



# Vaccination Nation: Federal Contractor Mandate and OSHA Emergency Temporary Standard

November 9, 2021

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



# Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

# Speakers

---



**Scott Hecker**

Senior Counsel  
Washington, DC  
shecker@seyfarth.com



**Kristin McGurn**

Partner  
Boston, MA  
shecker@seyfarth.com



**Brent Clark**

Partner  
Chicago, IL  
bclark@Seyfarth.com



## Biden Vaccine Plan

- Federal Contractor Mandate (Safer Federal Workforce Task Force)
  - Effective date for vaccination now January 4, 2022.
- Private Business Mandate (OSHA)
  - Employers Must Collect Data and Assemble Vaccination Roster by December 5, 2021.
  - Employees must be vaccinated or test by January 4, 2022.
- Centers for Medicare & Medicaid Services (“CMS”)
  - Health care facilities must have vaccination policy by December 5, 2021.
  - Health care employees must be vaccinated by January 4, 2022.

# OSHA COVID-19 Emergency Temporary Standard on Vaccination and Testing



## COVID-19 ETS

- ETS permitted under Section 6(c)(1) of the OSH Act when:
  - employees are exposed to “grave danger” from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
  - the emergency standard is necessary to protect employees from such danger
- Permits OSHA to avoid traditional rule making process
- Valid for Six Months
- 21 State Plan states must adopt substantially similar ETS within 30 days
- Prior ETS issued to health care employers June 21, 2021
- Federal Court Actions
  - Nationwide stay sought in U.S. Court of Appeals for the Fifth Circuit.
  - Other challenges filed in other federal courts by states and employers (6th Cir., 7th Cir., 8th Cir., 11th Cir., and D.C. Cir.).

## Covered Employers Under ETS

### **All employers with 100 or more employees will have to require workers to vaccinate or test**

- 100 employees counted on nationwide basis
- 100 employees at any time while ETS is in effect
- Fully remote workers count towards the 100-employee threshold
- Only count employer's own employees at multi-employer worksite
- Does not cover worksites that are covered by federal contractor mandate.
- Does not cover worksites covered by healthcare ETS, unless health care ETS expires.



## **ETS Requirements for December 5, 2021**

- Policy: Establish policy on vaccination (paragraph (d))
- Notification: Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h)).
- Medical Removal: Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h)).
- Employee Training: Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j)).



## ETS Requirements for December 5, 2021

- Support for Vaccination: Provide support for employee vaccination (paragraph (f)).
  - Vaccination expenses paid
  - Paid time for obtaining vaccine
  - Paid sick leave for adverse reactions
- Vaccination Roster: Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e)).
- Masking: Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i)).

# January 4, 2022 Testing Requirements

- Employers must ensure that employees have received both shots of a two-dose vaccination regimen, or one dose for single-dose vaccines by January 4, 2022.
- Or employees must undergo at least weekly testing or within 7 days before returning to work (if away from the workplace for a week or longer).
- Over-the-counter antigen testing is acceptable.
- Testing cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Testing can be unpaid.
  - May be state law or bargaining issues requiring payment, as reasonable and necessary expenses or due to timing and location of testing.

## November 6, 2021 Fifth Circuit Stay

- A three-judge panel in the Fifth Circuit granted Petitioner’s emergency motion to stay the ETS on Saturday, November 6.
- The panel noted “grave statutory and constitutional issues with the” ETS.
- The Court then set an expedited briefing schedule regarding Petitioner’s motion for a permanent injunction:
  - OSHA was required to submit its response by 5pm CT yesterday, November 8; and
  - Petitioners were required to submit any reply by 5pm CT today, November 9.
- A decision could issue promptly, but reassignment to another Court of Appeals could occur through the MDL lottery process early next week.
- If the Fifth Circuit enters a permanent injunction, OSHA will likely appeal to the Supreme Court.



# Executive Order 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors

- Signed on September 9, 2021; immediate effective date
- Key takeaways:
  - Requires federal contractors to follow COVID-19 workplace safety protocols
  - Vaccine mandate not included in EO, but President Biden expected the Task Force Guidance would include the mandate.
  - Requires that FAR Council create a contract clause by October 8 requiring contractors and subs comply with all Task Force Guidance.
- Guidance issued by the Safer Federal Workforce Task Force on September 24, 2021.
- Executive Order
- <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>
- Task Force Guidance  
[https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf)

# Overview of Task Force Guidance



## Three Key Principles

1. COVID-19 Vaccination of covered contractor employees
  - No testing option but does allow for accommodations for medical and religious reasons
2. Compliance by individuals, including covered contractor employees and visitors, with masking and physical distancing requirements in covered contractor workplaces.
3. Designation by covered contractors of person(s) to coordinate COVID-19 workplace safety efforts.



## Who Does EO Apply To?

- instrument that incorporates the clause described in the Executive Order
  - (Refers to definition of covered contract in DOL proposed rule on minimum wage for contractors)
- Covered Contractors – any prime or subcontractor that is party to a covered contract
- Covered Employees – any employee working on, or in connection with, a covered contract or working at a covered contractor workplace (which includes employees not themselves working on, or in connection with, a covered contract)
  - (Remote employees are covered by the vaccine requirement but not masking/physical distancing requirements)
- Covered Contractor Workplace – any location controlled by a covered contractor at which any employee working on, or in connection with, a covered contract is likely to be present during the period of performance



## **Task Force Guidance – Important Dates**

- October 8, 2021 – deadline for FAR Council to provide inclusion of clause into new federal contracts (issued on October 1, inserted into new contracts beginning October 15).
  - October 15, 2021 – Executive Order applies to new contracts, solicitations, or renewals after this date.
  - December 8, 2021 – Covered employees and workplaces must be fully vaccinated by this date.
-

## Task Force Guidance – Acceptable Documents



### **Contractors must review and approve acceptable documents:**

- Copies of immunization records from a healthcare provider or pharmacy;
- The COVID-19 vaccination record card;
- Medical records documenting the vaccination;
- Immunization records from a public health or state immunization information system; and/or
- Any other official documentation outlining the vaccine name, dates of administration, and the health care professional or clinic site administering the vaccine.

## FAR Clause



### **FAR Council issued Clause 52.223-99:**

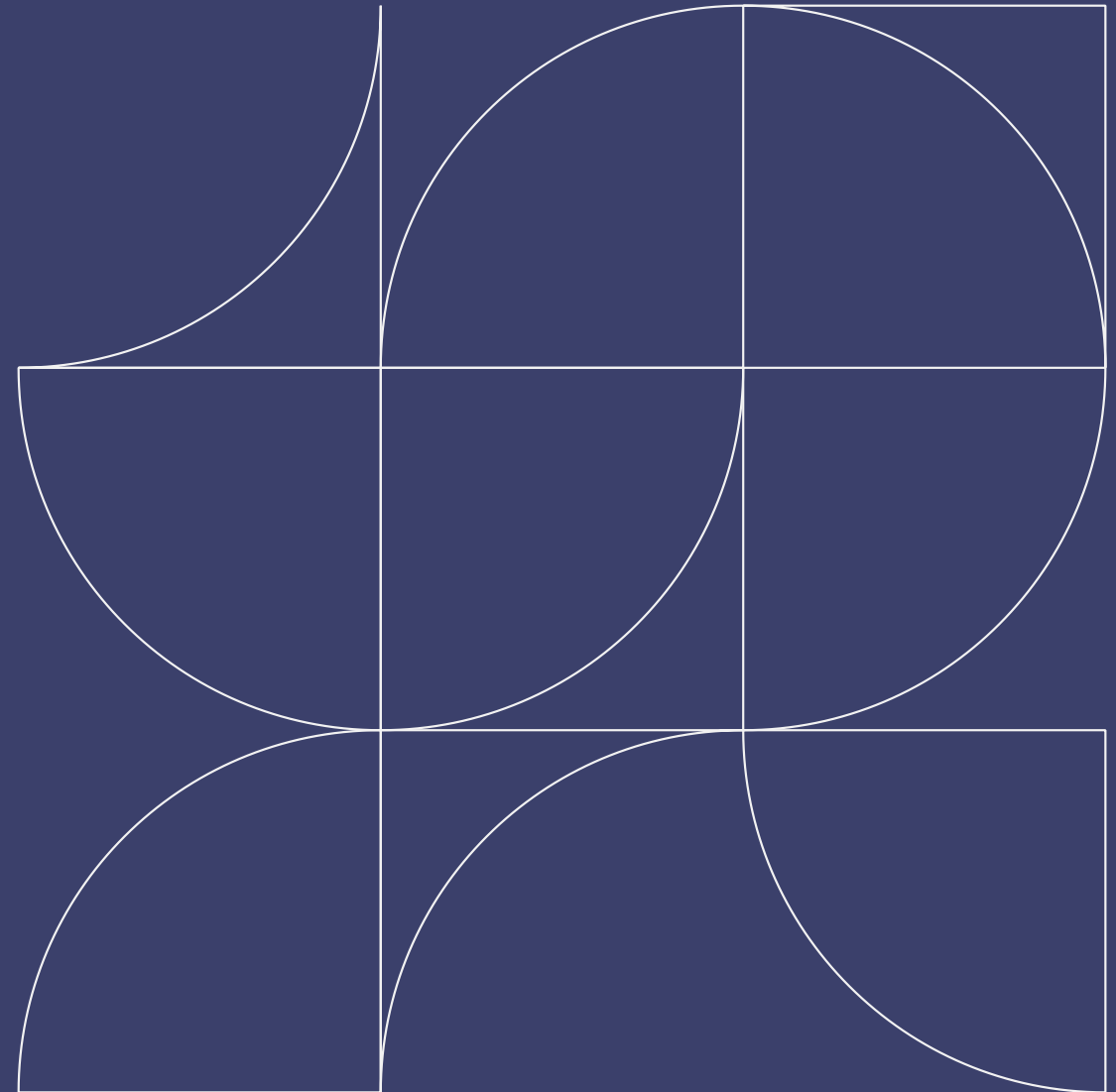
- To be inserted into covered federal contracts.
- Individual Agencies have discretion as to when the clause is to be inserted into covered contracts – “Class Deviation”.
- Recommended including the Clause in contracts beyond the scope of EO 14042 (including supply contracts and contracts under the simplified acquisition threshold (“SAT”) of \$250,000).
- Once inserted, contracts must comply with Sept 24, 2021 Task Force Guidance for vaccinations.
- Final regulation is in process, but no timetable.

# CMS Emergency Regulation – Requirements & Timeline



- Centers for Medicare & Medicaid Services issued **emergency regulations** on November 4, 2021
- Covered Facilities must establish a policy by December 5, 2021
- Existing survey and enforcement processes for monitoring; CoPs modified.
- All eligible staff working at health care facilities that receive funding from Medicaid/Medicare must be fully vaccinated against COVID-19 by January 4, 2022 prior to providing care or services
  - similar to Federal Contractor EO and prior regulations governing Nursing Homes
    - no testing as alternative to vaccination
  - covers staff who interact with other staff, patients, residents, clients or PACE program participants
  - accommodations for religious beliefs, observances and practices, and recognized medical conditions
  - reasonable time and paid leave to receive vaccine and recover from side effects, as under ETS

# Accommodation Strategies





# Accommodation Issues

- **Types of Accommodation Requests**
  - Religious
  - Medical/Disability
  - “Other”
- **Organizational Approach**
- **Systematic Work Flow**
  - Intake requests
  - Evaluate whether complete, requires follow up
  - Evaluate possible accommodations
  - Consider hardship, direct threat analysis
  - Determine whether to grant or deny
  - Communicate decisions
- **Preparing for Consequences**
  - Implementing accommodations
  - Outcomes where no reasonable accommodation

# Accommodations Issues – Main Types of Exemptions



## Medical/Disability

- ADA, Rehabilitation Act, Title VII, and many state laws govern protections and accommodations based on disability and/or medical conditions.
- Employers required to give **reasonable accommodations** absent **undue hardship**.
- Generally cannot exclude individuals from the workplace for health or safety reasons unless “**direct threat**” even with reasonable accommodation.



## Religious

- Title VII protects employees who have a **sincerely held religious belief**, practice, or observance that conflict with vaccination.
- Covers more than traditional religions.
- Employers required to give **reasonable accommodations** absent **undue hardship** (more than *de minimis* cost or burden).

*The “Other” Exemptions – Personal, political, secular, etc. not required to be accommodated under Title VII; expected/not allowed under some mandates*

# Accommodations Issues

Decide Organizational  
Approach

## Main Paths and Considerations

- Establish Criteria for Evaluating Requests
  - Wide latitude
  - Strict interpretation
- Evaluate Support for Exemption Requests
- Scrutinize Exemption Requests
  - Interactive, inquisitive process
  - Involve HR and/or Legal teams
- Evaluate Undue Hardship



## Preparing for Consequences

- Implementing Accommodations
  - Masking
  - Social distancing
  - Frequent testing
  - Closed offices, partitions, distancing
  - Remote work
  - Modified shifts or reassignment
  - Periodic review
- No Reasonable Accommodations?
  - Temporary job alteration
  - Leave of absence
  - Termination

# Questions?

Please contact us for our  
blogs, articles, and Vaccine  
Playbook.

