

# Employers Receive Mixed Messages as Courts Review COVID-19 Vaccine Rules

Biden administration asked appeals court to lift hold on vaccine-or-testing directive

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**T**he federal government and some state leaders want to require certain workers to get vaccinated against the coronavirus (or at least test weekly for COVID-19), while other state leaders seek to ban such mandates or expand exemptions. Many employers are confused about how to move forward as courts consider legal challenges to various federal and state directives.

Although the federal vaccine-or-testing rule is on hold, the Biden administration has asked a federal appeals court to reinstate the requirement, and employers should note that many other directives remain in place.

We've gathered articles on the news from *SHRM Online* and other media outlets.

## OSHA Pauses Vaccine-or-Testing Rule

Businesses with at least 100 employees are covered by the Occupational Safety and Health Administration's (OSHA's) emergency temporary standard (ETS), which would require employers to prepare their COVID-19 vaccination policies and begin having unvaccinated employees wear masks by Dec 6. Covered businesses would also have to ensure that employees who are not fully vaccinated are also tested for COVID-19 at least weekly starting Jan. 4.

However, a federal circuit court stayed the rule while a legal challenge makes its way through the courts, and OSHA has taken some pressure off employers by suspending implementation and enforcement of the ETS.

For now, employers are not required to comply with the rule's deadlines. "However, employers should beware that this pause on implementation does not mean that the ETS has been struck down or that OSHA will rescind or decline to enforce it," according to law firm Dorsey.

OSHA stated it "remains confident in its authority to protect workers in emergencies."

Dorsey said, "Even with the legal challenges, covered employers would be wise to prepare required policies and practices, including the logistics of processing employee requests for medical and religious exemptions, even if those plans are then put on hold. Because a decision could be issued at any time, and the ETS is immediately enforceable, it is possible that employers will be required to comply with the ETS on a tight schedule."

(*SHRM Online* ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-december-deadline-ets.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-december-deadline-ets.aspx))) and (Dorsey (<https://www.dorsey.com/newsresources/publications/client-alerts/2021/11/oshas-covid-emergency-temporary-standard>))

### **Biden Administration Asks Court to Lift Stay**

On Nov. 23, the U.S. Department of Justice (DOJ) asked a federal appeals court to reinstate OSHA's ETS. "Delaying this standard would endanger many thousands of people and would likely cost many lives per day," according to DOJ documents filed with the court. "With the reopening of workplaces and the emergence of the highly transmissible delta variant, the threat to workers is ongoing and overwhelming."

(The Hill (<https://thehill.com/regulation/court-battles/582778-biden-administration-asks-court-to-revive-workplace-vaccine-mandate>))

### **States Challenge Federal Contractor Rules**

In guidance for federal contractors updated on Nov. 10, the Safer Federal Workforce Task Force clarified that covered contractor employees must be fully vaccinated no later than Jan. 18, 2022.

This requirement is not affected by the block of the emergency temporary standard, but several state attorneys general are challenging this federal directive, too. The challenge faces an uphill battle, however, because the federal government has a long history of attaching specific conditions to federal contracts. Arizona's attorney general, who is a plaintiff in the case, called the lawsuit a "long shot" (<https://www.bloomberg.com/news/articles/2021-09-16/arizona-ag-admits-suit-over-biden-vaccine-rules-is-a-long-shot>) but maintained that he was fighting for "important principles."

While litigation ensues, covered federal contractors are left working to satisfy the vaccination requirements because testing in lieu of vaccinations isn't an option for them.

(Bloomberg Law (<https://news.bloomberglaw.com/daily-labor-report/why-contractor-vaccine-mandate-is-tough-to-challenge-in-court>)) and (*SHRM Online* ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-federal-contractor-employees-must-be-fully-vaccinated.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-federal-contractor-employees-must-be-fully-vaccinated.aspx)))

### **Judge Denies Florida's Request to Block Health Care Vaccine Rule**

Another directive from the Biden administration requires certain health care employees to get vaccinated if they work for Medicare- and Medicaid-certified providers and suppliers. On Nov. 20, a federal judge in Florida denied a request from state leaders to temporarily block the rule. U.S. District Judge Casey Rodgers said that Florida didn't show "that irreparable injury will occur " if the mandate takes effect in December as planned.

(CNN (<https://www.cnn.com/2021/11/22/politics/florida-biden-hhs-vaccine-mandate/index.html>))

### **Some States Ban Vaccine Mandates or Expand Exemptions**

Some states, including Alabama, Florida, Iowa and Tennessee, have passed laws to ban COVID-19 vaccination requirements or expand exemptions. For instance, Tennessee's legislation prohibits many employers in the state from requiring employees, job applicants and customers to show proof of vaccination. Alabama's law requires employers to allow for more exemptions to vaccination directives than federal laws allow.

(McGuireWoods (<https://www.mcguirewoods.com/client-resources/Alerts/2021/11/new-tennessee-alabama-laws-restrict-employer-covid-19-vaccination-mandates>))

### **Police and Firefighter Unions Challenge City Mandates**

Police and firefighter unions in Chicago, Los Angeles and New York City have filed lawsuits challenging their respective city's ordinance requiring municipal workers to get vaccinated against the coronavirus.

"Vaccinations are critical to combating the COVID-19 pandemic," said Melanie Hartzog, New York City's deputy mayor for health and human services. "This mandate is a bold step that protects our families, friends and communities, including those that are not yet eligible for the vaccine, such as our city's youngest residents."

Pat Lynch, president of the New York City Police Benevolent Association, said the city's hard deadline "sets the city up for a real crisis." A Staten Island judge, however, refused to temporarily block the vaccination mandate before it took effect.

(*Chicago Sun-Times* (<https://chicago.suntimes.com/city-hall/2021/11/22757414/chicago-covid-vaccine-mandate-police-union>)), (*Los Angeles Times* (<https://www.latimes.com/california/story/2021-10-29/los-angeles-police-union-sues-city-over-rollout-of-covid-19-vaccination-mandate>)) and (Associated Press (<https://apnews.com/article/coronavirus-pandemic-health-police-new-york-new-york-city-52cc12e52d33f664e8e144aa59436590>))

### **Court Upholds Airlines' COVID-19 Vaccination Policy**

While the federal directive for private businesses has been temporarily blocked, courts have generally upheld employer mandates. A judge from the U.S. District for the Northern District of Texas refused to block a COVID-19 vaccination mandate for Southwest Airlines pilots ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/judge-allows-southwest-to-mandate-covid-19-vaccination-for-pilots.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/judge-allows-southwest-to-mandate-covid-19-vaccination-for-pilots.aspx)) despite their labor union's claim that the policy had to be negotiated pursuant to a collective bargaining agreement.

Another judge from the same court upheld a United Airlines policy that requires workers to be vaccinated against COVID-19 or placed on unpaid leave if they have a medical or religious exemption.

(*SHRM Online* ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-united-airlines-vaccination-policy-upheld.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-united-airlines-vaccination-policy-upheld.aspx)))

### **Can a Worker Refuse to Get Vaccinated?**

The Equal Employment Opportunity Commission has periodically updated its guidance in response to workplace vaccination questions (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>). Significantly, the agency said that the federal anti-discrimination laws it enforces don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated against COVID-19. Employers that encourage or require vaccinations, however, must consider reasonable accommodations when employees refuse to get vaccinated for medical reasons, including pregnancy-related reasons ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/making-pregnancy-related-accommodations-under-covid-19-vaccine-policies.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/making-pregnancy-related-accommodations-under-covid-19-vaccine-policies.aspx)), or based on sincerely held religious beliefs, unless an accommodation would cause undue hardship for the business.

(*SHRM Online* ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx)))

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