Federal Vaccine Mandates and Higher Ed: What You Should Know

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Agenda

- Review and analyze status of Federal COVID-19 Employee Vaccination Mandates
  - Implications of recent legal action
- Discuss their applicability to Educational Institutions
- Address Practical Issues and Considerations
- Offer Tips and Strategies for Ensuring Compliance and Minimizing Legal and Organizational Risk
Poll Question

How likely is your institution to require employee proof of employee vaccination status?

1. Very likely because we’re subject to an employee vaccination mandate.
2. We already require proof of vaccination status for students, faculty, and staff.
3. It’s possible, but we haven’t decided whether to mandate or simply encourage employee vaccinations.
4. We have no plans currently to mandate proof of employee vaccination status.
Federal Vaccine Mandates in a Nutshell

- **Occupational Health and Safety Administration (OSHA)**

- **“Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors”** (Executive Order 14042) – issued on September 9, 2021

- **OSHA COVID-19 Vaccination and Testing ETS for Businesses with 100 or more Employees** – published and effective on Friday, November 5, 2021

- **Centers for Medicare and Medicaid Services (CMS) “Omnibus COVID-19 Health Care Staff Vaccination” Interim Final Rule** – published and effective on Friday, November 5, 2021
Federal Vaccine Mandates in a Nutshell

Various states and localities may impose additional or different vaccination, testing, masking and/or distancing requirements.
Biden Administration Action Plan: “Path out of the Pandemic”

- Formally announced on September 9, 2021
- Preceded by July 29, 2021 Announcement and Accompanying Fact Sheet
Biden Administration Action Plan: “Path out of the Pandemic”

- Six-Pronged Approach:
  1. Vaccinating the Unvaccinated
  2. Further Protecting the Vaccinated
  3. Keeping Schools Safely Open
  4. Increasing Testing and Requiring Masking
  5. Protecting Our Economic Recovery
  6. Improving Care for those with COVID-19
Biden Administration Action Plan: “Path out of the Pandemic”

Substantive Components of “Path Out” Plan:

- E.O. 14043: Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees
- Directive to OSHA – Issue Rule “Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly”
- Directive to Centers for Medicare and Medicaid Services (CMS) to mandate vaccinations for employees working at healthcare facilities that receive Medicare or Medicaid reimbursement
Poll Question

Do you offer on-campus healthcare services?

- Yes
- No
- I don’t know
Healthcare-Related Vaccine Mandates

- OSHA COVID-19 Healthcare ETS
  - Effective since June 21, 2021
  - Applies to all settings where any employee provides healthcare services or healthcare support services
    - Including healthcare services that are embedded within a non-healthcare setting

- CMS “Omnibus COVID-19 Health Care Staff Vaccination”
  - Interim Final Rule published in Federal Register on November 5
  - Mandates vaccinations for employees working at healthcare facilities that receive Medicare or Medicaid reimbursement
Federal Contractor Vaccine Mandate

- Safer Federal Workforce Task Force Guidance
  - Issued by Task Force on September 24, 2021
  - Updated several times, most recently on November 1
  - Includes key terms, FAQs and Answers
Federal Contractor Vaccine Mandate

- **Key Requirements**
  - All covered contractor employees must be vaccinated against COVID-19
    - Limited exemption applicable to employees legally entitled to a medical/disability or religious accommodation
  - Masking and physical distancing by covered contractor employees and visitors while in covered contractor workplaces
  - Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces
Federal Contractor Vaccine Mandate

Scope of Coverage

- EO 14042 applies to any contract; contract-like instrument; solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument for:
  - Procurement contract for services
  - Construction or leasehold interest in real property
  - SCA-covered services
  - Concessions
  - Services in connection to federal property or lands
Federal Contractor Vaccine Mandate

Scope of Coverage

- EO 14042 does not apply to:
  - Federal grants
  - Contracts, contract-like instruments, or agreements with Indian Tribes
  - Federal contracts or subcontracts whose value is equal to or less than the FAR “simplified acquisition threshold” of $250,000
  - Employees who perform work outside the United States or its outlying areas
  - Subcontracts solely for the provision of products
Federal Contractor Vaccine Mandate

- Employee Vaccination Requirement
  - Applies to all full and part-time employees who work on or in connection with a federal contract
  - **INCLUDES** remote workers
  - Work “in connection with a federal contract” means “those who perform duties necessary to performance of contract but who do not directly engage in performing specific work called for by the covered contract, such as human resources, billing and legal review…”
Federal Contractor Vaccine Mandate

- **Employee Vaccination Requirement**
  - “Covered contractor employee”
    - Any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace
    - **INCLUDES** contractor employees who are not working on/in connection with a covered contract
  - “Covered contractor workplace”
    - Defined as “a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract”
    - Excludes “a covered contractor employee’s residence”
Federal Contractor Vaccine Mandate

- Employee Vaccination Requirement
  - Only exceptions are: (1) for employees exempted due to disability, medical or religious need and (2) where an “urgent, mission-critical need” requires employee to begin work before becoming fully vaccinated
  - Agency may issue a temporary extension for up to 60 days
  - Workers still must comply with masking and physical distancing requirements
Federal Contractor Vaccine Mandate

- Applicability to Educational Institutions
  - Examples of Federal Contracts (or contract-like instruments)
    - Research and development non-grant funding
    - ROTC Program
    - Others?
Federal Contractor Vaccine Mandate

- Applicability to Educational Institutions
  - Which employees are covered?
    - Faculty and staff – work on or in connection with federal contracts
    - Research lab workers
    - Administrative functions
Federal Contractor Vaccine Mandate

- **Applicability to Educational Institutions**
  - Which **employees** are covered?
  - Student employees:
    - students who are “working” on government funded projects for class credit but not money?
    - Work study students?
Federal Contractor Vaccine Mandate

- Applicability to Educational Institutions
  - Which locations are covered?
    - Entire system?
    - Specific locations only?
Federal Contractor Vaccine Mandate

- **Enforcing Vaccination Requirement**
  - Must require workers produce proof of vaccination in the form of a copy of:
    - Record of immunization from a health care provider or pharmacy
    - COVID-19 Vaccination Record Card
    - Medical records documenting the vaccination
    - Immunization records from a public health or State immunization information system, or
    - Any other official documentation verifying vaccination
Federal Contractor Vaccine Mandate

- Enforcing Vaccination Requirement
  - Must contain vaccine name, date(s) of administration, and the name of health care provider that administered it
  - May allow employees to submit proof via digital photograph, scanned image, or .pdf
OSHA COVID-19 ETS

Basic Requirements:

- Implement either (1) an across-the-board mandatory employee vaccination policy or (2) a mandatory vaccination policy with weekly COVID-19 testing option as a condition of entering the workplace
- Collect and retain employee records re: vaccination status
- Detailed, prescriptive recordkeeping compliance obligations
- Provide paid leave to obtain vaccination or to recover from side effects
- Require reporting of COVID-19 positive cases and remove affected employees
OSHA COVID-19 ETS

- Generally applies to **all** employers with 100 or more employees that are **not** subject to EO 14042 or the CMS IFR
- Published in the *Federal Register* on November 5; tiered compliance dates of December 5, 2021 and January 4, 2022
- First legal challenges filed immediately thereafter
  - Actions pending (as of Monday) in the Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits
    - Challenges likely to be consolidated sometime next week
OSHA COVID-19 ETS

- Three-Judge Panel of Fifth Circuit put rule on hold
  - Enjoined Enforcement of ETS as of Saturday, November 6, 2021
  - ETS raises “grave statutory and constitutional issues”
- Biden Administration reply due on Monday, November 7
- Order effectively halts upcoming testing and vaccination compliance deadlines for covered businesses at least in Texas, Louisiana, and Mississippi
- Motions for Injunctive Relief pending in other jurisdictions
Vaccination Deadlines – EO, ETS, and IFR

- All covered employees must be fully vaccinated by **January 4, 2022**

  **NEW DATE FOR COMPLIANCE** per November 4, 2021 White House Fact Sheet

- Vaccination deadline previously was December 8, 2021
- Fate of ETS uncertain

“To make it easy for businesses and workers to comply, the Administration is announcing today that the deadline for workers to receive their shots will be the same for the OSHA rule, the CMS rule, and the previously-announced federal contractor vaccination requirement. Employees falling under the ETS, CMS, or federal contractor rules will need to have their final vaccination dose – either their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – by January 4, 2022.”
Calculating Vaccination Timeframes

- Moderna (two-dose):
  - First shot on/about November 23
  - Second shot on/about December 21

- Pfizer (two-dose):
  - First shot on/about November 30
  - Second shot on/about December 21

- Johnson & Johnson (single dose): on/about December 21
Legal and Practical Considerations

- Current Status of Federal Mandates
- Conflicting State and Local Mandates and Restrictions
- Handling Accommodation and Other Exemption Requests
Current Legal Status of Mandates

- **OSHA ETS**: enjoined in at least one jurisdiction
- **CMS IFR**
  - No challenges as of this writing
  - Industry groups generally supportive; asked for clear guidance
- **EO 14042**
  - Challenges brought by several Republican-led states including Florida, Texas, Georgia and Missouri and are pending in several federal district courts
  - No injunctive relief granted to date
Conflicting State and/or Local Laws?

- Task Force EO Guidance FAQs answer this question directly:

  Q: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in the Task Force Guidance for Federal Contractors and Subcontractors?

  A: Yes. **These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.**
Conflicting State and/or Local Laws?

- ETS Section 1910.501(a) *Purpose*:

  “This section is intended to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace, and to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees.”

- This principle is reiterated throughout the Preamble:

  “When OSHA issues a standard pursuant to section 6—whether permanent or an ETS—section 18 of the OSH Act provides that OSHA’s standard preempts any state occupational safety or health standard ‘relating to [the same] occupational safety or health issue’ as the Federal standard.”
What’s the Upshot?

➢ If you’re subject to the CMS IFR or EO 14042, compliance preparations and planning should proceed as planned
  ➢ Covered contractors still subject to EO, even if ETS is paused
  ➢ Executive Action ≠ Agency Action

➢ If you’re subject to the OSHA ETS:
  ➢ Be prepared to pivot quickly, should the injunction be lifted and/or the rule upheld in whole or in part
    ➢ Information collection and recordkeeping requirements may be especially onerous if unprepared
  ➢ Monitor for developments impacting enforceability of ETS, compliance dates
Practical Issues and Considerations

- Disability Accommodation Issues
  - Immunocompromised Individuals
    - Underlying condition(s) place them at higher risk of severe illness or death due to COVID-19
    - CDC recommends that they be vaccinated
Practical Issues and Considerations

- Disability Accommodation Issues
  - Individuals with severe allergies to vaccine components, i.e., Polyethylene Glycol (PEG) or Polysorbate
  - If individual (1) previously has had a severe allergic reaction or (2) suffers an immediate allergic reaction, whether severe or non-severe, to any ingredient in a mRNA (Pfizer-BioNTech and Moderna) or J&J/Janssen COVID-19 vaccine, CDC recommends AGAINST getting the relevant vaccine
  - May be able to get different type of vaccine depending on nature of allergy
  - Individual should consult with physician
Poll Question

Must a covered contractor exempt an employee from the vaccination mandate due to a documented medical condition that does not meet the legal definition of “disability” (for which an accommodation must be considered)?
Poll Question

1. No, because the EO only provides for disability or religious accommodation.
2. No. The EO permits, but doesn’t require, exemptions based on non-disabling medical conditions.
3. Yes, but only to the extent that the medical condition would become disabling if the individual were forced to get vaccinated.
4. Yes, because the EO requires employers to exempt employees for medical reasons.
Practical Issues and Considerations

Per the Task Force Guidance:

“Q: Can a covered contractor grant a covered contractor employee an extension to the deadline for vaccination due to a documented medical necessity… even if the contractor employee does not meet the legal definition of “disability” to be entitled to an accommodation?”
Practical Issues and Considerations

Per the Task Force Guidance:

A: Even in cases where the covered contractor employee does not meet the legal definition of “disability” to be entitled to an accommodation, in some limited circumstances, a covered contractor may grant the contractor employee an extension to a vaccination deadline based upon other medical considerations:

- Such as where 90-day delay recommended after monoclonal antibody or convalescent plasma COVID-19 treatment
- Covered contractors should specify the date by which the employee must be vaccinated (i.e., length of extension)
- Determinations should be made on a case-by-case basis
Practical Issues and Considerations

Tips for Handling Disability-Related Accommodation Requests

- Granting an exemption from a vaccination mandate may be required in some, but not all, cases!
  - Medical documentation will be key
  - Differs from religious accommodation process
- Engage in the interactive process
- Consider reasonable and effective alternatives
  - COVID-19 testing
  - Additional PPE, distancing protocols
  - Remote work
Practical Issues and Considerations

Tips for Handling Disability-Related Accommodation Requests

- Document your efforts
- Same rules apply re: qualifications, undue hardship, direct threat

Example: Is a neonatal intensive care unit (NICU) nurse who is unable to obtain a vaccine otherwise qualified, that is, able to safely perform the essential functions of the job with or without reasonable accommodation?
Practical Issues and Considerations

- Vaccine Resistance Due to Pregnancy
  - Individuals trying to get pregnant or might become pregnant in the future
  - CDC recommends they be vaccinated
    - Implication is that, absent specific medical justification, exemption on those grounds is not required
  - Be mindful of state and/or local laws imposing pregnancy accommodation requirements
  - Q re: whether the EO’s vaccination policy overrides conflicting state or local accommodation rules
Practical Issues and Considerations

- Vaccine Resistance Due to Pregnancy
  - Individuals who are currently pregnant or breastfeeding

Task Force: “The CDC recommends COVID-19 vaccination for people who are pregnant, breastfeeding, trying to become pregnant now, or trying to become pregnant in the future. The American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine recommend that all pregnant individuals be vaccinated against COVID-19. However, a covered contractor may allow a covered contractor employee to delay vaccination based on the contractor employee’s particular medical circumstances, consistent with the covered contractor’s process for reviewing delay requests.”
Practical Issues and Considerations

- Religious Objections to Vaccination
  - Common example - use of fetal cell line contrary to religious opposition to abortion
  - Practical conundra (for employers and employees)
    - Fetal cell lines used to develop numerous common OTC drugs, other vaccines
    - Many religious leaders endorse vaccination generally, or where mandated
    - Fake form letters readily available and being used
  - Question re: how to police for fraud and abuse in light of legal duty to accommodate
Duty to Accommodate Religious Belief

- Title VII requires employers to provide reasonable accommodations to employees whose sincerely-held religious beliefs conflict with a work rule or requirement.
- EEOC: Vaccination objections “based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as ‘religious beliefs’ under Title VII”
Practical Issues and Considerations

- Religious Accommodations
  - In general, may not question sincerity of religious belief
  - However, per the EEOC: Where an employer has “an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance,” the employer is permitted to request additional information supporting the employee’s request
  - Title VII religious accommodation duty subject to undue hardship analysis
    - No more than a “de minimis” burden required
Practical Issues and Considerations

- Handling Religious Accommodation Requests
  - Have a process in place for receiving and considering accommodations
  - Ask the right questions without overstepping
  - Ensure POC is trained on policies, understands compliance obligations under Title VII
    - Where to go with questions
    - How to handle doubts re: sincerity of religiously-held belief
Have a Question?
Submit questions to our presenters using the Chat.

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