

COVID-19 Vaccination and Testing Mandates Under Review by the Courts

A COVID-19 Communication from Questco - December 1, 2021

Update on OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS)

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing ETS, published on November 5, 2021. ***The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order."*** On November 16, 2021, a lottery took place to determine which circuit court will hear appeals in the numerous challenges to the ETS in a consolidated manner. The *US Court of Appeals for the Sixth Circuit* has been selected via a random drawing to review consolidated litigation over OSHA's ETS.

While OSHA remains confident in its authority to protect workers in emergencies, since the stay, [OSHA has announced](#) it will "take no steps to implement or enforce" the ETS until the courts issue further direction.

Based on the deadlines presented to the Sixth Circuit Court for hearing and responding to the motions presented, it is likely that the ETS will continue to be stayed until at least December 10th (past the December 6, 2021 deadline) while the Sixth Circuit Court considers briefings. However, it is possible that, before December 10th, the Sixth Circuit Court lifts the stay. If the stay is lifted, the ETS requirements could become effective on the date of the court's order or on a later date set by the Sixth Circuit Court. As such, there continues to be a great deal of uncertainty surrounding if and when the ETS will be effective.

Centers for Medicare and Medicaid ("CMS") Vaccine Mandate Blocked in 10 States

On November 4, 2021, the CMS released a new Interim Final Rule (IFR) regarding staff vaccination at certain facilities that participate in the Medicare and Medicaid programs. The IFR requires covered health facilities to mandate all employees, volunteers and contractors have a first vaccine dose by December 6, 2021 and to be fully vaccinated by January 4, 2022. Providers that fail to comply could lose access to Medicare and Medicaid funds. The determination of whether you are a covered employer has a number of complexities that need to be evaluated.

On Monday, November 29, 2021, a federal judge blocked the Biden administration vaccine requirement for healthcare providers in 10 states, finding that the agency that issued the rule mandating healthcare workers get vaccinated against the coronavirus likely exceeded its authority. The ruling by U.S. District Judge Matthew Schelp in St. Louis prevents CMS from enforcing its vaccine mandate for healthcare workers until the court can hear legal challenges brought by the 10 states: [Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire](#).

Information provided herein is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney or accountant.

November 10th Guidance Extended Deadline for Federal Contractors Vaccine Mandate Compliance

In guidance for federal contractors updated on November 10, 2021, the Safer Federal Workforce Task Force clarified that covered contractor employees must be fully vaccinated no later than January 18, 2022, extended from the original deadline of December 8, 2021. This requirement is not affected by the block of the emergency temporary standard.

[The guidance](#) noted that people are considered fully vaccinated against COVID-19 two weeks after they have received the second dose in a two-dose series or two weeks after they have received a single-dose vaccine. In other words, federal contractor employees must have received the second doses of the Pfizer or Moderna vaccinations or the one dose of the Johnson & Johnson vaccine by January 4, 2022.

Some states have sued, challenging the vaccination requirement for federal contractors.

Challenges Surrounding the Collection of Information, Recordkeeping and Workplace Compliance

We recommend that you **not** wait to see the outcome of these legal battles before contemplating what your company will do. Consider bringing together your senior level management to begin addressing these issues now. Most likely, one or more of the mandates will impact your business. Key topics to consider include:

- What are your current workplace policies with respect to vaccination requirements, social distancing, and masking?
 - Assess current policies to ensure they comply with jurisdictional requirements
 - Talk through changes required should the mandates become law
- Operational challenges that need to be addressed
 - Securely collecting and housing employee vaccination status
 - Tracking information including secure access to ongoing compliance management
- Survey your employees now
 - What is the vaccination status across your employee base?
 - Consider the potential compliance process and associated costs

Questco remains committed to ensuring that our clients are in compliance with all government mandated COVID-19 workplace requirements and will continue to provide updates on this evolving situation. Please direct any questions you may have to your Client Success Manager so we may assist you.

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