



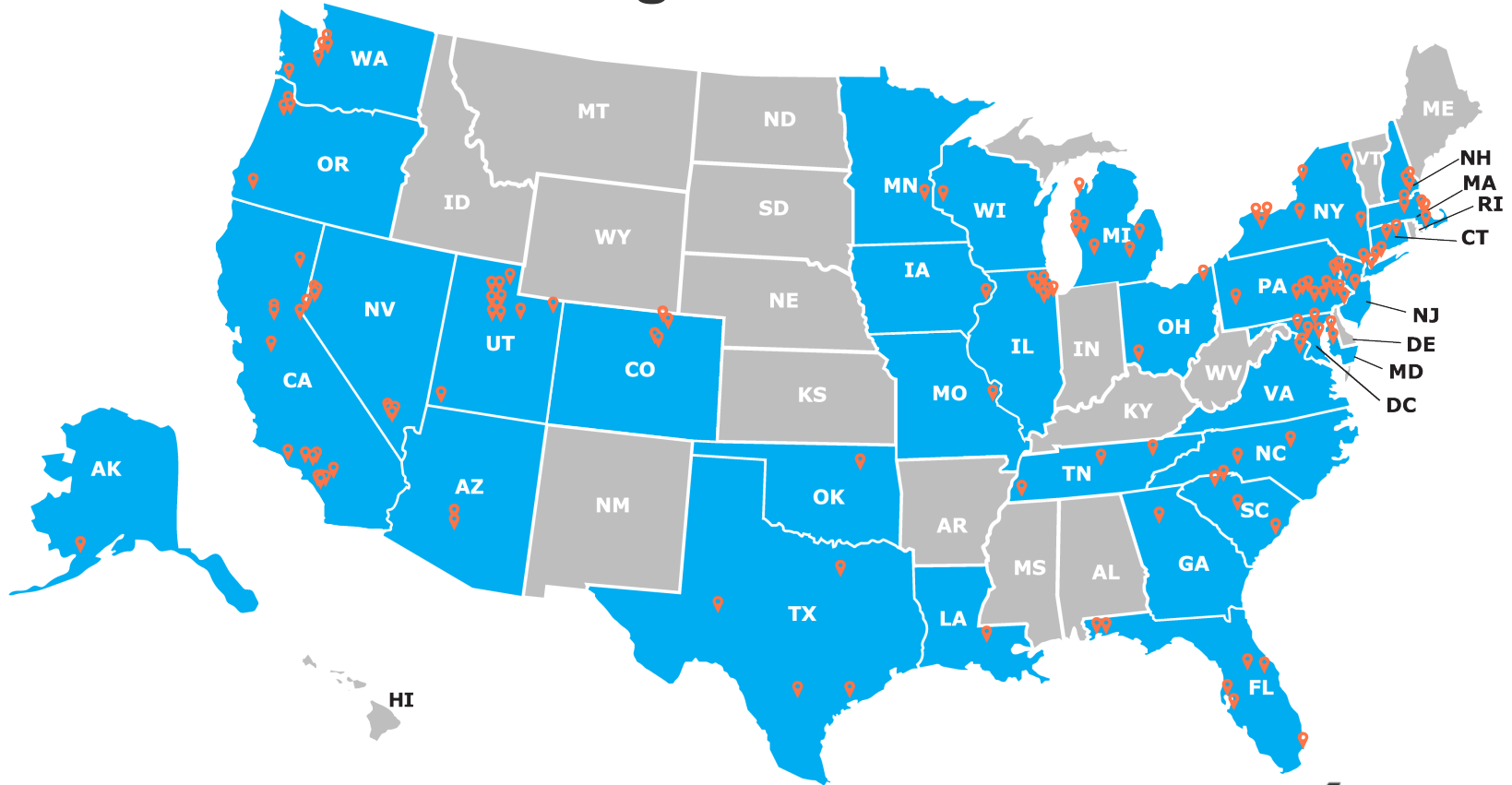
Welcome to Our Webinar Series
**OSHA Vaccine Mandate
Blocked: What Now?**

Doug Desmarais, Esq. | *Smith & Downey*

February 8, 2022



Welcome to Our Regional Alera Partner Firms!





Questions?

During the webinar if you have any questions, please feel free to...

- 🗨 Zoom Chat: Enter questions via the “Chat” feature in the Zoom meeting

Reminders

1. Slides and resources will be emailed after the webinar and are available on

silbs.com/events

2. Complete our 2-minute post webinar [SURVEY](#)** All completed surveys will be entered to win a \$100 Goldbelly gift card!

Congratulations to the winners from our last webinar!

**Traci Alley, Ingleside
Ron Seufert, C-Care!**



UPCOMING

[HCM Trends Update](#)

February 9th, 2 PM – 3 PM EST

Speaker: Bobbi Kloss

[HIPAA Privacy & Security Overview](#)

February 23rd, 2 PM – 3 PM EST

Speaker: Stacy Barrow, Esq.

[What is the Future of Finance/Accounting Post-Pandemic?](#)

March 2nd, 1 PM – 2 PM EST

Speaker: Tom Hood

Webinars





Welcome

Doug Desmarais, Esq., *Smith & Downey*

OSHA ETS – Paused

- ▶ OSHA ETS was stayed by a federal appeals court:
 - Fifth Circuit paused the ETS on November 6
 - The appeal process took a while and prevented the ETS from going into effect

- ▶ Prior Deadlines:
 - December 6, 2021 – deadline to implement vaccine and testing policies; and
 - January 4, 2022 – deadline to ensure compliance with the vaccine and/or testing mandate

OSHA ETS – Stay Lifted

- ▶ A federal appeals court lifted the stay on December 17, 2021
- ▶ OSHA announced a slight delay to the start of enforcement
- ▶ Previous deadlines of December 6 and January 4 were changed to January 10 and February 9, respectively

OSHA ETS – Supreme Court

- ▶ Supreme Court heard arguments on January 7, 2022
 - *National Federation of Independent Business v. Department of Labor*
- ▶ January 13, 2022 – Supreme Court struck down OSHA ETS
 - Ruled 6 to 3 in favor of those challenging the OSHA ETS

OSHA's Next Steps?

- ▶ The OSHA ETS was a temporary rule
 - It did not undergo the formal rulemaking process
 - Following the Supreme Court's ruling, OSHA withdrew its ETS

- ▶ OSHA can now use the ETS as a basis for a permanent vaccine mandate
 - Cannot be the exact same as the ETS (Supreme Court would rule the same)
 - Has to undergo the formal rulemaking process

- ▶ Expect any permanent rule to be narrower in scope

Continuing OSHA Obligations

- ▶ 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

OSHA Bloodborne Pathogen Policy

- ▶ Employers must take certain steps to protect employees who are occupationally exposed to blood or other potentially infectious material
 - Meaning, employees who can reasonably be anticipated to come into contact with such infectious material

- ▶ Employers administering on-site COVID-19 tests should consider creating and enforcing an OSHA-compliant Bloodborne Pathogen Policy
 - This includes a policy which:
 - Implements universal precautions;
 - Identifies and uses engineering controls and work practice controls;
 - Provides for PPE for employees;
 - Makes available hepatitis B vaccinations;
 - Makes available post-exposure evaluations and follow-ups to those exposed;
 - Uses labels to communicate hazards; and
 - Provides information and training to workers

OSHA Penalties

- ▶ OSHA General Duty Clause:
 - Requires employers to provide employees with a workplace that is free of known dangers
 - Must take reasonable actions to ensure the health and safety of its workforce

- ▶ OSHA assesses penalties for violations:
 - Recently, OSHA fined an Ohio employer **\$26,527** for not taking proper health and safety precautions, leading to 88 employees testing positive for COVID-19, 5 employees being hospitalized, and 2 employees dying

- ▶ Mask/vaccine mandates in the office help an employer to be compliant with the General Duty Clause

Healthcare Vaccine Mandate Overview

- ▶ Applies to Medicare-certified health care facilities, providers, and suppliers
- ▶ 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
- ▶ **Dates for vaccination compliance:**
 - March 15 – in states which challenged the healthcare mandate
 - February 28 – states which did not challenge the mandate
- ▶ Mandate also requires covered entities to develop and implement a plan to ensure vaccination compliance, accommodation review, and proper documentation procedures

Federal Contractor Vaccine Mandate Overview

- ▶ 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.
- ▶ Mandate is currently **stayed** nationwide (*not currently pending SCOTUS review*).

CDC Quarantine Guidelines

▶ Exposed to COVID-19:

- 5 days of quarantine, followed by mask use for 5 more days, if:
 - Unvaccinated;
 - More than 6 months from Pfizer/Moderna vaccine; or
 - More than 2 months from J&J vaccine.
- 10 days of mask wearing if quarantine is not feasible.
- No quarantine necessary if boosted.

▶ Positive for COVID-19:

- 5 days of quarantine and, if asymptomatic after 5 days, strict mask use for the next 5 days.

Accommodations: ADA

- ▶ The ADA requires that employees receive a reasonable accommodation due to a disability.
 - This requirement extends to 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 to allow the employee to continue working from home, or to require the employee to wear a mask while in the office.
- ▶ 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.

Vaccinations – Title VII

- ▶ Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- ▶ Like the ADA’s reasonable accommodation requirement, the same 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.
 - But should still be used with caution.
- ▶ An employee may object due to his/her sincerely held religious beliefs.
 - But determining what is a true, sincere religious belief is often tricky.
 - Supporting information verifying the employee’s sincere beliefs may be requested.

Confidentiality

- ▶ Information about an employee's **medical status** must be kept **confidential!**
- ▶ An employee's **religious accommodation request** must be kept **confidential!**
- ▶ Only personnel with a **significant need to know** should be made aware of an employee's medical status and/or religious accommodation request, including vaccination status and including COVID-19 and/or flu infection status.
- ▶ A “significant need to know” means a person to whom a supervisor reports and/or authorized human resources personnel. That person, in turn, can report any such information to the individual(s) to whom they report.



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