

*NEBRASKA CHAMBER VIRTUAL BRIEFING*

# COVID VACCINE RULES FOR PRIVATE-SECTOR WORKERS



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## *Guest Presenters*

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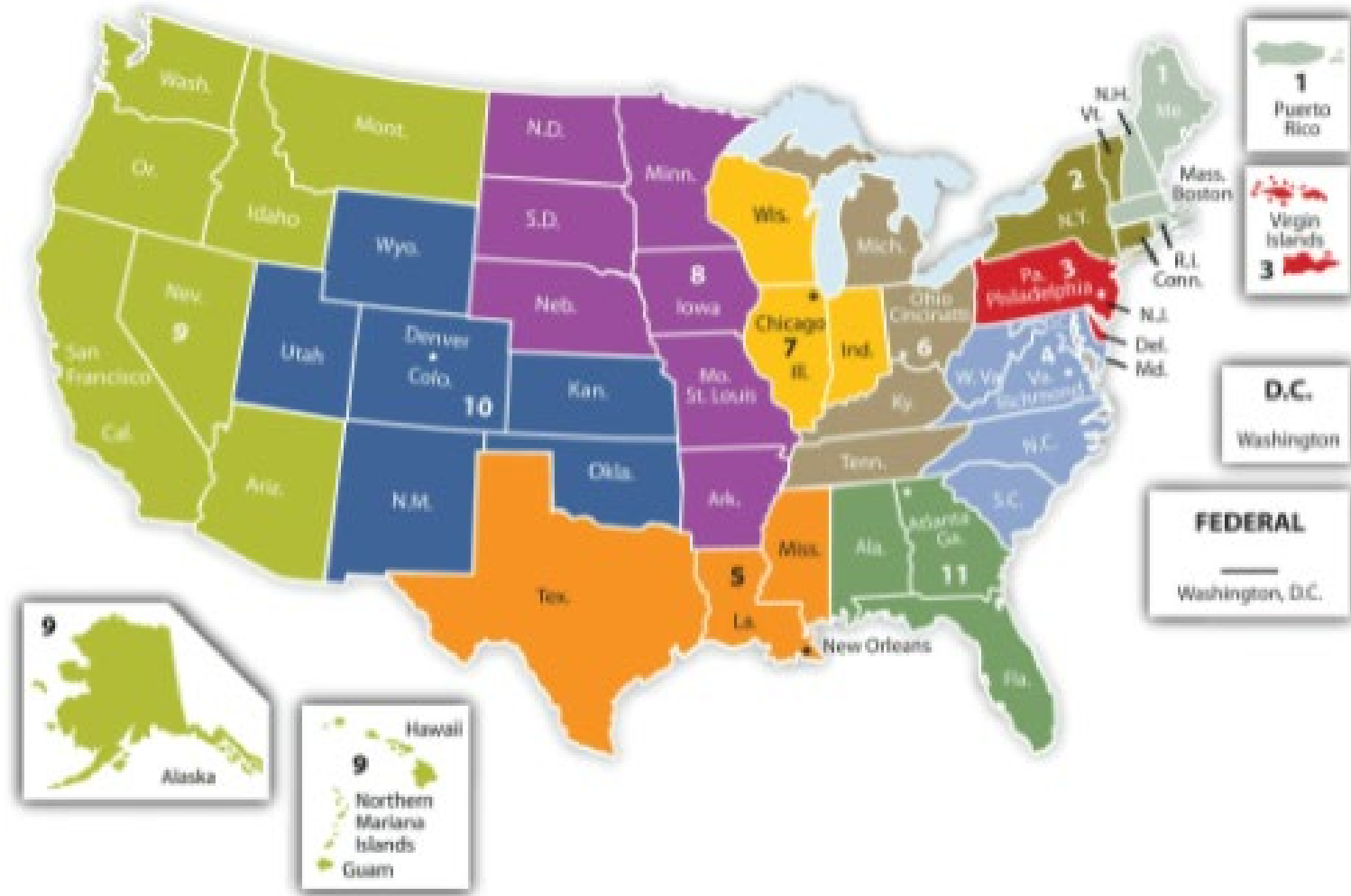
September 9, 2021

- Biden Administration announces its new COVID-19 Action Plan containing a 6-prong approach to combat the pandemic
- 3 components of the Action Plan's "vaccinate the unvaccinated" prong imposed new requirements on employers

November 4, 2021

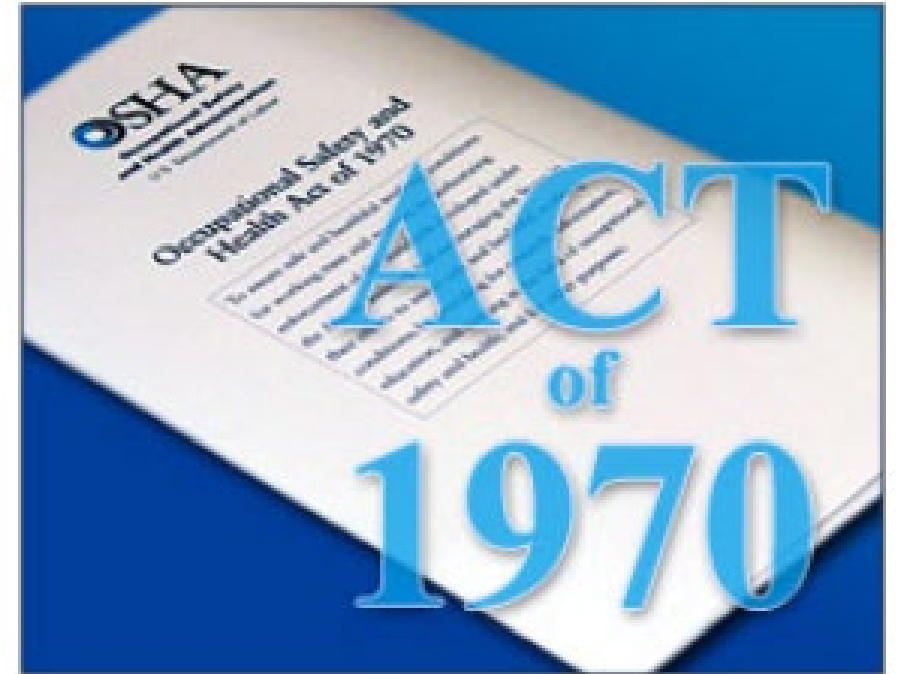
- OSHA releases its Emergency Temporary Standard (ETS)
- Included request for public input on whether scope of ETS should be expanded to cover employers with *fewer than* 100 employees

*Avalanche* of litigation immediately ensues across the country



# Authority

- OSH Act
  - Emergency Temporary Standard
    - “grave danger”
    - “from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.”
    - “necessary to protect employees from such danger.”
    - Effective for 6 months
  - OSHA already imposes one vaccination requirement on certain employers
    - Hepatitis B, but employee may decline.





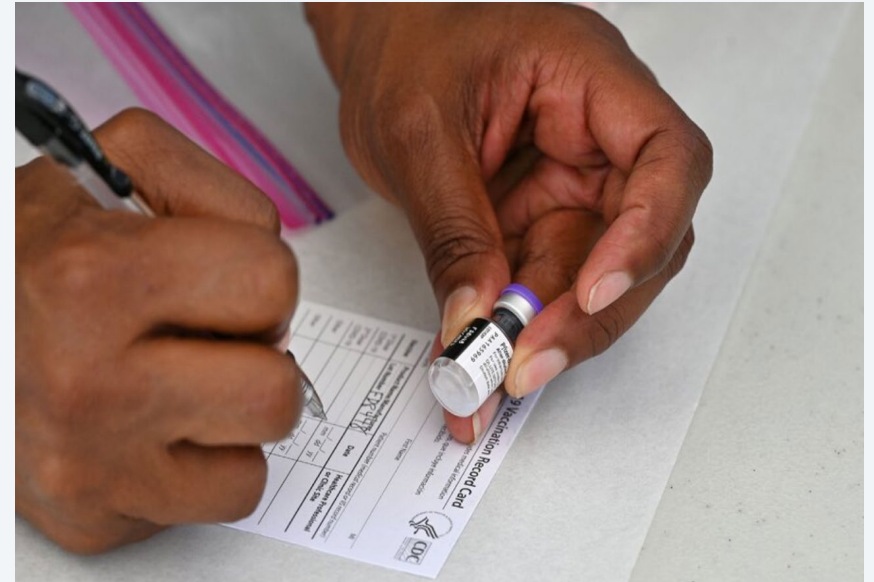


## *Back to the Litigation*

- 5th Circuit
  - 3-judge panel granted stay of ETS
  - There is “cause to believe there are grave statutory and constitutional issues with the [ETS].”
  - Government ordered to respond by 5:00 p.m. Monday, November 8, 2021

# White House Response

- **November 8, 2021**
  - “People should not wait . . . .They should continue to move forward and make sure they’re getting their workplace vaccinated”
  - 5<sup>th</sup> Circuit should lift the pause because pausing may “cost dozens or even hundreds of lives per day.”







# U.S. Department of Labor's Response

- 28 U.S.C. §2112
  - Multiple petitions for review of a single agency order
  - Lottery selection
- Tuesday, November 16, 2021
  - Anticipated date for selection of forum

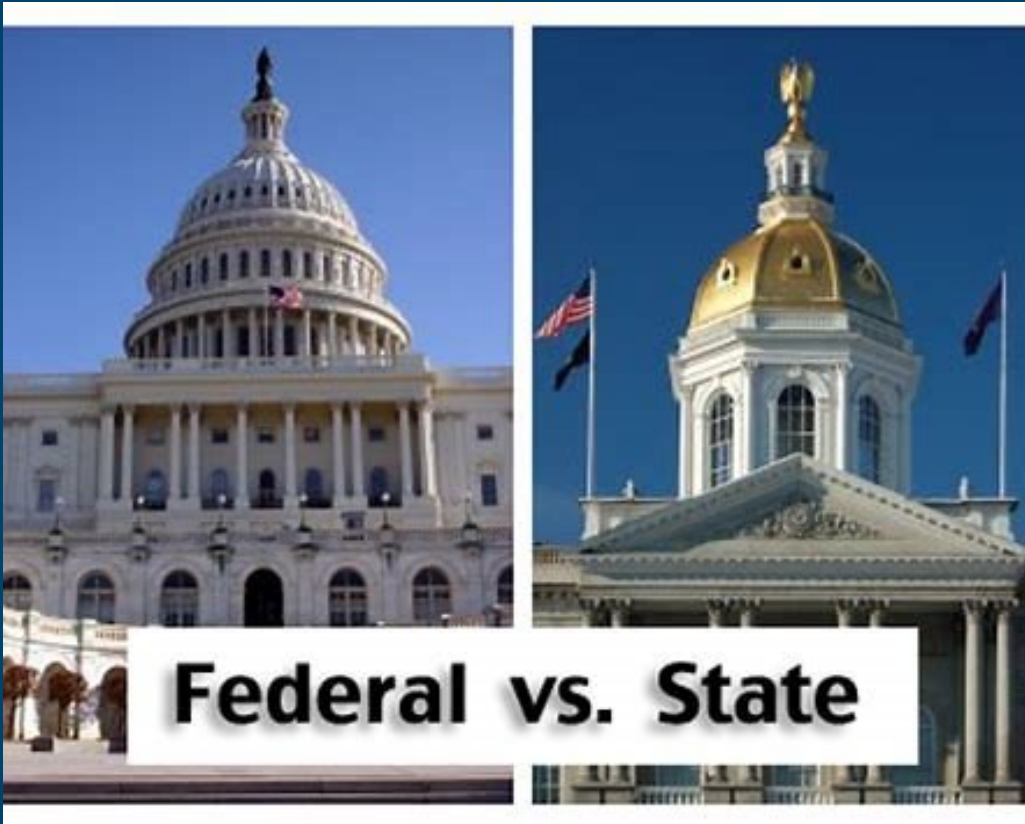


## Potential Arguments by Business

- Exceeds Executive Branch authority in Art. II and any purported delegation by Congress (Art. I) is unconstitutional
- ETS Option is rarely used and OSHA exceeded its authority
- Timing of ETS 2 years after pandemic began
- ETS for health care industry issued in June did not require a vaccination requirement
- ETS is both underinclusive and overinclusive







**Federal vs. State**

## Other Issues

- Preemption
  - Inconsistent state and local requirements preempted
- Collective bargaining agreements can contain terms that *exceed* OSHA requirements

# Understanding the ETS

- Covered Employers
  - All employers in all workplaces under OSHA's authority and jurisdiction
  - Employers that have at least 100 employees firm- or corporate-wide, at any time the ETS is in effect



# Understanding the ETS

- Workplaces NOT Covered
  - Workplaces covered by Guidance for Federal Contractors and Subcontractors; and
  - Workplaces covered by Healthcare ETS.





# Understanding the ETS

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- ETS does NOT apply to
  - Employees working entirely remotely (telework)
  - Employees who work exclusively outdoors
- *But . . .*
  - These employees count towards the 100 total



# Understanding the ETS

- ETS requires covered employers to:
  1. Develop, implement and enforce a mandatory COVID-19 vaccination policy; *or*
  2. Establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.
    - Employee must test weekly (if employee in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace at least once a week).
- Employer policy must be issued by December 4, 2021

## Mandatory Vaccination Policy Template

The OSHA COVID-19 Emergency Temporary Standard (ETS) on Vaccination and Testing generally requires employers to establish, implement, and enforce a written mandatory vaccination policy (29 CFR 1910.501(d)(1)).<sup>1</sup> Employers may use this template to develop a mandatory COVID-19 vaccination policy for their workplaces.

Employers using this template will need to customize areas marked with blue text and modify (change, add, or remove sections of) this document to accurately represent their policies. Text that is italicized is sample language employers may use when developing their policies; however, that text is not comprehensive and not all of that text will be applicable to all workplaces. Employers will need to add to or revise the italicized text to ensure the final policy matches the specific procedures that will be implemented in their workplaces.

Lastly, employers using this template should consider incorporating their policies and procedures for non-employees (e.g., visitors, customers) and for employees of other employers (e.g., contractor employees).

# Understanding the ETS

- Mandatory Vaccination Policy
  - Exempt
    - Employees for whom vaccination is medically contraindicated
    - Employees for whom medical necessity requires a delay in vaccination
    - Employees requiring reasonable accommodation
      - Disability
      - Sincerely-held religious beliefs, practices or observances
  - Not Exempt
    - Those with antibodies or natural immunity

**EXEMPT**



# Understanding the ETS

- Must require face coverings for those not vaccinated
- “Face covering” definition is rigorous



# OSHA Penalties

- 2021
  - \$13,653/violation
  - \$13,653/day for failure to abate
- “Build Back Better” Reconciliation bill
  - \$70,000/violation
  - \$70,000/day for failure to abate
  - \$700,000 for willful and repeated violations



# *Who pays for the testing?*

- Does not require employers to pay for testing costs, however. . .
  - “employer payment for testing may be required by other laws, regulations, or collective bargaining agreements . . . .”
- Pre-COVID EEOC Guidance on ADA
  - If employer requires employee to undergo medical test, employer must pay
- Fair Labor Standards Act
  - FLSA violation if cost of required medical test takes employee below minimum wage.
- State laws
  - Some states require employers to reimburse employees for all job-related expenses



# Understanding the ETS

- Determination of employee vaccination status
  - Record from health care provider or pharmacy
  - COVID-19 Vaccination Card
  - Medical Records
  - Similar official documentation
- *If none of the above:*
  - Signed and dated statement from employee, including declaration regarding possible criminal penalties

**COVID-19 Vaccination Record Card**

Please keep this record card, which includes medical information about the vaccines you have received.  
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.

Last Name \_\_\_\_\_ First Name \_\_\_\_\_  
Date of birth \_\_\_\_\_ Patient number (medical record or IIS record number) \_\_\_\_\_  
MI \_\_\_\_\_

Vaccine	Product Name/Manufacturer	Lot Number	Date
1 <sup>st</sup> Dose COVID-19			mm / dd / yy
2 <sup>nd</sup> Dose COVID-19			mm / dd / yy
Other			mm / dd / yy

Healthcare Professional or Clinic Site \_\_\_\_\_

*I declare that this statement about my vaccination status is true and correct. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to **criminal penalties**.*

# Understanding the ETS



- Covered employers must maintain a roster of each employee's vaccination status
  - Confidential medical record under OSHA and ADA

# Understanding the ETS

- Agriculture
  - Appropriations bills prohibit OSHA from enforcing any of its rules against agricultural operations with 10 or fewer employees and do not maintain a temporary labor camp.
  - But ETS expressly applies to:
    - Ag establishments with 11 or more employees engaged in hand-labor.
    - Ag establishments with temporary labor camps, regardless of number of employees.



*What type of  
COVID-19 testing is  
acceptable under  
the ETS?*



- Under the ETS, a “COVID-19 test” must be a test for SARS-CoV-2 that is:
  1. Cleared, approved, or authorized by the FDA to detect current infection with the SARS-CoV-2 virus;
  2. Administered in accordance with the authorized instructions; and
  3. Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

*We've already  
implemented a COVID  
vaccination policy?  
Does the ETS require  
us to issue a new one?*



- Not necessarily.
- The previously issued policy is satisfactory if it meets all of the requirements in the ETS.

*Can we have a policy that only mandates the vaccination for customer-facing positions, but the testing option for everyone else?*



- Yes.
- Employer may choose to require vaccination of only some subset of its employees (e.g., those working in stores), and to treat vaccination as optional for others (e.g., those who work from headquarters or who perform intermittent telework).
- This approach would comply with the standard so long as the employer complies with option 1 (mandatory vaccination) or option 2 (testing + face covering) for the respective groups.



*Can we require  
employees to use PTO  
to get vaccinated?*



- No.
- Employers must provide up to 4 hours of paid time, at the employee's regular rate of pay, for purposes of vaccination.
  - 4 hours/dose
- Cannot be offset by any other leave that the employee has accrued, such as sick leave, PTO or vacation.

*Do we have to keep  
copies of every  
COVID test result  
for unvaccinated  
employees?*



- Yes.
- Retention period
  - So long as the ETS remains in effect.

*I know we're going to screw this up—does OSHA at least take into account that we tried to comply before hammering us with a huge penalty?*



- OSHA claims they will take into account “good faith efforts” to comply
- Possible factors for good faith defense:
  1. Worksites where almost all workers are vaccinated, and the remaining unvaccinated workers have limited to no contact with others;
  2. Worksites with only a small portion of unvaccinated workers, when those who are unvaccinated have had the first dose and are scheduled to receive the final requisite dose;
  3. Establishments with high employee turnover rates, and where consistent efforts are made to ensure that new employees are promptly incorporated into the employer’s vaccination policy.

A circular frame containing a person's silhouette from behind, looking at a television screen. The screen displays a blue, noisy, static-like background with the words "STAY TUNED" in large, bold, black capital letters. The person is wearing a dark jacket. The entire scene is set against a light gray background with a red graphic element on the left.

**STAY TUNED**



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***How Can I Learn More?***