence of at least one other person.” In-person workers need to provide employers with proof that they have received at least one dose of the COVID-19 vaccine. Employees cannot avoid the requirement by opting for regular testing. Medical and religious exemptions to the vaccine are still available for qualifying employees. Significantly, the New York City vaccine mandate does not apply to workplaces already covered by other federal, state or local mandates.

New York City is the first municipality in the country to have a COVID-19 vaccination mandate for private sector employers, with the regulation affecting 184,000 businesses, according to the Office of the Mayor.

Inspectors began enforcing the vaccine mandate on December 27, 2021. If a business refuses to comply, it could be subject to a fine of \$1,000, as well as escalating penalties if noncompliance persists.

The city's new mayor, Eric Adams, who assumed office on January 1, 2022, announced that he will keep the mandate in place.

## Court Action

### 1. OSHA ETS Litigation

On November 6, 2021, almost immediately after the issuance of the OSHA ETS, the U.S. Court of Appeals for the Fifth Circuit issued a [temporary stay](#) of the ETS. The Fifth Circuit cited potential “grave statutory and constitutional issues,” and thus created general ambiguity for employers gearing up to comply with the mandate. Although the Fifth Circuit was the first federal appeals court to issue a temporary stay, on November 16, 2021, the U.S. Court of Appeals for the Sixth Circuit was chosen via a lottery system, in accordance with U.S. federal rules for multi-circuit litigation. Subsequently, on December 17, 2021, the Sixth Circuit dissolved the Fifth Circuit's stay of the OSHA ETS, meaning that OSHA can now implement the ETS with a January 10, 2022, compliance deadline. However, as discussed further below, on December 22, 2021, the Supreme Court announced that that it will hear oral arguments for this case on January 7, 2022.

OSHA announced that, to account for uncertainty created by the stay, it will be exercising discretion in enforcing the compliance dates of the ETS. OSHA will not issue citations for ETS noncompliance before January 10, 2022, or for noncompliance with testing requirements before February 9, 2022, so long as an employer is “exercising reasonable, good faith efforts to come into compliance with the standard.”

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## 2. Executive Order 14042 (Federal Government Contractors and Subcontractors)

On November 30, 2021, the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction barring the Biden administration from enforcing its COVID-19 vaccination mandate in Tennessee, Ohio and Kentucky. The court held that President Biden likely exceeded his authority with Executive Order 14042 in requiring federal contractors and subcontractors to mandate COVID-19 vaccinations for their employees.

On December 7, 2021, a Georgia federal judge enjoined the COVID-19 vaccine mandate for federal contractors from going into effect on a national level, ruling that the Biden administration had likely exceeded its procurement authority. On December 20, 2021, the Eleventh Circuit refused to stay the injunction, finding that the federal government had failed to demonstrate irreparable harm, which is necessary to lift the injunction. The Eleventh Circuit has set an expedited schedule extending into late January 2022 for briefing on the merits of the appeal.

Collectively, the Kentucky and Georgia injunctions enjoin enforcement of the vaccine mandate for federal contractors and subcontractors, as set forth in Executive Order 14042, and in all covered contracts in the United States. In response to the stays, the Office of Management and Budget has issued guidance on applying the requirements of the executive order, while ensuring compliance with the injunctions. The guidance specifically provides that the federal government will not take action to enforce the vaccine mandate, where the place of performance identified in the contract or contract-like instrument is in the United States or its territories. However, federal agencies' COVID-19 workplace safety protocols for federal buildings and federally controlled facilities still apply in all locations.

## 3. CMS Litigation

On November 30, 2021, a federal judge in Louisiana temporarily blocked the CMS from enforcing its COVID-19 vaccine mandate for covered health care workers until the court can decide legal challenges. In addition, 14 plaintiff states filed challenges in Louisiana, including Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah and West Virginia.

On November 29, 2021, the Missouri court entered a preliminary injunction against the Biden administration,

temporarily preventing vaccination requirements for health care workers from taking effect in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming. The court found that the Biden administration had overstepped its authority in ordering employees at a wide range of health care facilities to get vaccinated, and that CMS needed clear approval from Congress to validate its vaccine requirement. The preliminary injunction will continue until there is a trial on the merits, or until further order of the court.

Between the two cases, the Louisiana and Missouri injunctions covered all states, the District of Columbia and the U.S. territories, with the effect of immediately halting the implementation and enforcement of the CMS vaccination mandate. On December 2, 2021, CMS announced that surveyors must not survey providers for compliance with the requirements of the CMS vaccination mandate while the preliminary injunctions are still in effect. However, on December 15, 2021, the Fifth Circuit partially upheld and partially reversed the Louisiana district court's injunction. While the CMS vaccination requirement is still stayed in the 14 states that filed challenges in Louisiana, and in the 10 states that make up the Missouri lawsuit, the injunction is lifted everywhere else. This means that as of December 15, 2021, the injunction is only in place for 24 states (but could be enforced in 26 states). Whether CMS will now enforce the mandate in these 26 states remains to be seen.

## 4. Supreme Court Action

On December 22, 2021, the Supreme Court announced it will hold a special hearing on January 7, 2022, to weigh the challenges and legitimacy of two of the Biden administration's COVID-19 initiatives: the OSHA ETS vaccine-or-testing mandate and the CMS requirement for covered health care workers. Thus far, the Supreme Court has mostly avoided the issue of vaccine mandates, though it rejected a challenge to Maine's vaccination mandate for health care workers in October.

## 5. New York City's Vaccine Mandate

Since Mayor Adams has opted to continue to enforce the New York City vaccine mandate, it is likely to face legal challenges. Opponents, including the City Council's Republican minority leader, Joe Borrelli, have already called the mandate illegal. Additionally, other city-based employees have threatened class-action litigation on behalf of all unvaccinated workers in New York City.

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## Next Steps

As the COVID-19 pandemic continues to evolve, and as federal and state laws issue complex guidance, employers must keep abreast of what is required from them. At this point, unless the Supreme Court enjoins the Sixth Circuit's order, covered employers will be required to comply with the OSHA ETS. However, as referenced previously in this article, OSHA has announced more flexible compliance deadlines. Accordingly, OSHA will not issue citations for noncompliance with any ETS requirements before January 10, 2022, and will not issue citations for noncompliance with testing requirements for unvaccinated employees before February 9, 2022, provided that employers exercise reasonable, good faith efforts to comply with the ETS.

At this time, to avoid penalties or loss of income, all employees falling under the ETS, CMS or federal contractor rules will need

to be fully vaccinated against COVID-19 by January 4, 2022. Given the upcoming urgent deadlines, covered employers must proactively assess their workforce's vaccination status while maintaining confidential records, and in some cases, implement testing/masking policies for unvaccinated employees. Employers also should remember: (1) vaccination requirements for federal contractors remain enjoined nationwide, as ruled by the Eleventh Circuit on December 20, 2021; and (2) the CMS rule is similarly stayed, for now, in 24 states, as of December 15, 2021. Nonetheless, employers must still be prepared to act swiftly moving forward, as injunctions may be lifted with minimal notice and a quick turnaround time. The same holds true for the New York City vaccination mandate, and employers should monitor any further developments that Mayor Adams announces.

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