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Vaccine Mandates for Healthcare Providers – What You Need to Know

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Update on Federal COVID-19 Vaccination Mandates



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Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS)

OSHA ETS Stay of Enforcement

- Presently, the OSHA ETS is stayed from enforcement by the United States Supreme Court as discussed later in this presentation.
- So, why discuss it at all?
- The stay of enforcement is temporary in nature pending a final review by the Sixth Circuit Court of Appeals on the lawfulness of the mandate.

OSHA ETS Overview

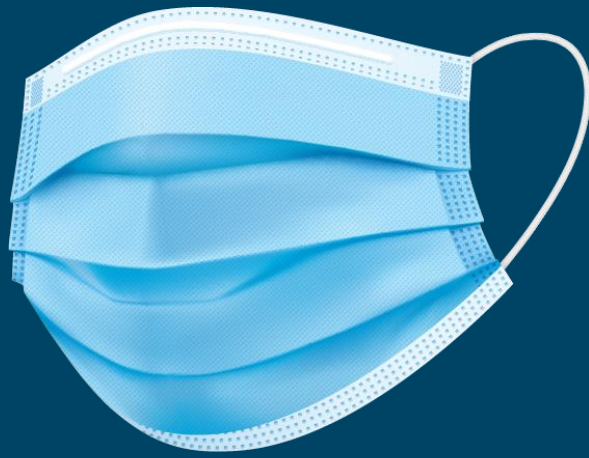
- On Thursday, November 4, 2021, OSHA issued its ETS regarding mandatory COVID-19 vaccinations for all private sector employers with 100 or more employees.
- Under the ETS, covered employers must implement and enforce a mandatory COVID-19 vaccination policy under which employees may either
 - become vaccinated or
 - undergo regular COVID-19 testing (at least once every 7 days for employees in the office each week) and wear a face covering at nearly all times in the workplace.
- Enforcement was set to begin on December 5, 2021 (the date unvaccinated workers needed to begin wearing masks), though the enforcement date was eventually delayed to January 10, 2022, due to various federal court litigation.

OSHA ETS – Defining 100 Employees

- Pursuant to the ETS, employers must count all employees, including part-time workers, remote workers, minors, and temporary employees, in determining its threshold compliance responsibility.
- Employers cannot consider separate locations as separate “workforces”; the 100-employee threshold includes all employees in all locations.
- The 100-employee threshold does not include independent contractors or workers provided by staffing agencies.

OSHA ETS – Defining 100 Employees

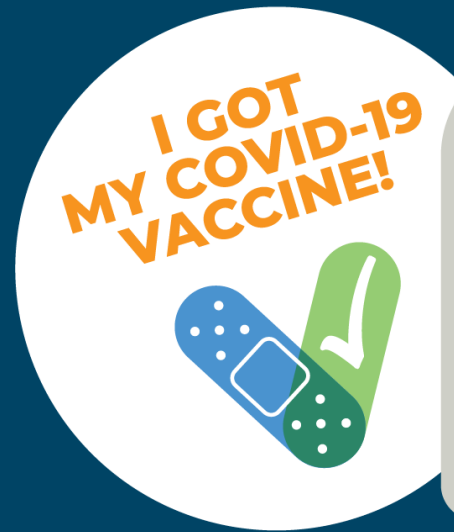
- OSHA has not provided a specific answer regarding treatment of sister, affiliated, or subsidiary companies (nor about companies with common ownership) in relation to the 100-employee threshold.
- However, in its Question and Answers related to the OSHA ETS, OSHA states (emphasis added):
 - “The count should be done at an employer level (firm- or corporate-wide), not the individual location. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted.”
- Therefore, separate corporate entities’ employees (even if affiliated) likely do not need to be combined for the 100-employee threshold.



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Compliance with the OSHA ETS Face Covering Requirement

- From January 10-13, unvaccinated employees subject to the ETS were mandated to always wear a mask in the workplace “when indoors and when occupying a vehicle with others for work purposes.”
- As the OSHA ETS is currently stayed from enforcement, as explained later in this presentation, employers need not presently enforce the face covering requirement.

Compliance with the OSHA ETS Face Covering Requirement

- When the OSHA ETS is in effect, employers must always enforce the face-covering requirement for its unvaccinated employees except:
 - when the employee is alone in a room with floor-to-ceiling walls and a closed door;
 - for a limited time period to allow the employee to drink and/or eat;
 - when the employee is wearing a respirator; or
 - where the employer can show that the use of face coverings is infeasible or creates a greater hazard.
- The fourth exception listed will likely be difficult to prove and should not be relied on with frequency.

Compliance with the OSHA ETS Testing Requirement

- Prior to the Supreme Court ruling discussed later in this presentation, employees must have received their “final vaccination dose” – either the second dose of Pfizer or Moderna, or a single dose of Johnson & Johnson – by February 9, 2022, to be exempted from the testing requirements of the ETS.
- As of the same date, unvaccinated employees were required to begin providing their employers with a negative COVID-19 test result every 7 days for continuing access to the workplace. For compliance with this requirement, employees cannot rely upon tests that are both self-administered and self-read.
- The ETS made limited exceptions to the testing requirement for employees who work exclusively from home or exclusively outside.

Compliance with OSHA the ETS Testing Requirement

- The ETS does not allow unvaccinated employees to administer and observe their own over-the-counter COVID-19 tests.
- However, unvaccinated employees may use over-the-counter COVID-19 tests so long as their employer observes the test results either in person or through live streaming video conferencing (such as Zoom, Skype, or Microsoft Teams).
- Employer-observers must document, record, and maintain the results of the observed over-the-counter tests. This documentation can include a written statement (a notation indicating the date and time observed, the observer, and the results), a photograph of the test result, or a video of the test result.

OSHA ETS Presently Stayed from Enforcement – Fifth Circuit Ruling

- On Saturday, November 6, 2021, the Fifth Circuit Court of Appeals (the federal Court of Appeals governing Louisiana, Mississippi, and Texas) issued a temporary stay of enforcement temporarily blocking OSHA's November 4 ETS.
- On Friday, November 12, 2021, the Fifth Circuit continued its stay of enforcement "pending adequate judicial review of . . . a permanent injunction." The Fifth Circuit's stay of enforcement barred OSHA from enforcing the ETS or taking steps to implement the ETS.
- The Fifth Circuit was the first federal court of appeals to rule on the OSHA ETS, though various groups filed motions for review of the ETS in 11 of the 12 federal appellate courts throughout the United States.

OSHA ETS Presently Stayed from Enforcement – Sixth Circuit Ruling

- To avoid conflicting rulings due to the number of challenges in different federal circuits, the Judicial Panel on Multidistrict Litigation, a special body that manages multidistrict, federal litigation, consolidated all the challenges into one challenge before a single federal court of appeals chosen by random lottery.
- On November 16, 2021, the Sixth Circuit Court of Appeals (the federal Court of Appeals governing Kentucky, Michigan, Ohio, and Tennessee) was chosen via a lottery system to oversee all consolidated challenges to OSHA's ETS; and all the various cases were transferred to that court.

OSHA ETS Presently Stayed from Enforcement – Sixth Circuit Ruling

- On November 23, 2021, OSHA filed an emergency motion seeking to dissolve the Fifth Circuit's stay of enforcement and allow OSHA to enforce the ETS while the Sixth Circuit considered and made a final ruling on the numerous challenges.
- On the evening of December 17, 2021, the Sixth Circuit granted OSHA's motion and dissolved the stay of enforcement issued by the Fifth Circuit. OSHA could once again enforce and take steps to implement the ETS.

OSHA ETS Presently Stayed from Enforcement – Plan for Enforcement

- The day after the Sixth Circuit issued its opinion, on December 18, 2021, OSHA issued a statement that it intended to move forward with enforcement of the ETS:
 - “Litigation Update
OSHA is gratified the U.S. Court of Appeals for the Sixth Circuit dissolved the Fifth Circuit’s stay on the Vaccination and Testing Emergency Temporary Standard. OSHA can now once again implement this vital workplace health standard, which will protect the health of workers by mitigating the spread of the unprecedented virus in the workplace.”

OSHA ETS Presently Stayed from Enforcement – Plan for Enforcement

- [Litigation Update (Cont'd)]

“To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.”

OSHA ETS Presently Stayed from Enforcement – Supreme Court Ruling

- Many parties to the litigation before the Sixth Circuit sought immediate review by the Supreme Court of the United States of the dissolution of the stay of enforcement.
- Typically, the Supreme Court handles this type of appeal through written opinion. However, on December 22, 2021, the Supreme Court announced it would hold a special session on Friday, January 7, 2022, to hear oral argument in cases concerning whether the OSHA ETS and/or CMS IFR should be stayed from enforcement.

OSHA ETS Presently Stayed from Enforcement – Supreme Court Ruling

- On January 13, 2022, the Supreme Court reinstated the stay of enforcement of the OSHA ETS.
- The Supreme Court's stay of enforcement once again bars OSHA from enforcing the ETS or taking steps to implement the ETS – despite the January 10 and February 9 deadlines it previously designated as enforcement deadlines.
- However, the Supreme Court's reinstatement of the stay of enforcement is not a final ruling on the lawfulness of the OSHA ETS.

What Now? (OSHA ETS)

- The Sixth Circuit will now determine whether the ETS is lawful.
- Should the Sixth Circuit find the ETS lawful, the ETS will be reinstated and enforceable once more pending appeal by the Sixth Circuit litigants and a final review of the lawfulness of the mandate by the United States Supreme Court.
- Should the Sixth Circuit find the ETS unlawful, the ETS will remain stayed from enforcement pending appeal by OSHA and a final review of the lawfulness of the mandate by the United States Supreme Court.



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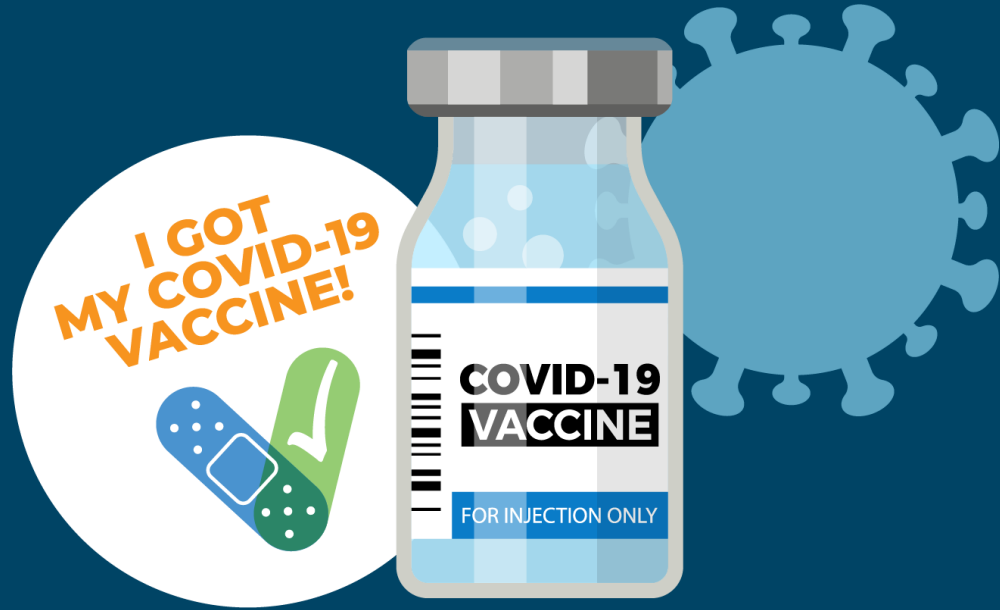
Executive Order 14042 (EO 14042) Ensuring Adequate Safety Protocols for Federal Contractors

EO 14042 Overview

- On Thursday, September 9, 2021, President Biden issued EO 14042 to ensure federal contractors “provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument.”
- EO 14042 is limited to certain federal contractors (and their subcontractors).
- EO 14042 required the employees of federal contractors to be fully vaccinated, as defined by the CDC, no later than January 18, 2022, among other requirements.

EO 14042 Applicable Contracts

- EO 14042 applies to federal government contractors (and their subcontractors) with contracts
 - concerning “services, construction, or a leasehold interest in real property”;
 - governed by “the Service Contract Act”;
 - for “concessions, including any concessions contract excluded by Department of Labor regulations”; or
 - in connection with “Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.”



OR

Reasonable Accommodations



EO 14042 Currently Enjoined from Enforcement

- On November 30, 2021, a Kentucky federal district court judge issued a preliminary injunction halting enforcement of EO 14042 in Kentucky, Ohio, and Tennessee.
- Then, on December 7, 2021, a Georgia federal district court judge issued a nationwide preliminary injunction halting enforcement of EO 14042.
- Following these rulings, The Office of Management and Budget issued updated guidance stating the government will take no action to enforce the clause implementing requirements of EO 14042 absent further written notice from the agency.

What Now? (EO 14042)

- A federal court of appeals may next review either the Kentucky or Georgia ruling.
- Alternatively, the U.S. Judicial Panel on Multidistrict Litigation may consolidate the federal cases (arising out of Kentucky, Georgia, or elsewhere) challenging EO 14042.
- Like the Sixth Circuit, chosen at random via lottery system to review the OSHA ETS stay of enforcement, a federal court of appeals would be selected at random to hear and determine all the consolidated cases concerning EO 14042.



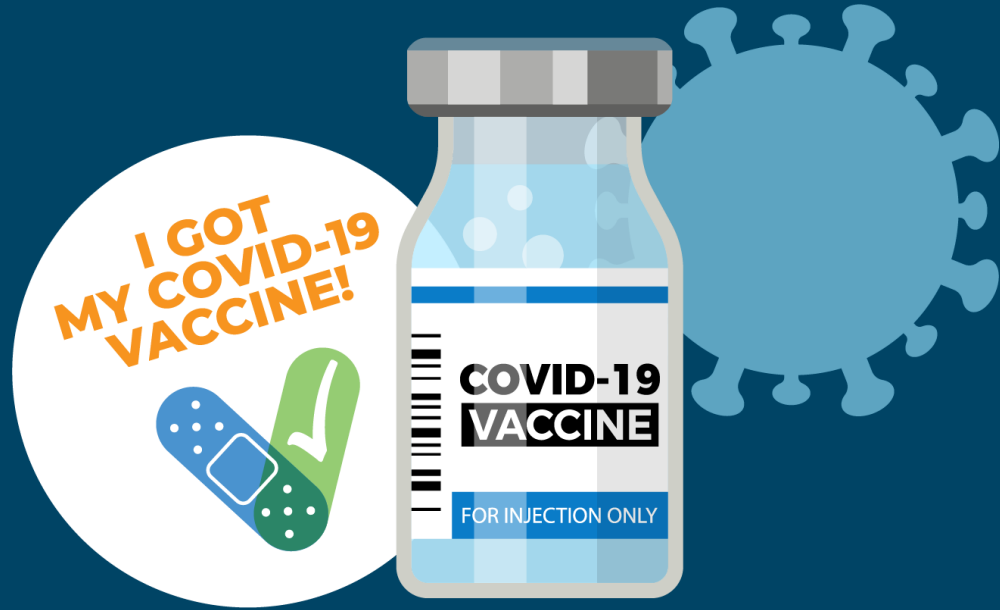
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Centers for Medicare & Medicaid Services (CMS) Interim Final Rule (IFR)



CMS IFR Overview

- On Thursday, November 4, 2021, CMS issued its IFR regarding mandatory COVID-19 vaccinations.
- The IFR applies to 21 types of providers and suppliers.
- The IFR broadly applies to all “staff” at the relevant facilities.
- The IFR required all staff at the relevant facilities to receive the first vaccination dose by December 5, 2021, and the second dose by January 4, 2022.



OR

Reasonable Accommodations



Previous Injunction Covering Half the Country – Missouri and Louisiana Rulings

- On Monday, November 29, 2021, a federal district court judge in the Eastern District of Missouri issued a preliminary injunction enjoining CMS from enforcing the IFR in 10 states.
- The next day, on Tuesday, November 30, 2021, a federal district court judge in the Western District of Louisiana issued a nationwide preliminary injunction restraining CMS from enforcing the IFR in any state—even though only 14 states had challenged the IFR in the Louisiana court.

Previous Injunction Covering Half the Country – Missouri and Louisiana Rulings

- The Missouri and Louisiana courts' reasoning for enjoining the IFR included:
 - CMS exceeded its authority.
 - CMS issued the IFR without following statutorily required processes.
 - The IFR violates the Administrative Procedure Act.
 - The IFR violates various clauses in the U.S. Constitution.

CMS December 2, 2021, Memorandum

- On December 2, 2021, in recognition of the court rulings previously discussed, CMS issued a memorandum acknowledging its plan to suspend enforcement of the IFR and all surveying related to compliance with the IFR.
- In the text of the memorandum, CMS stated it “remains confident in its authority to protect the health and safety of patients in facilities certified by Medicare and Medicaid programs.”

Previous Injunction Covering Half the Country – Fifth Circuit Ruling

- On December 15, 2021, the Fifth Circuit Court of Appeals (the federal court governing Texas, Louisiana, and Mississippi) partially granted the government's request to stay the injunction issued by the Louisiana district court.
- Instead of applying nationwide, the Fifth Circuit changed the scope of the temporary injunction to apply only to the 14 states that challenged the IFR before the Louisiana court:
 - Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah, and West Virginia.

Previous Injunction Covering Half the Country – Fifth Circuit and Texas Rulings

- On the same date, December 15, 2021, a federal district court in Texas granted a preliminary injunction applicable to Texas.
- Therefore, until January 13, 2022, due to the 3 orders from the federal district courts in Missouri, Louisiana, and Texas, CMS was barred from enforcing the IFR or taking steps to implement the IFR in 25 states:
 - Alabama
 - Alaska
 - Arizona
 - Arkansas
 - Georgia
 - Idaho
 - Indiana
 - Iowa
 - Kansas
 - Kentucky
 - Louisiana
 - Mississippi
 - Missouri
 - Montana
 - Nebraska
 - New Hampshire
 - North Dakota
 - Ohio
 - Oklahoma
 - South Carolina
 - South Dakota
 - Texas
 - Utah
 - West Virginia
 - Wyoming

Previous Injunction Covering Half the Country

- Even though the CMS IFR was enjoined from enforcement in half the country, CMS could still take steps to implement and enforce the IFR in the remaining 25 states and Washington D.C., which included:
 - California
 - Colorado
 - Connecticut
 - Delaware
 - Florida
 - Hawaii
 - Illinois
 - Maine
 - Maryland
 - Massachusetts
 - Michigan
 - Minnesota
 - Nevada
 - New Jersey
 - New Mexico
 - New York
 - North Carolina
 - Oregon
 - Pennsylvania
 - Rhode Island
 - Tennessee
 - Vermont
 - Virginia
 - Washington
 - Washington D.C.
 - Wisconsin

CMS Enforcement for 25 Applicable States and Washington D.C.

- On December 28, 2021, CMS issued guidance for the IFR for the 25 states (and Washington D.C.) where the IFR is not currently enjoined by litigation.
 - For clarity, those states include California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin.
- The first compliance deadline identified by CMS in this guidance is January 27, 2022.

CMS Enforcement for 25 Applicable States and Washington D.C.

- On or before January 27, 2022, the facilities subject to CMS's December 28 guidance must demonstrate that they have developed and implemented policies and procedures for ensuring that:
 - all facility staff are vaccinated for COVID-19; and
 - 100% of the staff have received at least one dose of the COVID-19 vaccine (or have a pending request for or have been granted a qualifying exemption or have been identified as having a temporary delay as recommended by the CDC).

CMS Enforcement for 25 Applicable States and Washington D.C.

- As of January 27, 2022, if less than 100% of the staff have received at least one dose of the COVID-19 vaccine (or have a pending request for or have been granted a qualifying exemption or have been identified as having a temporary delay as recommended by the CDC), the facility is non-compliant and will receive a notice of non-compliance.
- A facility that is above 80% and has a plan to achieve a 100% staff vaccination rate within 60 days would not be subject to additional enforcement action except in limited circumstances.

CMS Enforcement for 25 Applicable States and Washington D.C.

- In addition, on or before February 28, 2022, the facilities subject to CMS's December 28 guidance must demonstrate that they have developed and implemented policies and procedures for ensuring that:
 - 100% of the staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series) or have been granted a qualifying exemption or have been identified as having a temporary delay as recommended by the CDC.

CMS Enforcement for 25 Applicable States and Washington D.C.

- As of February 28, 2022, if less than 100% of the staff have received the necessary doses to complete the vaccine series (i.e., one dose of a single-dose vaccine or all doses of a multiple-dose vaccine series) or have been granted a qualifying exemption or have been identified as having a temporary delay as recommended by the CDC), the facility is non-compliant.
- A facility that is above 90% and has a plan to achieve a 100% staff vaccination rate within 30 days would not be subject to additional enforcement action except in limited circumstances.

CMS Enforcement for 25 Applicable States and Washington D.C.

- Finally, on or before March 28, 2022, the facilities subject to CMS's December 28 guidance that have not met the 100% standard may be subject to enforcement actions depending on the severity of the deficiency and the type of facility.

CMS Compliance Surveys for 25 Applicable States and Washington D.C.

- For the facilities subject to CMS's December 28 guidance, surveys for compliance as part of initial certification, standard recertification or reaccreditation, and complaint surveys will begin on January 27, 2022.

CMS IFR Reinstated Nationwide – Supreme Court Ruling

- On January 13, 2022, the Supreme Court reinstated the CMS IFR nationwide.
- Now, CMS can enforce the IFR and take steps to implement the IFR in the remaining 25 states where the IFR was previously enjoined.
 - For clarity, those states include Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.
- However, again, though the CMS IFR is reinstated for enforcement nationwide, it is not a final ruling on the lawfulness of the CMS IFR.

CMS IFR Reinstated Nationwide – Supreme Court Ruling

- On January 13, 2022, CMS issued a statement regarding the Supreme Court ruling.
- In its statement, CMS said, “health care providers subject to the [IFR] in the . . . [states] covered by this decision will now need to establish plans and procedures to ensure their staff are vaccinated and to have their employees receive at least the first dose of a COVID-19 vaccine. Today’s decision does not affect compliance timelines for providers in the District of Columbia . . . and the 25 states” subject to the December 28 guidance.
- CMS will likely issue enforcement guidelines for the remainder of the United States soon.

What Now? (CMS IFR)

- One or more federal district courts may now determine whether the IFR is lawful.
- Should a federal district court find the IFR lawful, the IFR will remain enforceable pending appeal to a federal court of appeals and a final review of the lawfulness of the mandate by the United States Supreme Court.
- Should a federal district court find the IFR unlawful, the ETS may be stayed from enforcement (in one or more states or nationwide) pending appeal by CMS to a federal court of appeals and a final review of the lawfulness of the mandate by the United States Supreme Court.



Other Considerations

Booster Vaccinations

- None of the vaccine mandates referenced in this presentation (OSHA ETS, EO 14042, and CMS IFR) require employees to receive COVID-19 booster vaccinations.
- In addition, none of the vaccine mandates require employers to collect documentation related to employees' receipt of COVID-19 booster doses.
- However, employers may mandate booster shots if they choose to and/or collect documentation related to employees' receipt of COVID-19 booster doses as the referenced laws may be changed at a later date to also mandate booster shots.

Religious, Medical, and Disability Accommodations

- A reasonable accommodation is any change in the work environment or the way a job is performed that enables a person with a need for accommodation to enjoy equal employment opportunities.
- Reasonable accommodations can be changes to a job position, work environment, policy, practice, or procedure.
- Employees may request reasonable accommodations due to disability, medical condition, and/or sincerely held religious beliefs, observances, or practices.

Religious, Medical, and Disability Accommodations

- Employees may request religious, medical, or disability accommodations from employer vaccine mandates, masking mandates, and/or testing mandates.
- Employers should review accommodation requests on a case-by-case basis and in compliance with Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.



Questions?



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Thank you

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