

CLIENT ALERT:**Supreme Court Strikes Down OSHA Vaccine Mandate**

By Gregory Paal

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With three key federal vaccine mandates facing judicial review, January 2022 is shaping up to be a critical month for the Biden Administration's COVID-19 response. **On January 13, 2022, the Supreme Court struck down the Large Employer vaccine mandate but upheld the Healthcare worker vaccine mandate.** The legal battle over the Federal Contractor is ongoing, and its future is in serious doubt after the Court's previous rulings. Employers also must stay abreast of state and local laws requiring vaccination and masking, as all levels of government grapple with the ongoing pandemic. This Alert provides an update on the federal vaccine mandates and an overview of the recently enacted Boston vaccine mandate as a counterpoint to the federal actions.

I. OSHA Emergency Rules

President Biden directed OSHA to issue emergency temporary standards ("ETS") requiring the employees of large employers and healthcare entities to be vaccinated or be tested for COVID-19 at least once per week.

Large Employer ETS - Enjoined

Overview: The Large Employer ETS required employers with one hundred or more employees to either adopt a rule making full vaccination a condition of employment or adopt a rule requiring employees to either be fully vaccinated or be tested for COVID-19 at least once a week. Additionally,

employers have several record-keeping and reporting responsibilities.

Legal Status: The Large Employer ETS has been permanently enjoined by a 6-3 Supreme Court ruling. Finding that COVID-19 is a generalized threat rather than a worksite-specific threat and that the issue of vaccination had become a "major question" requiring heightened scrutiny, the Court ruled that the language in the OSHA Act is not sufficiently clear enough to authorize OSHA to respond to the ongoing pandemic with a vaccine mandate. **Consequently, without new authorization from Congress, OSHA's ETS is unenforceable.** Employers who want to make vaccination a condition of employment should check whether their state and local laws permit such a rule.

Healthcare Worker ETS - Expired

Overview: OSHA issued an ETS requiring healthcare workers to be vaccinated or get weekly COVID-19 tests on June 21, 2021. An ETS expires after six months, so the Healthcare Worker ETS is no longer in effect as of December 21, 2021. Workers who were previously covered by the Healthcare Worker ETS are now likely covered by either the CMS mandate or the Large Employer ETS.

Legal Status: OSHA has stated that the recordkeeping portion of the rule remains in effect while it develops a permanent rule based on the Healthcare ETS. Given the Supreme Court's ruling on the Large

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Employer ETS, though, it is unclear that such a rule could survive. In the meantime, OSHA has stated that it will enforce the general duty clause, which in the healthcare context means that employers will be required to provide adequate personal protective equipment to their workers.

II. *Federal Contractor Mandate*

Overview: Federal agencies have been instructed to incorporate a clause into their contracts requiring federal contractors to comply with all guidance published by the Safer Federal Workforce Task Force (“Task Force”). One key provision of the Task Force guidance requires all covered federal contractor employees to be vaccinated. Additionally, prime federal contractors are required to incorporate the same clause mandating compliance with the Task Force guidance into all covered subcontracts, expanding the vaccination mandate to subcontractors of federal contractors.

An in-depth analysis of the Federal Contractor Mandate is available [here](#). Analysis of additional Task Force Guidance is available [here](#).

All government actions, whether federal, state, or local are subject to federal anti-discrimination laws. Guidance for handling religious accommodation requests to the vaccine mandate is available [here](#).

Effective Date: The effective clause requiring contractors to comply with Task Force Guidance began to be incorporated into new contracts as of October 15th. Contractors are not required to comply with the clause

until it is incorporated into their federal contract or subcontract.

Legal Status: The Federal Contractor mandate was enjoined nationwide by a Georgia District Court on December 7th. The injunction was upheld by the 11th Circuit on December 17th pending a hearing that is likely to take place at some point in late January. The Task Force has stated that it will not enforce the clause requiring compliance with the Task Force guidance while the case is pending. The Supreme Court’s rulings on the Large Employer ETS and the CMS mandate shed little light on the Federal Contractor mandate, though the hostility of the Court to the federal government’s vaccination measures suggest that the mandate faces an uphill battle.

III. *CMS Healthcare Worker Mandate*

Overview: The Centers for Medicare and Medicaid Services (CMS) issued an interim final rule requiring workers who are employed by entities that participate in Medicare and Medicaid to be fully vaccinated by January 4th. CMS can enforce the rule with penalties up to and including termination of noncomplying entities from the Medicare and Medicaid programs.

Effective Date: The rule was announced November 4th and requires all workers covered by the CMS rule to be vaccinated by January 4th.

Legal Status: The Supreme Court has upheld the CMS mandate by a narrow 5-4 margin, ruling that CMS has the authority to condition participation in Medicare and

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Medicaid on healthcare entities complying with the health and safety-promoting regulations CMS promulgates, including the vaccination mandate.

State and Local Mandates

As federal courts continue to block the Biden Administration's attempts to get more workers vaccinated, state and local governments have begun to issue their own rules to encourage vaccination uptake. Some cities have adopted health codes requiring proof of vaccination to enter certain public spaces. These state and local rules, grounded in long-established state police powers and more insulated from strident federal courts hostile to vaccination mandates, are less likely to face the kinds of legal challenges that have limited the federal government's actions. The recently issued vaccination mandate in Boston, which encourages vaccination uptake by limiting access to certain public accommodations, is an example of such a local policy.

Boston's Vaccination Mandate

Overview: Patrons and employees must show proof of vaccination to enter certain public accommodations in Boston, including establishments that offer indoor food services, indoor entertainment and event venues, and indoor gyms and other fitness settings. The mandate provides limited exceptions based on the nature of the covered entity and the nature of the visit. For example, individuals who are entering for a "quick and limited purpose" are exempt from displaying proof of vaccination. Exempted individuals

are required to wear facemasks while in the covered premises.

Effective Date: The mandate was announced December 20, 2021 and will be phased in over time between January 2022 and May 2022. People over the age of 12 must show proof of at least one dose by January 15th and proof of full vaccination by February 15th to enter covered establishments. Children from the ages of 5 to 11 must have proof of at least one dose by March 1st, and everyone over the age of 5 must show proof of vaccination by May 1st to enter covered establishments.

Legal Status: Boston's mandate is likely to face legal challenges, though none have materialized as of yet. It remains to be seen how the courts will analyze this particular use of the local government's authority to issue public health rules.

Looking Ahead: While state and local mandates have the potential to improve vaccination rates where federal mandates are limited or enjoined by the courts, they are inherently limited in scope and inconsistent both between and within states. With the large employer mandate struck down, employers may face serious compliance challenges if a patchwork of state and local COVID-related regulations emerge in its wake. Employers should be sure to stay up to date as their compliance requirements shift.

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