



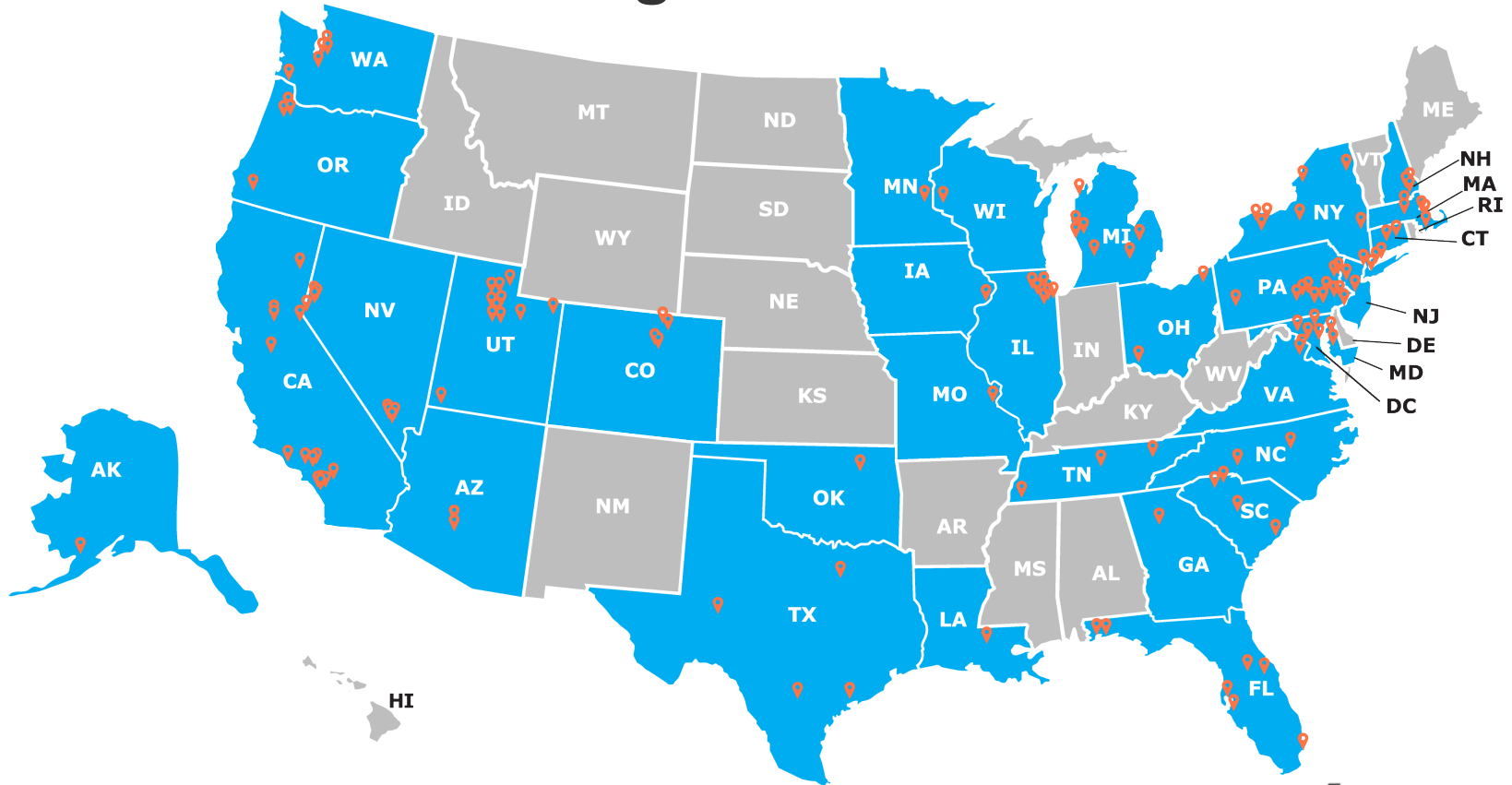
Welcome to the SIG University Webinar Series
**Federal Vaccine Mandate:
Review of OSHA Guidelines**

*Stacy Barrow, Esq. | Marathas, Barrow,
Weatherhead, and Lent LLP*

November 10, 2021



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Questions?

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Reminders

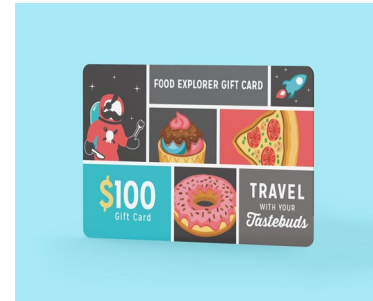
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**Brianna Ferran, Chesapeake Electric
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UPCOMING

Mental Health: Managing Stress & Year End Burnout

November 18th, 2 PM – 3 PM EST

Federal Vaccine Mandates: Legal Challenges

December 2nd, 2 PM – 3 PM EST

Speakers: Stacy Barrow, Esq. and Danielle Capilla

End of Year Compliance Roundup

December 8th, 12 PM – 1 PM EST

Speaker: Stacy Barrow, Esq.

Webinars





PREPARING FOR OSHA'S COVID-19 VACCINATION ETS: EMPLOYER CHECKLIST

The Occupational Safety and Health Administration (OSHA) has been directed to issue an emergency temporary standard (ETS) imposing vaccine mandates for private employers. This checklist is a jumping-off point for your organization as you prepare for the upcoming rule.

[Click here to see the checklist!](#)



Welcome

Stacy Barrow, Esq., *Marathas, Barrow,
Weatherhead, and Lent LLP*



Federal Vaccine Mandate for Private Employers (100+)

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November 10, 2021

Agenda

- ▶ Background on Federal Vaccine Mandate for Private Employers
- ▶ Covered Employers & Exceptions
 - Remote Employees and Employees Working Outdoors
- ▶ Obtaining Proof of Vaccination
- ▶ Providing Paid Time Off for Vaccination
- ▶ Testing
- ▶ Written Policy / Record Retention
- ▶ Guidance for Federal Contractors

Background

- ▶ 8/23/21 – Pfizer vaccine fully FDA approved
- ▶ 9/9/21 – President Biden announced that he ordered OSHA to develop an Emergency Temporary Standard (ETS) that requires private employers with 100 or more employees to mandate that employees either be fully vaccinated or submit to weekly COVID-19 testing
- ▶ 11/5/21 – OSHA published the [COVID-19 Vaccination and Testing Emergency Temporary Standard](#) in the Federal Register based on the “grave danger” posed by exposure to COVID-19
 - A [summary](#), [fact sheet](#), and [FAQs](#) are also available
- ▶ 11/9/21 – Pfizer expected to ask FDA to clear boosters for all adults

- ▶ The ETS was immediately challenged, and a temporary injunction was issued by a federal court in Texas on 11/6, giving the Biden administration until 11/8 to respond, with plaintiffs then having until 11/9 to respond
 - Clearly, the ETS will be challenged, particularly in states where state law prohibits employers from mandating vaccines
- ▶ ETS is intended to **preempt** inconsistent state and local requirements relating to COVID-19 vaccine issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees
- ▶ ETS can stay in place for 6 months, after which it may be replaced by a permanent regulation subject to the typical "notice and comment" rule-making process based on a "significant risk" standard, not "grave danger"



Background



Background

- ▶ Covered employers (100+ employees) must develop and enforce a mandatory, written COVID-19 vaccination policy by 12/5/21
 - Alternatively, the policy may require employees to either be vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work
 - Employees continue to have legal protections under the ADA and Title VII
 - Vaccine not mandated when contra-indicated or due to a medically necessary delay
- ▶ Employees must be fully vaccinated, and employers must begin testing unvaccinated employees by 1/4/22
 - Fully vaccinated means they've received both doses of a two-dose vaccine two weeks prior to January 4, 2022 (i.e., 2nd dose administered by 12/21/21)
 - Two-dose vaccines must also have been provided within at least the minimum recommended interval between doses

Covered Employers

- ▶ ETS applies to employers with 100 or more employees at “any time the ETS is in effect” regardless of where the employees report to work
 - Applies for the duration of the ETS even headcount drops below 100
 - Count employees even if part-time, remote, work exclusively outdoors, or do not report to the worksite
 - Temporary employees obtained through a staffing agency do not count as employees of the company; these employees are counted by the staffing agency
 - Independent contractors do not count towards the total number of employees



▶ Examples:

- If an employer has 100 or more employees on 11/5/21, the ETS applies for the duration of the standard, which will be a maximum of 6 months
- If the employer has 90 employees on 11/5/21, the ETS does not apply
 - If that same employer later hires 10 more employees, compliance with the ETS becomes required and will be required for the duration of the standard

▶ Remote employees, employees working exclusively outdoors, and employees who do not report to a workplace where other coworkers or customers are present **are not required to be vaccinated**

- They are still counted when determining the 100-employee threshold



Covered Employers

Employers NOT Covered by the ETS

- ▶ The ETS does not cover:
 - Workplaces covered under the Workplace Task Force for Federal Contractors and Subcontractors;
 - Employees in settings covered by the Healthcare ETS;
 - Workplaces of employers who have fewer than 100 employees in total; and
 - Public employers in states without OSHA-approved State Plans



- ▶ Employers must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated
- ▶ Acceptable proof of vaccination status include:
 - Record of immunization from a health care provider or pharmacy;
 - Copy of the COVID-19 vaccination card;
 - Copy of medical records documenting the vaccination;
 - Copy of records from a public health immunization information system; or
 - Copy of any other official documentation that contains the type of vaccine administered, dates of administration, and the name of the health care professional or clinic site administering the vaccine



Obtaining Proof of Vaccination



Obtaining Proof of Vaccination

- ▶ Employees unable to provide acceptable proof of vaccination must be required to submit a signed statement that includes an attestation:
 - Of their vaccination status (fully or partially vaccinated); and
 - That they have lost and are otherwise unable to produce proof
- ▶ The signed statement must include a statement from the employee certifying that their statement about their vaccination status is true and accurate, and acknowledging that if they knowingly provide false information regarding vaccination status on this form, they may be subject to criminal penalties

A close-up photograph of a hand wearing a blue nitrile glove. The hand is holding a clear glass vial containing a clear liquid, which is being inserted into the top of a white syringe. The syringe has a clear plunger and a needle. The background is a blurred blue and white, suggesting a clinical or laboratory setting.

Obtaining Proof of Vaccination

- ▶ Further, the employee should, to the best of their recollection, include the following in their attestation:
 - The type of vaccine administered;
 - Date(s) of administration; and
 - The name of the health care professional or clinic site administering the vaccine
- ▶ If an employee does not provide acceptable proof of receipt of the vaccine (or the signed statement meeting the above requirements), then they must be treated as not fully vaccinated

Providing PTO for Vaccination

- ▶ Employers must provide four hours of PTO (per dose) to receive the vaccine
 - Paid at the employee's regular rate of pay
 - Cannot be offset by any other accrued leave
 - If more than four hours are needed, then the time is unpaid, but protected, leave
- ▶ If an employee needs time off to recover from vaccine side effects, then they may be required to use sick leave or PTO
 - If no sick leave/PTO is available, then employer must provide the time and pay for it
 - Employers cannot require employees to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects
 - ETS does not specify how much recovery time must be provided, though the employer must provide a "reasonable" amount of time
 - OSHA suggests two days of paid sick time is "reasonable"



Providing PTO for Vaccination

- ▶ Paid time off is not required:
 - for employees who must be removed from the workplace for failure to be vaccinated or failure to submit to the required testing
 - if an employee is removed from the workplace due to a positive COVID-19 diagnosis or test result
 - Employer must still comply with any other applicable law, ordinance, regulation, or collective bargaining agreement that requires such time be paid



Providing PTO for Vaccination

- ▶ Employers are not required to retroactively provide PTO for time used to receive the vaccine or recover from the side effects of the vaccine to employees who received the vaccine prior to the ETS
- ▶ Employers are not required to reimburse employees for transportation costs incurred to receive the vaccination
- ▶ Employers are not required to grant paid time to employees who receive the vaccine during non-work hours; however, the employee must still be provided reasonable time and paid sick leave to recover from side effects that they experience during scheduled work time

- ▶ Employers are not required to provide a testing option
- ▶ Employers that allow employees to be tested in lieu of vaccination must apply testing requirements to any employee who reports at least once every 7 days to a workplace where other individuals such as coworkers or customers are present
- ▶ In these cases, the employee:
 - Must be tested for COVID-19 at least once every 7 days; and
 - Must provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result



Administering Testing



Administering Testing

- ▶ If an employee does not provide documentation of a COVID-19 test result, the employer must keep that employee removed from the workplace until the employee provides a test result
- ▶ The employer is not required to pay employees for this time.
- ▶ If an employee is diagnosed with COVID-19 or receives a positive COVID-19 test, then they are not required to submit to weekly testing for 90 days following the positive test result or diagnosis

- ▶ Employers allowing testing in lieu of vaccination must specify in their written policy how testing will be conducted (e.g., provided by the employer at the workplace, employees independently scheduling tests at point-of-care locations, etc.), how employees should provide their COVID-19 test results to the employer, and what tests are permitted
- ▶ Tests authorized by the employer must be:
 1. Authorized by the FDA to detect current infection with the SARS-CoV-2 virus;
 2. administered in accordance with the authorized instructions; and
 3. not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor

A hand holding a syringe against a blue background. The syringe is held in a way that the needle points downwards. The background is a solid blue color with a faint, semi-transparent image of a hand holding a syringe.

What Tests Can be Used?



What Tests Can be Used?

- ▶ Examples of permissible tests include:
 - tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens);
 - proctored over-the-counter tests;
 - point of care tests; and
 - tests where specimen collection and processing is performed or observed by the employer
- ▶ Employers cannot accept an at home test administered by the employee or his or her family member



Who Pays for the Testing?

- ▶ ETS provides that employers are not required to cover any costs associated with the testing
 - An employer may have to comply with other laws, ordinances, regulations, or collective bargaining agreements that mandate the employer pay for testing
- ▶ In general, testing that is not due to an employee having recent, known exposure to COVID-19, ordered by a health care provider, or due to an employee experiencing symptoms of COVID-19 would not be covered by the employer's health plan



Record Retention

- ▶ Employers must maintain a roster of vaccinated employees, a record of each employee's vaccination status, and preserve the acceptable proof of vaccination for each fully or partially vaccinated employee
- ▶ Employers who offer testing in lieu of vaccination must maintain a record of each test result provided by each employee or obtained by the employer's own testing
 - These are medical records and are maintained separately from personnel file
- ▶ Records are only required to be preserved while the ETS is in effect

▶ If an employer chooses to allow testing in lieu of vaccination, they must ensure that all non-fully vaccinated employees wear a face covering when indoors and when occupying a vehicle with another person for work purposes, unless the following apply:

- The employee is alone in a room with floor to ceiling walls and a closed door;
- The employee is eating or drinking (for a limited period of time) at the workplace or for identification purposes in compliance with safety and security requirements;
- The employee is wearing a respirator or facemask; or
- The employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with the rule
 - For example, when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee



Face Coverings / Face Masks

Face Coverings / Face Masks



- ▶ Face coverings must completely cover an employee's nose and mouth and must be:
 - Made with two or more layers of a breathable fabric that is tightly woven;
 - Secured to the head with ties, ear loops, or elastic bands that go behind the head;
 - Fitted snugly over the nose, mouth, and chin with no large gaps on the outside of the face; and
 - A solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings
- ▶ Clear face coverings or cloth coverings with a clear plastic panel are also permitted

Face Coverings / Face Masks

- ▶ Employers are prohibited from preventing any employee from voluntarily wearing a face covering or facemask unless the employer can demonstrate that doing so would create a hazard of serious injury or death, such as interfering with the safe operation of equipment
- ▶ Employers cannot prohibit customers or visitors from wearing face coverings
- ▶ Employers are not required to pay for the face coverings unless required by other applicable laws or regulations or collective bargaining agreements



- ▶ Employers' written policies should include provisions addressing:
 1. whether the vaccine is required or whether there will be a testing/face covering option;
 2. how employees' vaccination status will be determined and how information is collected;
 3. paid time off and sick leave for vaccination purposes;
 4. notification of positive tests and removal of positive employees from the workplace;
 5. how the employer will make required information available, and
 6. disciplinary action for employees who violate the policy

- ▶ Written policy should also include the effective date, which employees are required to comply, deadlines for being vaccinated or submitting vaccination information, testing requirements and deadlines (if applicable), and procedures for compliance and enforcement



Written Policy Requirements



Informing Employees

- ▶ Employers must inform each employee about:
 1. The requirements of the ETS as well as any employer policies and procedures established to implement this section,
 2. COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated,
 3. Protections against retaliation and discrimination, and
 4. Laws that provide for criminal penalties for knowingly supplying false statements or documentation

- ▶ Employers should include this document with their policy:
 - [Key Things to Know About COVID-19 Vaccines](#)

- ▶ Model policies available:
<https://www.osha.gov/coronavirus/ets2>

- ▶ Employers must provide their written policy to OSHA as well as the aggregate number of fully vaccinated employees at the workplace and the total number of employees at the workplace within 4 hours of a request
 - All other required records must be provided by the end of the next business day

- ▶ Employers must make available any individual COVID-19 documentation and test results by the end of the next business day following a request
 - Employee or someone with written authorized consent may request this information
 - Employee or their representative may request the aggregate number of fully vaccinated employees at the workplace and the total number of employees at the workplace
 - Employer must provide by the end of the next business day following the request



Record Disclosure

Enforcement

- ▶ Non-compliant employers could be fined approximately \$13,650 per employee
- ▶ Now that the ETS is public, State OSHA plans have 15 days to adopt the ETS or announce an alternative, and another 15 days to issue their own ETS if they announce an alternative
- ▶ 29 states + DC are Federal OSHA states
- ▶ 21 states are State OSHA states
- ▶ 6 states are State OSHA states for state & local gov't workers only



- ▶ The Biden Administration pushed back the deadline for federal contractors to comply with the vaccine mandate from 12/8/21 to 1/4/22
- ▶ The Safer Federal Workforce Task Force issued [updated guidance](#) on 11/1/21 providing contractors some flexibility in handling accommodation requests, employees who need to delay vaccination, and employees who refuse to be vaccinated

Federal Contractors



Key Provisions for Federal Contractors

- ▶ All employees of federal contractors, including those employees working remotely, must be fully vaccinated by 1/4/22
 - Limited exceptions for those who receive an exemption as a reasonable accommodation for a medical or religious reason
 - After 1/4/22, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the compliance clause has been incorporated into the covered contract
- ▶ The vaccine mandate applies even for those employees who **work outside or work from home**
- ▶ There is **no option** for frequent testing in lieu of vaccination

- ▶ The vaccine mandate applies to **all employees** of a federal contractor – not just the employees who work on federal contracts unless the other employees are **entirely** separate from contractor employees
- ▶ Per updated guidance issued by the Task Force on 11/1/21, contractors and subcontractors dealing with medical and religious accommodation requests, employees who must delay vaccination, and employees who refuse vaccination are granted some flexibility

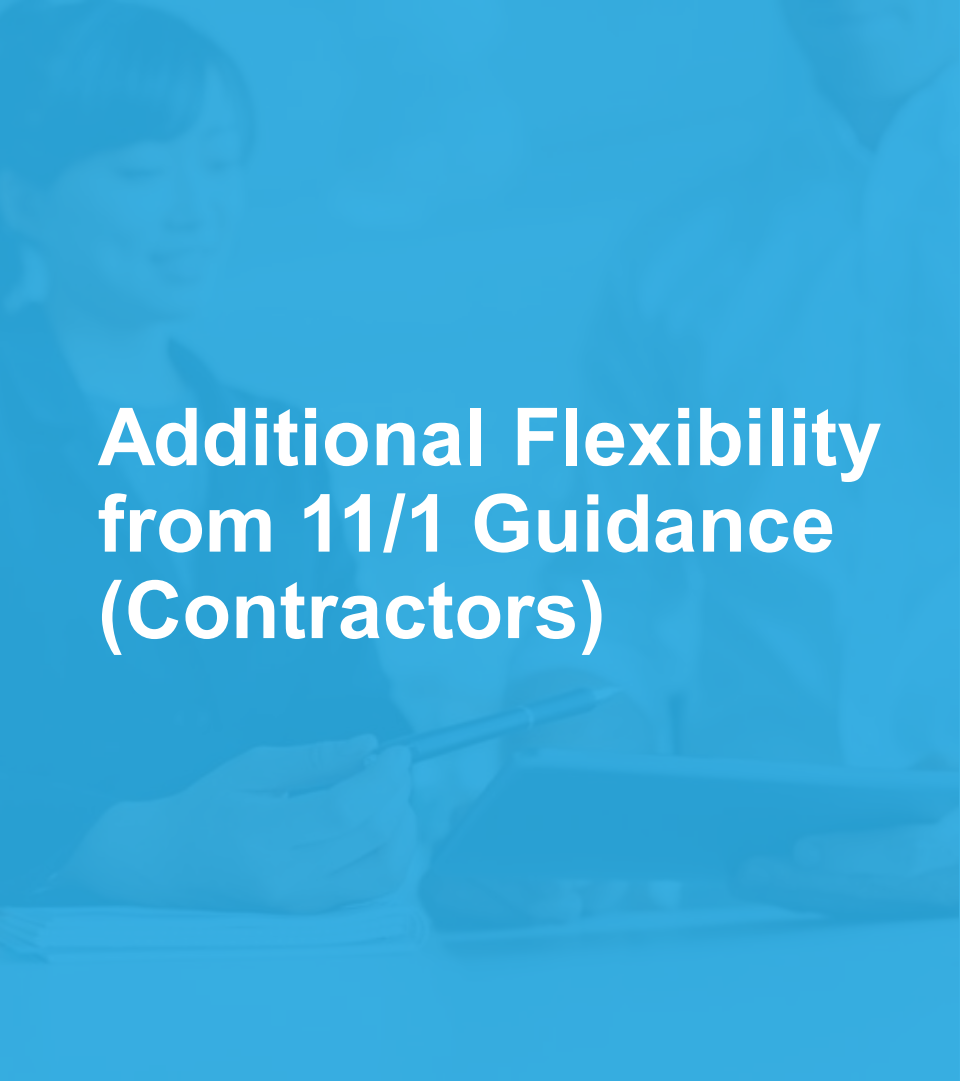
Key Provisions for Federal Contractors

Key Provisions for Federal Contractors

- ▶ The requirements **apply** to contracts for:
 - Services, construction, or leasehold interest in property,
 - Services covered by the Service Contract Act (SCA),
 - Concessions not otherwise subject to the SCA, and
 - Work related to federal property or lands
- ▶ The requirements **do not** apply to:
 - Contracts below \$250,000,
 - Contracts solely for products,
 - Employees who perform work outside of the United States, and
 - Contracts or agreements with Indian Tribes



- ▶ If an employee submits an accommodation request, the employee does not have to obtain an exemption by 1/4/22
 - While the request is pending, the contractor must require the employee to follow workplace safety protocols for individuals who are not fully vaccinated
- ▶ The updated guidance acknowledged that some employees may not be able to be fully vaccinated by 1/4/22 because delayed vaccination is recommended
 - For example, vaccination should be delayed for 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment



Additional Flexibility from 11/1 Guidance (Contractors)



Additional Flexibility from 11/1 Guidance (Contractors)

- ▶ Contractors are not required to fire or suspend every employee who refuses to be vaccinated by 1/4/22
- ▶ The guidance suggests that employers may develop an enforcement policy that encourages compliance, utilizing a limited period of counseling and education, followed by additional disciplinary measures if necessary
- ▶ Federal contractors must **verify** an employee's vaccination status by **obtaining proof of vaccination**
 - Self-attestation from an employee is not permitted



Questions?

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