

# The Delta Variant: The Continued COVID Implications in Your Workplace

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# Agenda

- Employer Vaccine Mandates
- Required Vaccine Mandates
  - Federal Contractors
  - Anticipated CMS Regulations
  - Anticipated OSHA ETS for large employers
- OSHA Considerations
  - Current OSHA Healthcare ETS
  - Mask Mandates
- Other Considerations



# COVID-19 Vaccination Programs

What are employers permitted to do?

- May REQUIRE employees to be vaccinated
  - Accommodations and exceptions must be provided (e.g., disability, religious freedom)
    - Wearing a face mask;
    - Working at a social distance from coworkers or non-employees;
    - Working a modified shift;
    - Getting periodic tests for COVID-19;
    - Teleworking; or
    - Being reassigned

# COVID-19 Vaccination Programs

- May offer INCENTIVES for becoming vaccinated
  - If vaccine provided by employer, incentive must be “not so substantial as to be coercive”
  - If vaccine obtained in the community, no restriction on incentive
- Incentive examples:
  - Cash bonus or gift card
  - Additional PTO
  - Drawing/raffle



# Biden's COVID-19 Action Plan

New Biden administration vaccine mandate requirements:

- Federal employees and contractors
- Health care providers
- Private employers with 100 or more employees



# Federal Contractor Mandate

- Requires government contracts to include a clause stating that the contractor and any subcontractors must comply with all guidance for contractor/subcontractor workplaces published by the Safer Federal Workforce Task Force.
- COVID language must be included in all new solicitations starting Oct. 15, 2021, and in all new covered contracts starting Nov. 14, 2021.
- For existing covered contracts, COVID language must be incorporated whenever a contractual option is exercised or an extension is made.
- Applies to all procurement contracts or contract-like instruments

# Federal Contractor Mandate

- Compliance required for wide range of employees that perform work “in connection” with a covered contract
- Contains broad definition of “covered contractor workplace”
- Covered federal contractors and subcontractors must conform to the following safety protocols:
  - (1) COVID-19 vaccination of every covered contractor employee, except in limited circumstances;
  - (2) Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
  - (3) Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts



# Anticipated CMS Regulations

- Mandatory COVID-19 vaccination for staff within all Medicare and Medicaid-certified facilities
- Applies to all Medicare and Medicaid-certified facilities
- Interim Final Rule with Comment Period is expected to be announced this month



# Anticipated CMS Regulations

- Speculations
  - Tracking and reporting
  - Enforcement
- Preparation for compliance
  - Keep an eye out for the regulations
  - Review vaccination policies
  - Educate patients and staff about obtaining a COVID-19 vaccination
  - Education staff about vaccination requirements

# Anticipated OSHA ETS Regulations

- Anticipated new emergency temporary standard to require vaccination or weekly testing for employers with 100+ employees





# General Industry Employers

- For most employers, COVID is a general duty clause issue.
- OSHA issued guidance in early 2021 and continues to update the guidance.
- OSHA Emphasis Program
  - Target industries – Healthcare, retail, restaurants, food processing, grocery stores

# OSHA General Guidance

- Leave/Quarantine process
- Physical-distancing protocols
- Face coverings BUT be careful with face coverings (N95 issues)
- Educate and train employees on COVID
- Consider mandating masks for customers/visitors to provide protection for employees
- Have a cleaning protocol and perform cleaning/disinfection
- Maintain your ventilation systems and evaluate your ventilation overall

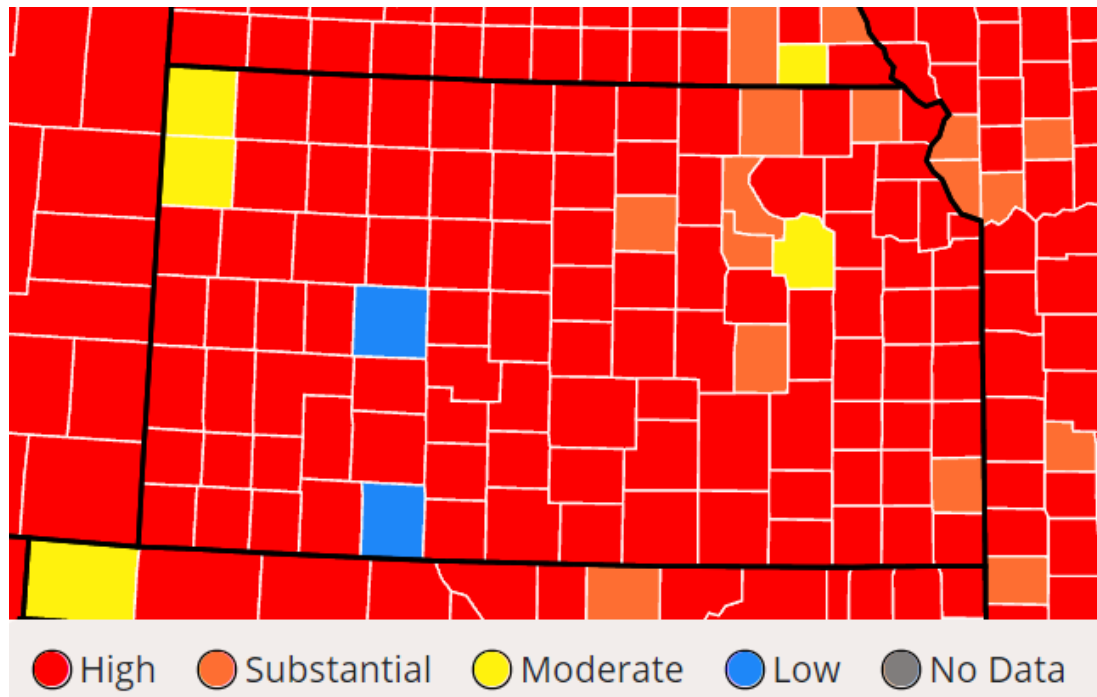


# Exemptions from OSHA

- Political subdivisions are exempt from OSHA when the organization:
  - Has been created directly by the State, so as to constitute a department or administrative arm of the government, or
  - Is administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate

# OSHA Updated Mask Guidance

- CDC guidance – fully vaccinated people must wear masks in public indoor settings if they are in locations with high or substantial COVID-19 transmission rates





# OSHA Emergency Temporary Standards (“ETS”)

- COVID-19 guidelines for healthcare settings
  - All settings where any employee provides healthcare services or healthcare support services
  - Includes hospital and ambulatory care facilities where suspected or confirmed COVID patients are treated
- COVID-19 plans that include:
  - Designation of a safety coordinator
  - A workplace-specific hazard assessment
  - Policies and procedures to minimize the risk of transmission of COVID-19 to employees

# COVID-19 ETS Policies Should Include Provisions For:

- Patient screening and management plans
- Standard and transmission-based precautions
- PPE
- Aerosol-generating procedures for those with COVID-19
- Physical distancing
- Physical barriers
- Cleaning and disinfection
- Ventilation
- Health screens and medical management
- Vaccinations
- Trainings
- Anti-retaliation policies
- Recordkeeping
- Reporting work-related COVID-19 fatalities and in-patient hospitalizations to OSHA

# ETS Exemptions

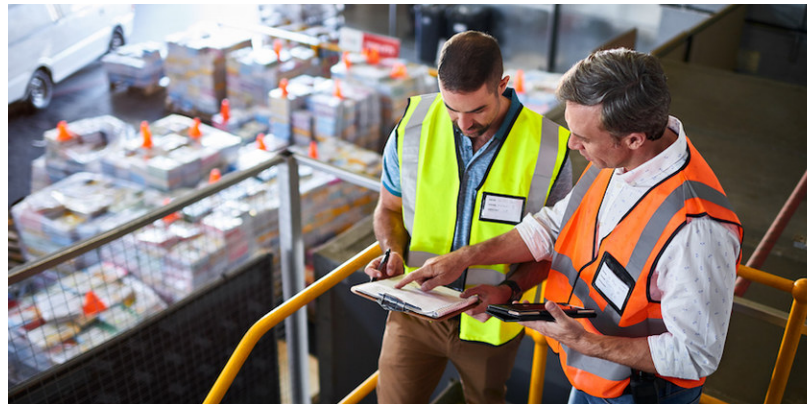
1. The provision of first-aid by an employee who is not a licensed healthcare provider
2. The dispensing of prescriptions by pharmacists in retail settings
  - Be careful, this is a narrow exemption
3. Non-hospital ambulatory care settings where all non-employees are screened prior to entry, and people with suspected or confirmed COVID–19 are not permitted to enter
4. Well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID–19 are not permitted to enter

# ETS Exemptions

5. Home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not present
  - There may be times that individuals in homes are not engaging in the provision of healthcare services.
6. Healthcare support services not performed in a healthcare setting (*e.g.*, off-site laundry)
  - Off-site is not well-defined
7. Telehealth services performed outside of a setting where direct patient care occurs

# OSHA ETS Enforcement

- Enforcement discretion for employers who are making a good-faith effort to comply
- General Duty Clause still applies even if ETS doesn't



# ETS Paid Leave Provisions

- Provide pay to employees mandated to quarantine
  - More than 500 employees – must pay the employee the same regular pay, up to \$1,400 per week, until the employee meets the return-to-work criteria
  - Fewer than 500 employees – Must pay the employee up to the \$1,400 per week cap but, beginning in the third week of an employee's removal, the amount can be reduced to two-thirds of the regular pay, with a maximum of \$200 per day
- Can be reduced by the amount of compensation that the employee receives from an employer-funded compensation program (e.g., paid sick leave, administrative leave)
- Provide reasonable time and paid leave to each employee for vaccination and any side effects experienced following vaccination



# Employee Testing

- Stay apprised of requirements from various health departments, CDC, CMS, local and state governments, etc.
- Different COVID-19 testing requirements for different types of facilities
  - Ex: Long-term care facilities
  - Recent CMS updates to staff and resident testing requirements following COVID-19 positive test from staff or resident depending on whether such individual can identify close contacts or not
  - Routine testing of staff to occur at intervals based on the level of community transmission
    - Varies from none to twice a week
    - Vaccinated staff do not need to be routinely tested
- What about religious/disability exemption requests?

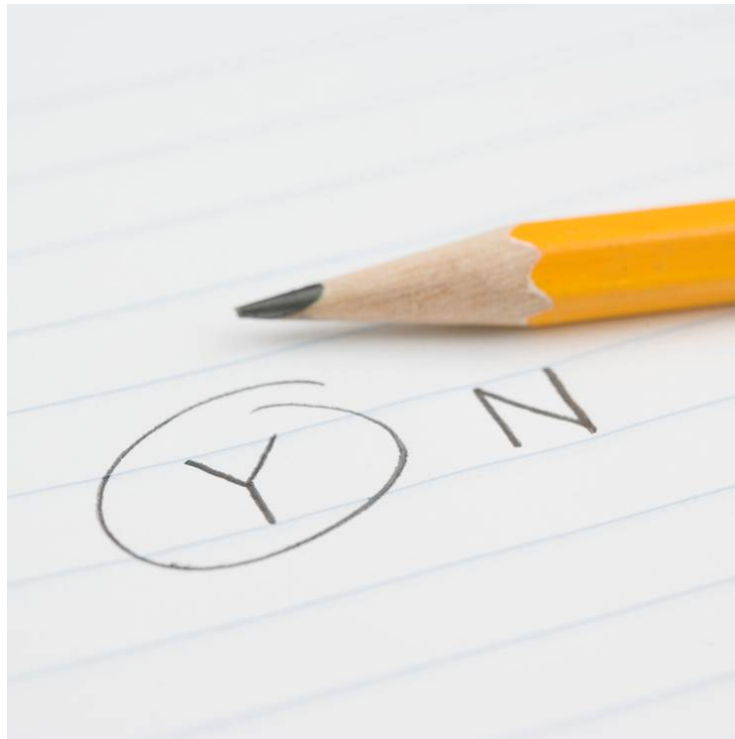


# Proof of Vaccination

- Yes, employers can require an employee to disclose whether they have received the COVID-19 vaccination
  - EEOC has clarified that is not a medical-related inquiry
  - Though, vaccination status is a confidential medical record
- Attestation by the employee
- Documentation
  - A copy of the record of immunization from a health care provider or pharmacy
  - A copy of the COVID-19 Vaccination Record Card
  - A copy of medical records documenting the vaccination
  - A copy of immunization records from a public health or State immunization information system, or
  - A copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine

# Hiring New Employees

- Job advertisement
- Job application
- Interview
- Post-offer



# Long-Haul COVID Patients

- People with “long COVID” have a range of new or ongoing symptoms that can last weeks or months after they are infected with the virus and that can worsen with physical or mental activity.
- DOJ and HHS recently issued guidance that “long COVID” can be a disability under the ADA if it substantially limits one or more major life activities.
  - Individualized assessment required to determine whether a person’s long COVID condition or any of its symptoms substantially limits a major life activity.
- These individuals are entitled to protections from discrimination and may be entitled to reasonable accommodations.

# Leaves of Absence COVID Policies

- Leave policies
  - Time off to receive COVID-19 vaccine and recover from any vaccine side effects
  - Time off for a close contact
  - Time off for a known or presumptive positive
- Paid or unpaid?
  - Distinguishing between vaccinated and unvaccinated
- Revising policies in preparation for mandates

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