

## Split Decision: U.S. Supreme Court Throws Out Vaccine Mandate For Large Employers But Revives It For Healthcare Workers



YOUR WORKPLACE IS OUR WORK.®



Presented by  
**Whitney Brown and Al Vreeland**  
**Lehr Middlebrooks Vreeland & Thompson, P.C.**

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1




## Today's Topics

1. What did SCOTUS do, and what didn't they do?
2. R.I.P.(?) Large Employer ETS
3. CMS Interim Final Rule
4. Update on CMS response to SCOTUS decision
5. Federal Contractor Guidelines – Status and Prognostication
6. Head Start Guidelines – Status and Prognostication
7. What if we want a vaccination policy?

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2



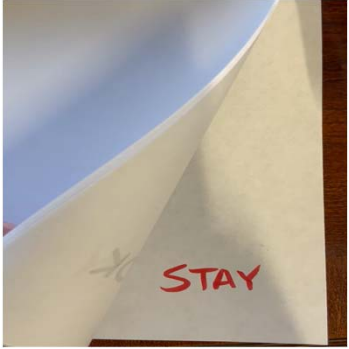
# OSHA LARGE EMPLOYER ETS

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 OSHA Large Employer ETS

**Q: With respect to the OSHA ETS, what just happened here?**



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## OSHA Large Employer ETS

### TIMELINE

- Nov. 5, 2021 - OSHA Large Employer ETS published
- Nov. 12, 2021 – Fifth Circuit stays enforcement, pending permanent injunction
- Dec. 17, 2021 – Sixth Circuit lifts Fifth Circuit's stay
- Jan. 13, 2022 – SCOTUS reinstates Fifth Circuit's stay

5

5



## OSHA Large Employer ETS




### **Rest In Peace, ETS?**

- Is the ETS, um, dead, or does someone else get to decide?
- Could OSHA go through the normal regulatory process with a similar rule?
- Would OSHA do that?

6


6



# CMS OMNIBUS STAFF VACCINATION RULE

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7



## CMS Staff Vaccination IFR

### TIMELINE

- Nov. 5, 2021 – CMS Omnibus Staff Vaccination Rule published
- Nov. 29, 2021 – E.D. Mo. stays enforcement in ten states.
- Nov. 30, 2021 – W.D. La. stays enforcement nationally.
- Dec. 15, 2021 – 5<sup>th</sup> Circuit overturns national scope of W.D. La. stay; maintains stay in 14 plaintiff states (inc. Alabama).
- Dec. 15, 2021 – N.D. Tex. stays enforcement in Texas
- Dec. 28, 2021 – CMS announces plan to enforce mandate in 25 states and D.C. where not enjoined; publishes guidance to surveyors.
- Jan. 13, 2022 – SCOTUS sets aside all stays.

8

8



## CMS Staff Vaccination IFR

### SCOPE: COVERED EMPLOYERS

Ambulatory Surgery Centers, Community Mental Health Centers, Comprehensive Outpatient Rehabilitation Facilities, Critical Access Hospitals, End-Stage Renal Disease Facilities, Home Health Agencies, Home Infusion Therapy Suppliers, Hospices, Hospitals, Intermediate Care Facilities for Individuals with Intellectual Disabilities, Clinics, Rehabilitation Agencies, and Public Health Agencies as providers of Outpatient Physical Therapy and Speech-Language Pathology Services, Psychiatric Residential Treatment Facilities (PRTFs), Programs for All-Inclusive Care for the Elderly Organizations (PACE), Rural Health Clinics/Federally Qualified Health Centers, and Long Term Care Facilities.

(Those subject to regulation at: 42 CFR 416.51, 42 CFR 418.60, 42 CFR 441.151, 42 CFR 460.74, 42 CFR 482.42, 42 CFR 483.80, 42 CFR 484.70, 42 CFR 485.58 and 485.70, 42 CFR 485.640, 42 CFR 485.725, 42 CFR 485.904, 42 CFR 486.525, 42 CFR 491.8, 42 CFR 494.30.)

9

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## CMS Staff Vaccination IFR

### SCOPE: COVERED EMPLOYEES

All covered facility staff are covered, except those providing telehealth or telemedicine or support services with no contact with patients or covered staff.

10

10



## CMS Staff Vaccination IFR

### KEY PROVISIONS

Covered facilities must develop and implement policies and procedures to ensure that:

- All scheduled staff have received first or only shot by ~~December 5, 2021~~ Jan. 27, 2022\*, and second shot by ~~Jan. 4, 2022~~ February 28, 2022\*, prior to providing services;
- A process to ensure mitigating measures for those not fully vaccinated;
- A process to track and secure documentation of vaccination and booster status;
- A process by which exemption may be granted based on federal standards;

\* Dates for facilities in 25 states and D.C. not covered by prior stays.

11

11



## CMS Staff Vaccination IFR

### KEY PROVISIONS

Covered facilities must develop and implement policies and procedures to ensure that:

- A process to track and secure documentation of exemption requests;
- A process to ensure that medical exemption requests are supported by specific medical evidence and signed by a licensed practitioner.
- A process for tracking and securing documentation for vaccination status for those who must be delayed in receiving COVID-19 vaccinations, in accordance with CDC guidelines;
- Contingency plans for staff that aren't fully vaccinated.

12

12



## CMS Staff Vaccination IFR

### KEY PROVISIONS

- No PTO requirements.
- Also of note, the OSHA Healthcare ETS was allowed to expire.

13

13



## CMS Staff Vaccination IFR

### CMS GUIDANCE TO SURVEYORS

- Nursing homes, home health agencies, and hospice may be subject to civil money penalties, denial of payments, or as a final measure, termination.
- Termination is the enforcement mechanism at other facilities. “[H]owever, CMS’s primary goal is to bring health care facilities into compliance. Termination would generally occur only after providing a facility with an opportunity to make corrections and come into compliance.”
- **“Facility staff vaccination rates under 100% constitute non-compliance under the rule.”**
  - Vaccination rate includes those granted an exemption or delay.

14

14



## CMS Staff Vaccination IFR

### CMS GUIDANCE TO SURVEYORS

- By Jan. 27, 2022, a facility can receive notice of non-compliance if it has less than 100% vaccination, but if it has over 80% **and** a plan to get to 100% vaccination in 60 days, it would not receive further enforcement action.
- By Feb. 27, 2022, a facility can receive notice of non-compliance if it has less than 100% vaccination, but if it has over 90% **and** a plan to achieve 100% vaccination within 30 days, it would not be subject to further enforcement action.
- By Mar. 28, 2022, facilities with under a 100% compliance rate may be subject to enforcement action.

15

15



## CMS Staff Vaccination IFR

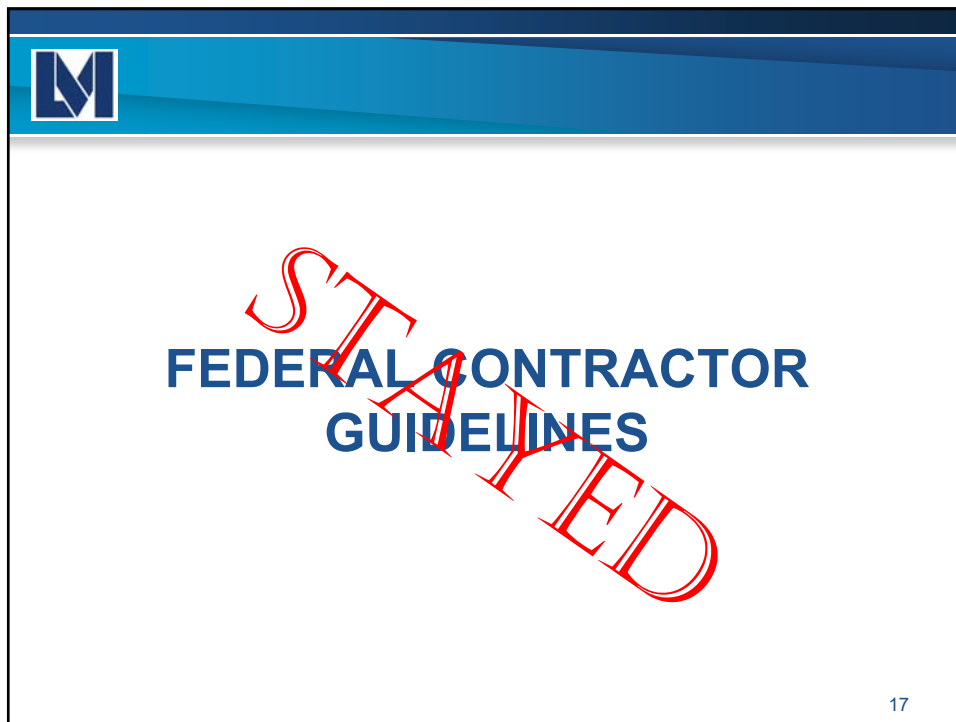
### CMS'S RESPONSE TO LITIGATION

- As on 8:45am Central on January 14, 2022, CMS had not updated its webpage with information as to whether it would expect covered facilities in the 25 states where enforcement had been stayed to meet the Jan. 27/Feb. 28 schedule.

16

16





17

**SCOPE: COVERED EMPLOYERS**

- Federal Contractors and Subcontractors at any tier:
  - Contracts must be for services, construction, or a leasehold interest in real property. Coverage is to be synonymous with the federal contractor minimum wage proposed final rule (issues pursuant to E.O. 14026).
    - The proposed rule to put E.O. 14026 in effect defines contracts for services as contracts covered by the SCA.
    - Likely excludes coverage for banks or credit unions based solely on FDIC/NCUA deposit insurance.
  - Extends to all areas, buildings, and facilities unless a building/facility is 100% clear of interactions with covered contractor employees.

18



## Federal Contractor Guidelines

### SCOPE: COVERED EMPLOYEES

Are any covered contractor employees excluded?

Generally, no. The Guidelines apply to:

- Covered contractor employees who work exclusively from home;
- Outdoor contractor and subcontractor workplace locations.

19

19



## Federal Contractor Guidelines

### KEY PROVISIONS

Executive Departments and Agencies must ensure that covered contracts include a clause that K-ors and sub-K-ors must comply with the Safer Federal Workforce Task Force Guidelines. Essentially that:

- All employees must be fully vaccinated; unless the employee is entitled to an accommodation (medical or religious) or Federal agency grants a 60-day exception due to urgent, mission-critical need;
- All employees or visitors must comply with masking and distancing requirements in covered contractor workplaces;
- Covered contractor designates point person(s) to coordinate COVID-19 safety efforts.

20

20



## Federal Contractor Guidelines

### KEY PROVISIONS: PROOF OF VACCINATION

Employers are required to determine the vaccination status of all employees and must retain documentation of vaccination status. Acceptable proof:

- Vaccination card;
- Copy of medical records documenting vaccination;
- Documents from government immunization system;
- Other official document verifying vaccination with vaccine name, date(s) of administration, and name of health care provider or clinic site.
- Employers may accept digital or scanned copies.
- Personal attestation is not allowed.

21

21



## Federal Contractor Guidelines

### CURRENT STATUS

- OMB has announced it won't try to enforce guidelines while stays in effect.
- *Georgia v. Biden* challenge is before Eleventh Circuit; briefing to be completed in Feb.
- What do the tea leaves of the Supreme Court's decision in the OSHA Large Employer ETS case and the CMS case suggest for the current litigation?

22


22



## HEAD START VACCINE AND MASK REQUIREMENTS

23

23



## Head Start Vaccine/Mask IFR

### TIMELINE

- Nov. 30, 2021 – Vaccine and Mask IFR published.
- Dec. 31, 2021 – N.D. Tex. enjoins rule in Texas.
- Jan. 1, 2022 – W.D. La. enjoins rule in 24 other states.

24

24



## Head Start Vaccine/Mask IFR

### SCOPE

- Masking – all participants, staff, contractors, volunteers, etc. (over two years old) of Head Start programs.
- Vaccination – all staff, contractors, and volunteers working in classrooms or with children.

25

25



## Head Start Vaccine/Mask IFR

### KEY PROVISIONS

- Masking took immediate effect on publication.
- Full vaccination required by Jan. 31.\*
- Employees due a delay or exemption consistent with federal law had to test weekly.

\*Like other agencies, Head Start defined fully vaccinated as two weeks post-last-shot, except that on the effective date, all that matters is that you've had your last shot.

26

26



## Head Start Vaccine/Mask IFR

### CURRENT STATUS

- Stayed in 25 states, including Alabama.
- No filings of note since injunction granted.
- What do the tea leaves of the Supreme Court's decision in the OSHA Large Employer ETS case and the CMS case suggest for the current litigation?

27

27



## WHAT IF YOU WANT A VAX OR VAX-OR-TEST POLICY?

28

28



## Elective Procedures



- What if we want to require our employees to be vaccinated?

29

29



## Elective Procedures

### Considerations Before Implementing a Mandatory Vaccination Policy

- Any state or local prohibitions which would purport to limit this.
  - Ex: Alabama's SB9, purports to set a required, largely self-certifying exemption request form and an appeals procedure to ADOL, where an employer has a mandatory vaccination policy.
- Expertise to handle accommodation requests.
- Morale, staffing issues.

30

30



## Elective Procedures

- What if we want to require our employees to be vaccinated or tested?



31

31



## Elective Procedures



### Considerations Before Implementing a Vax-or-Test Policy

- Any state or local prohibitions which would purport to limit this.
- FLSA: Cost of test.
- FLSA: Time to test.
- Logistics/accountability to ensure it's done.
- Expertise to handle accommodation requests.
- Confidential maintenance of results.
- Morale, staffing issues.

32

32





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33