

# Electronic Alert

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## **How Employers Should Approach the Federal Vaccine Mandates that are Held Up in Courts**

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In the past few months, we have covered the three major federal vaccine mandates that apply to employers locally and across the country: an OSHA ETS, a mandate for federal contractors, and a mandate for certain healthcare workers. The White House issued the mandates via Executive Orders and they are to be implemented by federal agencies. All three mandates have been subject to a fire storm of litigation. The challenges are generally premised on constitutional and statutory violations—raising questions about the limits of executive power and the administrative procedures that agencies must follow during emergency situations.

Here is what you need to know about your obligations under the mandates as the court battles rage on:

### **OSHA ETS**

The federal Occupational Health and Safety Administration’s (OSHA) Emergency Temporary Standard (ETS) requires that employers with 100 or more employees (“covered employers”) either implement a mandatory workplace vaccine policy or test their unvaccinated employees for COVID-19 at least once per week. The ETS also requires that unvaccinated employees of covered employers wear face coverings while they are indoors.

The Fifth Circuit Court of Appeals issued a nationwide stay of the ETS and the legal challenges (including whether the stay will remain in place) have since been consolidated and transferred to the Sixth Circuit Court of Appeals. The White House is seeking to lift the stay, but the Sixth Circuit has not yet indicated whether the legal challenges will be heard by a three judge panel or the full court and has not set a schedule for a decision. Oregon OSHA, which was originally set to announce its own rule in early December that would be “at least as effective” as the federal ETS, will likely not proceed until there are further developments with the challenges at the federal level.

### **Federal Contractor Vaccine Mandate**

The Safer Federal Workforce Task Force issued guidance earlier this fall that required employees of federal contractors and subcontractors to be vaccinated against COVID-19. The federal contractor mandate did not allow for a testing alternative (but did allow for disability and religious accommodations) and it even applied to those who work remotely full-time. Similar to the OSHA ETS, the federal contractor mandate required face coverings for unvaccinated employees. Initial challenges were only in effect in certain states, but on December 7, 2021, a

federal judge in Georgia issued a temporary injunction that put a nationwide hold on the mandate pending further consideration of the legal challenges.

### **Federal Healthcare Worker Vaccine Mandate**

The Centers for Medicare and Medicaid Services' rule required that all employees in facilities participating in Medicare or Medicaid be vaccinated—allowing for disability or religious exemptions, but not a blanket testing alternative. This rule was put on hold in about 10 states last week by a federal judge. The stay on this rule does not affect the Oregon Health Authority's temporary rule requiring Oregon healthcare providers and healthcare staff to be vaccinated against COVID-19.

The deadline for employees to be vaccinated under all three mandates was set for early next year, but all three mandates are on hold until the litigation plays out. It is possible that one, if not all, of the challenges to the mandates will go before the U.S. Supreme Court.

While it is unlikely that all three mandates come out unscathed, employers should not assume that none of the provisions in the mandates will go into effect. Various parts of the rules could be struck down and others could survive. It is also possible that one or more of the federal agencies will redraft their mandate in such a fashion that will survive future legal challenges.

In light of all the uncertainty, what should employers do now?

- Familiarize yourself with the current mandates and how they may apply to your employees.
- Inform employees that you are in a “wait and see” mode and that you will share updates as they become available.
- Be prepared to update policies and procedures once details are fully available. If a mandate survives the legal challenges, we anticipate that employers will have some time to prepare for compliance, but we recommend being ready to hit the ground running.
- Stay tuned! Stay alert to legal updates at both the federal and state level.

*For questions about responding to vaccine mandates or for any other matters related to navigating COVID-19 in the workplace, contact Amy Angel or Bruce Garrett at 503-228-0500, or at [aangel@barran.com](mailto:aangel@barran.com) or [bgarrett@barran.com](mailto:bgarrett@barran.com).*