

COVID-19 and the Workplace: The Challenges Continue . . .

November 18, 2021



SMITH & DOWNEY, P.A.

Doug Desmarais, Esq.

Kerstin Miller, Esq.

Justen Barbierri, Esq.

Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

A Long Time Ago, In a Galaxy Far, Far Away . . .

- Before the arrival of COVID-19, employers' workplace health and safety mandates were primarily dictated by the Occupational Safety and Health Act. That law was administered by the Occupational Safety and Health Agency ("OSHA"), although states were allowed to establish OSHA-approved State Plans.
- Maryland is one of 28 OSHA-approved State Plans, and is referred to as "MOSH."
- Many industries (e.g., health care; construction; etc.) are highly regulated, with numerous industry-specific requirements.
- **All** industries and professionals are governed by the General Duty Clause, which requires employers to furnish to each employee "a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm..."

OSHA General Duty Clause & 300 Log

- The General Duty Clause requires employers to comply with all occupational safety and health standards.
- OSHA 300 Log
 - Employers (with 10 or more employees) must keep a Form 300 to record work-related injuries and illnesses.
 - Injury/illness is considered work-related if an event or exposure in the work environment caused or contributed to the condition.
- Employers must also report a work-related death within 8 hours, and a work-related hospitalization within 24 hours.

CDC Guidelines – Question #1

What constitutes a “higher-risk workplace” and what are the guidelines for such workplaces?

CDC Guidelines – Answer #1

- High risk work places, according to the CDC, include manufacturing, meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing.
- These places are suggested to:
 - Implement staggered arrival, departure and break times;
 - Maintain signage as a reminder to maintain social distancing;
 - Require unvaccinated employees to wear masks;
 - Require all employees to wear a mask if in an area of substantial or high transmission; and
 - Use solid physical barriers where employees cannot maintain six feet of distancing

The Need for an Annual HR Physical (Cont.)

- Handbook – When was your last “physical”?
 - Safety Policies.
 - Leave of Absence Policies.
 - Anti-Discrimination Policies.
 - Inclusion of New Employment Laws? - Does your handbook reflect recent updates, e.g., the Maryland Healthy Working Families Act; Maryland Fair Employment Practices Act; and reflect the new Maryland minimum wage?

President Biden's COVID-19 Orders

- President Biden has adopted a plan entitled the “Path Out of the Pandemic.”
- Included within the Plan are vaccine mandates for:
 - Federal contractors
 - Large private employers (100+ employees)
 - Healthcare employers; and
 - Portions of the federal government.

Federal Contractor Vaccine Mandate

Snapshot

- Applies to a federal contractor who is a party to a covered federal contract.
 - A covered federal contract must include vaccination mandate clause if the contract is awarded, or renewed, on or after November 14, 2021.
- A covered contractor must ensure that employees are vaccinated if they are performing work on a covered contract.
 - Requires a contractor's employees to be fully vaccinated if they perform work on a government contract, regardless of whether they actually visit a federal worksite.
- Also applies to subcontractors.
 - Prime contractors are obligated to include vaccine mandate clause in the subcontract.
 - And government agencies are authorized to prohibit unvaccinated individuals from agency premises.
- Compliance deadline for vaccination is now moved to January 18, 2022.
 - Vaccines must be completed by January 4, 2022

Contractor Vaccines – Question #1

What is a covered government contract?

Contractor Vaccines – Answer #1

- A contract is a covered government contract if it incorporates the vaccine mandate clause.
 - The clause must be incorporated in certain contracts awarded or renewed on or after November 14, 2021.
- Applies to those awarded/renewed contracts that are:
 - For services in excess of \$250,000;
 - Covered by the Service Contract Act; and
 - For services provided on federal land.
- It does not necessarily apply to contracts for the provision of products.

Contractor Vaccines – Question #2

Which employees are covered?

Contractor Vaccines – Answer #2

- Covered employees include any individual working on or in connection with a covered contract.
- This includes those who are providing indirect support for a contract.
- And it includes remote workers who perform work on a covered contract – even if the employee never steps foot in the office or government facility.
- Additionally, even those employees who have had COVID-19 (no matter how recent) must still be vaccinated.

Contractor Vaccines – Question #3

What is an acceptable
form of vaccination proof?

Contractor Vaccines – Answer #3

- Guidance provides that an employee must show actual documented proof of vaccination.
 - i.e., the employee's vaccination card or official certificate of vaccination.
- An attestation of vaccination by the employee is not acceptable.
 - i.e., "I, _____, certify that I am vaccinated" will not suffice.
- Antibody tests are also not acceptable forms of proof.

Contractor Vaccines – Question #4

Can the government agency impose the vaccine mandate clause during the term of the existing contract?

Contractor Vaccines – Answer #4

- A government agency may, in certain circumstances, incorporate the vaccine mandate clause into an existing contract.
 - How the agency is able to accomplish this depends on whether the contract is covered under FAR or DFARS.
- DFARS – Defense Federal Acquisition Regulation Supplement (for DOD contracts)
 - Must obtain a bilateral modification to alter the existing contract.
 - Bilateral modification requires that **both** parties to the contract (i.e., the government agency and the prime contractor) agree to the inclusion of the clause.
- FAR – Federal Acquisition Regulations
 - Government agency is advised to send a cover letter detailing the inclusion of the clause along with a modification request.

Contractor Vaccines – Question #5

How does this apply to a subcontractor?

What are a contractor's obligations in relation to a subcontractor?

Contractor Vaccines – Answer #5

- Subcontractors are considered covered contractors under the mandate.
 - Although subcontractors do not have a direct contract with the government.
- A prime contractor is obligated to “flow down” its vaccination obligations to any covered subcontractor.
 - This means incorporating the vaccine mandate clause in the subcontract and ensuring that the subcontractor is aware of its vaccine obligations.
 - But prime contractors are instructed to “assume” that a subcontractor is compliant unless credible evidence suggests otherwise.
- Government agencies are provided the authority to prohibit unvaccinated individuals from the government facility.
 - So, even if the vaccine mandate clause is not incorporated into a contract or subcontract, and even if an accommodation is provided to an employee, the agency may still essentially enforce a vaccine mandate on those working at a government facility.

Contractor Vaccines – Question #6

Can a contractor force a subcontractor to disclose who is and isn't vaccinated?

Contractor Vaccines – Answer #6

- Contractors are instructed to communicate the vaccination and/or accommodation status of employees to the government agency's contracting officer.
 - This is due to the government agency's authority to restrict access to unvaccinated individuals.
- Nothing in the guidance or in the vaccine mandate clauses seemingly permit a prime contractor to require a subcontractor to disclose its employees' vaccine status.
 - But the government agency can require proof of vaccine on-site.

Contractor Vaccines – Question #7

Are Reasonable Accommodations Available for Employees of Government Contractors?

Contractor Vaccines – Answer #7

- Employees are entitled to seek:
 - Religious Accommodations Under Title VII of the Civil Rights Act of 1964
 - Disability Accommodations Under the Americans with Disabilities Act

Contractor Vaccines – Question #8

What are the possible penalties for noncompliance?

Contractor Vaccines – Answer #8

- The specific penalties have not yet been announced.
- Penalties will be imposed by the specific government agency that is overseeing the contract.
 - May lead to inconsistent penalties, and inconsistent appeal processes.
- Possible penalties include:
 - Barring employees from the worksite;
 - Suspension of the contract; and
 - Prohibition from future contracts.

Contractor Vaccines – Question #9

What are the obligations when a union represents the workforce?

Contractor Vaccines – Answer #9

- There is a general duty to bargain over the terms and conditions of employment.
 - A vaccine requirement among employees would need to be negotiated with any union prior to its implementation.
- An exception applies where the CBA includes a sufficient management rights clause.
 - i.e., “The employer reserves the right to implement new rules and policies that involve the safety and protection of all employees.”
- The Board now applies a “contract coverage” standard and will determine whether the action taken by the employer is within the scope of the at-issue clause.
 - The management rights clause can be very broad.

CMS Vaccine Interim Final Rule (IFR)

Snapshot

- This Interim Final Rule (IFR) is enforced through the Centers for Medicare and Medicaid Services (CMS).
- It applies to Medicare-certified health care facilities, providers, and suppliers.
- And it covers nearly all staff of these entities, including their full- and part-time employees, licensed practitioners, trainees, contractors, volunteers, and student workers who are providing care, treatment, and other services.
- It preempts any state laws prohibiting vaccine mandates
- The IFR requires covered entities to ensure that staff members are vaccinated by the prescribed dates.
 - And it requires covered entities to develop and implement a plan to ensure vaccination compliance, accommodation review, and proper documentation procedures.

CMS IFR – Question #1

What are the deadlines?

CMS IFR – Answer #1

- The CMS IFR requires that the healthcare worker's first dose is required by December 6, 2021.
 - Staff must complete this step before they can provide any care, treatment or other services for the facility and/or its patients.
 - The second dose (if applicable) is required by January 4, 2022.
 - Accommodation requests must be submitted by December 6, 2021.
 - An accommodation request may stay the Dec. 6 vaccination deadline.
- There are 10 states that have challenged the CMS vaccine mandate in court, which could result in delayed enforcement of the mandate.
 - The challenges differ from the OSHA ETS challenge in that no plaintiff states have filed a motion to stay enforcement – only that the IFR be set aside and the CMS be enjoined from enforcing.

CMS IFR – Question #2

To whom does this IFR apply?

CMS IFR – Answer #2

- The IFR applies to Medicare- and Medicaid-certified providers and suppliers.
 - Ex.: ambulatory surgical centers, hospitals, hospices, psychiatric residential treatment facilities, nursing homes, community mental health centers, etc.
- It does not apply to:
 - Facilities not subject to CMS health and safety regulations (e.g., physician offices, assisted living facilities, group homes, schools that receive Medicaid funding)
 - The following regulated provider/supplier types: (1) Religious Nonmedical Healthcare Institutions; (2) Organ procurement organizations; and (3) Portable x-ray suppliers.
- All staff members of these entities are covered by the vaccine mandate.
 - Includes physicians with admitting privileges
 - Limited exception: those who work 100% remote (i.e., an employee who does not occasionally encounter coworkers or clients).

CMS IFR – Question #3

What other requirements does the IFR impose?

CMS IFR – Answer #3

- In addition to requiring vaccines for employees, covered employers must also develop and implement a plan in order to:
 - Receive accommodation and exemption requests;
 - Provide accommodations for those who are in need of them;
 - Document staff vaccinations; and
 - Ensure compliance among vendors.
- Accommodation requests must be appropriately documented and evaluated.
 - For medical requests, all documentation confirming recognized clinical contraindications must be signed and dated by a licensed practitioner other than the individual requesting the exemption.
- If unvaccinated staff are present in facility, the facility must develop a process for implementing additional precautions to mitigate transmission and spread of COVID-19.

CMS IFR – Question #4

Are reasonable accommodations permitted under this IFR?

CMS IFR – Answer #4

- Accommodation requests must be submitted by December 6, 2021.
 - While an accommodation request is pending, the employee does not have to meet the Dec. 6 vaccination deadline.
- Accommodations may only be provided for medical or religious reasons.
- Covered employers may not offer testing as an alternative, *unless* the employee is in need of a reasonable accommodation and testing is an effective way of providing that accommodation.

CMS IFR – Question #5

How will the IFR be enforced?

CMS IFR – Answer #5

- CMS will expect state survey agencies to conduct onsite compliance reviews of the vaccination requirements in two ways:
 - Standard recertification surveys
 - Assessment of vaccination status of staff on all complaint surveys
- When a surveyor is onsite at a facility, they will review:
 - The provider's COVID-19 vaccination policies and procedures;
 - The number of resident and staff COVID-19 cases over the previous four weeks; and
 - A list of all staff and their vaccination status.
- In addition to the state survey agencies, CMS will require all Accrediting Organizations to update their survey processes to assess compliance with the new vaccination requirements
- Penalties for non-compliance may include civil money penalties, denial of pay for new admissions, and termination from Medicare/Medicaid program

CMS IFR – Question #6

How does the IFR Interact with other government mandates?

CMS IFR – Answer #6

- **CMS asserts its rule takes priority above other federal vaccination requirements.**
- If a facility is not regulated by the Conditions of Participation because of nonparticipation in the Medicare and Medicaid programs, then other mandates may apply – such as the federal contractor mandate, or the OSHA ETS.
- The American Hospital Association announced it is seeking clarification to confirm OSHA's position regarding whether the OSHA ETS rule applies in situations where the CMS IFR applies.

OSHA ETS

Snapshot

- Applies to entities with 100 or more employees.
- ***Unlike contractor vaccine mandate or healthcare mandate, testing can be used as an alternative to vaccine mandate.***
- However, the mandate is currently stayed.
 - All challenges of the mandate are consolidated, and a motion to lift the stay will be heard by the Sixth Circuit Court of Appeals.
 - OSHA has announced that it is suspending enforcement on the mandate until the Sixth Circuit (or maybe the Supreme Court) has decided on the issue.
- Prior deadlines included a December 6, 2021 deadline to implement vaccine and testing policies, and a January 4, 2022 deadline to ensure compliance with the vaccine and/or testing mandate.

OSHA ETS

Status of Court of Appeals Challenge

- The Fifth Circuit stayed the OSHA ETS on November 12.
 - Other challenges were consolidated, and a lottery was held to determine which Circuit will hear the consolidated challenge.
 - OSHA has currently suspended any work on this ETS, pending the outcome.
- Lottery outcome: any challenges will be heard by the Sixth Circuit Court of Appeals.
 - Composition of court:
 - 6 Democrat-appointed judges and 20 Republican-appointed judges.
 - Oversees Kentucky, Michigan, Ohio, and Tennessee.
- Federal gov't will now file a motion with the 6th Cir. to lift the stay.
- This is considered a favorable draw for the vaccine mandate challengers.
 - But it will most likely make its way to the Supreme Court.
 - Could see an en banc appeal first, no matter the outcome.
 - Or it could go onto the SCOTUS shadow docket.

OSHA ETS

Timing

- No real telling of when the Sixth Circuit will hear the motion to lift the stay.
 - There might be an emergency hearing, an en banc appeal, an appeal to SCOTUS, or all three.
 - Until the Sixth Circuit rules, the deadlines and enforcement are all stayed.
 - Meaning, the below deadlines will likely be pushed back.
- Deadlines for compliance are staggered.
 - December 6:
 - Determine the vaccination status of all employees and obtain proof (and document info).
 - Begin masking requirements.
 - Develop vaccine mandate and/or testing policy, including leave policy.
 - January 4:
 - Must be compliant with either vaccine mandate or testing requirements.

OSHA ETS – Question #1

How does an employer calculate the number of employees?

OSHA ETS – Answer #1

- Must include all full- and part-time workers.
- All employees employed by a single corporate entity must be counted together.
 - If two entities are not the same corporate entity, they may still be considered the same for calculation purposes if they share in handling safety responsibilities.
 - Should consider whether two entities share a safety manager, the same safety protocols, and the like.
- Once an employer has 100 or more employees during the effective period of the OSHA ETS, they will be covered.
 - The entity is covered regardless of whether it had 100 or more employees at the time of the ETS' effective date or whether the count falls below 100 employees during the rule's effective period.

OSHA ETS – Question #2

What other requirements are imposed by the mandate (e.g., leave requirements, obligation to follow CDC guidelines, testing requirements)?

OSHA ETS – Answer #2

- Employers must also:
 - Develop, implement and enforce a mandatory vaccination or weekly testing policy.
 - Determine the vaccination status of each employee (obtaining proof from the employee, maintain records of the status, and a roster of each employee's status).
 - Provide reasonable paid time off for an employee to get vaccinated and recover from side effects (up to 4 hours, which can be provided via existing leave).
 - Require employees to promptly provide notice of receiving a vaccine.
 - Remove from the workplace any employee who has tested positive for COVID-19.
 - Require unvaccinated employees to wear a mask indoors.
 - Distribute information to employees about the ETS requirements, vaccine efficacy and safety, vaccine benefits, retaliation protections, and possible criminal penalties for supplying false statements/documentation.

OSHA ETS – Question #3

Does the OSHA ETS apply to all employees of a covered employer?

OSHA ETS – Answer #3

- Not all employees must be vaccinated or undergo periodic testing.
- Although all employees will be counted, only those who work in an office and/or meet with co-workers or customers will be required to be vaccinated or undergo periodic testing.
- Employees who work outside are also not required to be vaccinated – so long as they do not spend any time working indoors.

OSHA ETS – Question #4

What are the penalties for noncompliance?

OSHA ETS – Answer #4

- OSHA can currently fine an employer up to \$13,653 per violation.
- Additional penalties could also be imposed for willful or egregious violations and failure to abate the violations.
 - Max total fine is up to \$136,532.
- Build Back Better Act: will raise the maximum fine amount to \$700,000.

OSHA ETS – Question #5

When will the OSHA ETS expire?

OSHA ETS – Answer #5

- The OSHA ETS can only remain in effect for 6 months.
- After 6 months, it must then be replaced by a permanent OSHA standard.
- The permanent standard requires a formal rulemaking process with the typical comment period.

OSHA ETS – Question #6

Who pays for periodic COVID-19 testing?

OSHA ETS – Answer #6

- The ETS permits an employer to pass the cost of testing to the employee.
- Employers should be aware of any obligations to pay for costs associated with employer-mandated rules/requirements (e.g., California reimbursement law).

OSHA ETS – Question #7

Can an employer require alternatives instead of vaccinations?

OSHA ETS – Answer #7

- Employers do not have to require vaccinations.
- But if an employer permits employees to not be fully vaccinated, the employer must instead require unvaccinated employees to undergo periodic COVID-19 testing.
 - Testing is weekly if the employee is in the workplace at least once a week.
 - And within 7 days before returning to work if the employee has been away from the office for one week or longer.
- Employers must also require employees to report any positive COVID-19 test immediately.
- And employers must require unvaccinated employees to wear a mask while indoors or when occupying a vehicle with another person.

Accommodations

Snapshot

- There are three main areas of concern related to accommodations:
 - Disability accommodations under the ADA;
 - Religious accommodations under Title VII; and
 - Disabilities related to pregnancy.
- Disability: a physical or mental impairment that substantially limits a major life activity.
- When a reasonable accommodation is requested, it starts the interactive dialogue process, which is used to determine if:
 - An accommodation is necessary;
 - An undue hardship might exist; and
 - There is an appropriate accommodation available.

Accommodations – ADA

- The ADA requires that employees receive a reasonable accommodation due to a disability.
 - This requirement extends to mandatory vaccines.
- If the employee has a disability that would prevent him/her from safely receiving the COVID-19 vaccine, a reasonable accommodation might be required.
 - A reasonable accommodation in lieu of being vaccinated could be allowing the employee to continue working from home, or requiring him/her to wear a mask while in the office.
 - In rare instances, vaccinated individuals have had severe, but non-life-threatening, allergic reactions.
- An employer need not provide a reasonable accommodation under the ADA if it would create an undue hardship.
 - “Undue hardship” under the ADA means a significant difficulty or expense in providing the accommodation.

Accommodations – Title VII

- Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- The same ADA reasonable accommodation (work from home or required to wear a mask while in the office) can also be used if the employee has a religious objection to the vaccination.
- However, Title VII’s “undue hardship” definition is any accommodation that would result in more than a de minimis cost to the employer.
 - This is a lower standard than the undue hardship definition under the ADA and requires only that an employer show that the requested accommodation would cause more than a trivial cost to the employer’s operations.
 - But the undue hardship reasoning should still be used with caution.
- An employee may object due to his/her sincerely held religious beliefs.
 - Determining what is a true, sincere religious belief is often tricky.
 - Supporting information verifying the employee’s sincere beliefs may be requested.

Federal Employee Religious Exemptions

- In certain circumstances, Federal law may entitle a Federal employee who has a religious objection to the COVID-19 vaccination requirement to an exception from that requirement, in which case the employee would instead comply with alternative health and safety protocols.
- In order to request a religious exception, please fill out this form. The purpose of this form is to start the accommodation process and help your agency determine whether you may be eligible for a religious exception.
- Where there is an objective basis to do so, the agency may ask you for additional information as needed to determine if you are legally entitled to an exception.
- Objections to COVID-19 vaccinations that are based on non-religious reasons, including personal preferences or non-religious concerns about the vaccine, do not qualify for a religious exception.

Federal Employee Religious Exemptions (Continued)

- Agencies may consider several factors in assessing whether a request for an exception is based on a sincerely held religious belief, including whether the employee has acted in a manner inconsistent with their professed belief. But no one factor is determinative.
- An individual's beliefs—or degree of adherence—may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be based on a sincerely held religious belief. All requests for a religious exception will be evaluated on an individual basis.

Federal Employee Religious Exemptions (Continued)

QUESTIONS:

1. Please describe the nature of your objection to the COVID-19 vaccination requirement.
2. Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise or conflict with your sincerely held religious beliefs, practices, or observances? If so, please explain how.
3. Please provide any additional information that you think may be helpful in reviewing your request. For example:
 - How long you have held the religious belief underlying your objection
 - Whether your religious objection is to the use of all vaccines, COVID-19 vaccines, a specific type of COVID-19 vaccine, or some other subset of vaccines
 - Whether you have received vaccines as an adult against any other diseases (such as a flu vaccine or a tetanus vaccine)

Accommodations – Question #1

Must an employee's reasonable accommodation request be accepted?

Accommodations – Answer #1

- Employers do not have to accept an employee's reasonable accommodation request if it would result in an undue hardship (discussed in the next slide).
- And employers do not have to provide the specific reasonable accommodation that was requested by the employee.
 - Where there are two or more effective accommodations, an employer is permitted to choose whichever accommodation is easier to provide.
 - But there is a requirement that any alternative accommodation is effective.
- Interactive dialogue is always going to be required.

Accommodations – Question #2

What constitutes an undue hardship under either the ADA or Title VII?

How do they differ?

Accommodations – Answer #2

- ADA (disability) undue hardship:
 - A “significant” difficulty or expense in providing the accommodation.
 - Meaning financial difficulty, unduly extensive accommodations, substantial or disruptive accommodations, or those accommodations that would fundamentally alter the employer’s operations or nature of business.
- Title VII (religion) undue hardship:
 - An accommodation that would result in more than a “de minimis” cost to the employer.
 - “De minimis” means having more than a minimal burden on operation of the business.
- The Title VII undue hardship defense is easier to meet as it is a lower standard.

Accommodations – Question #3

What proof may an employer require related to an disability accommodation request?

Accommodations – Answer #3

- Employers may not ask currently-employed employees to undergo medical examinations unless they are related to the employee's job and necessary for the conduct of the employer's business.
 - This prohibition also applies to questions asked about an employee's disability.

Accommodations – Question #4

To what extent may an employer question an employee's religious beliefs?

Accommodations – Answer #4

- EEOC requires an individualized assessment to determine whether an accommodation for religious beliefs is necessary.
- Employers may ask for an explanation of how an employee's religious beliefs prevent them from receiving a vaccination.
- And employers may take into account factors that undermine an employee's credibility related to their religious beliefs, including:
 - Actions inconsistent with the employee's professed beliefs;
 - The timing of the request; and
 - Any other reasons that the accommodation may be sought for non-religious reasons.

Accommodations – Question #5

Are employers required to continue providing an employee work from home capabilities as a reasonable accommodation?

Accommodations – Answer #5

- Employers are not required to continue providing work from home accommodations to those employees who have been working from home during the pandemic.
- Each accommodation request should undergo an individualized assessment.
- And employers are permitted to discontinue any accommodation that subsequently imposes an undue burden.
 - The interactive dialogue should be reopened, though.

Questions?