

Business Better (Season 2, Episode 4): Federal Vaccine Mandates: What's Next for Employers?

Speakers: Brian Pedrow, Shannon Farmer, and Lila Sevener

Steve Burkhart:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, Steve Burkhart. After a long career at global consumer products company BIC, where I served as Vice President of Administration, General Counsel, and Secretary, I'm now of counsel in the Litigation Department of Ballard Spahr, a law firm with clients across industries and throughout the country.

Steve Burkhart:

In today's episode, our Ballard lawyers provide an update on the current status of the federal COVID-19 vaccine mandate, and the steps employers should be taking as a result of the recent changes. Leading this discussion is Lila Sevener, an associate in Ballard's Philadelphia office. With Lila are Brian Pedrow and Shannon Farmer, both of whom are partners in Ballard's Philadelphia office. Lila, Brian, and Shannon all focus on representing employers in the labor and employment litigation and investigations and counseling them on employment policies and practices. With that, I'll turn the episode over to Lila Sevener to kick off the discussion with Brian and Shannon.

Lila Sevener:

Thank you for joining us today for this podcast on the latest on federal vaccine mandates and what comes next for employers. My name is Lila Sevener, and I'm joined by two colleagues, Brian Pedrow and Shannon Farmer, who will introduce themselves.

Brian Pedrow:

Hello. I'm Brian Pedrow, a partner in the Labor and Employment Group at Ballard.

Shannon Farmer:

I'm Shannon Farmer, also a partner in the Labor and Employment Group at Ballard.

Lila Sevener:

On today's podcast, we plan to update you on the current status of the patchwork of federal vaccine mandates, from OSHA to CMS to the Federal Contractor Executive Order, and where each stands from a legal perspective. Also, given the various court decisions impacting the viability of these federal initiatives, many employers are contemplating what steps to take now, which we will discuss on this podcast. Let's start with the discussion of the OSHA Emergency Temporary Standard, or ETS, for large employers. Before we talk about the current status of this standard, Shannon can you remind us who the standard applied to and what it required?

Shannon Farmer:

Absolutely. It would've required employers to choose between a vaccine mandate or to require unvaccinated employees to test on a weekly basis. And it applied to private employers with 100 or more employees.

Lila Sevener:

And what is the current status?

Shannon Farmer:

A stay was issued before the rule ever took effect and the legal challenges to the rule were consolidated before the Sixth Circuit Court of Appeals. The Sixth Circuit lifted the stay in mid-December, meaning that OSHA could proceed with ramping up for enforcement. However, on January 13th, days before OSHA's new enforcement deadline, the US Supreme Court stayed the rule again pending disposition of the petitions for review in the Sixth Circuit and disposition of the applicant's petitions for writs of certiorari if timely sought.

Shannon Farmer:

The Supreme Court found that the standard exceeded OSHA's authority under the Occupational Safety and Health Act. That's the act that governs OSHA. Specifically, the court found that COVID-19 is not a hazard limited to the workplace and OSHA's authority is limited to workplace safety. Interestingly, although the court found that the standard was too broad, they stated that OSHA does have the authority to regulate occupation-specific risks related to COVID-19 where the virus poses a special danger because of the particular features of an employee's job or workplace if OSHA decides to come back with a modified standard in the future.

Lila Sevener:

So Brian, what is the next step for the standard?

Brian Pedrow:

Good question. And one for which it is not entirely clear what the answer is. OSHA announced on January 25th, a couple weeks after the Supreme Court decision, that it is withdrawing the vaccine or test rule as an Emergency Temporary Standard effective the next day, January 26th. The agency wrote on its website that it's not withdrawing the ETS as a proposed rule and is "prioritizing its resources to focus on finalizing a permanent COVID-19 healthcare standard."

Lila Sevener:

So what does this mean for employers?

Brian Pedrow:

It's not entirely clear what this means for future rulemaking in this area. The ETS still exists as a proposed OSHA regulation, and the comment period closed back in early December 2021. But we can expect additional legal challenges if OSHA attempts to simply convert the ETS into a final regulation. OSHA could modify the ETS to focus more narrowly on higher-risk industries or workplaces as the Supreme Court suggested. And OSHA's top priority in terms of rulemaking seems to be the healthcare industry.

Brian Pedrow:

However, even though OSHA withdrew the ETS, OSHA has indicated that it still intends to vigorously enforce workplace safety rules and use the agency's authority under the General Duty Clause of the Occupational Safety and Health Act. Labor Secretary Marty Walsh stated that employers are responsible for the safety of their workers on the job and that regardless of the ultimate outcome of the litigation involving the ETS, OSHA will do everything in its existing authority to hold businesses accountable for protecting their workers, including under the COVID-19 National Emphasis Program and the General Duty Clause.

Brian Pedrow:

So what this means is that all employers under OSHA's authority, no matter the number of employees really, have a duty under the General Duty Clause to provide a work environment that is free from recognized hazards that are causing or likely to cause death or serious physical harm, including COVID-19, or if they don't, they risk being cited by OSHA.

Lila Sevener:

So Shannon, what steps can employers take to ensure a safe and healthy workplace?

Shannon Farmer:

Employers need to do what they've been doing throughout these now almost two years of the pandemic. That means evaluating their workplace and consider what is the best approach to mitigate the risk posed by COVID-19 while also taking into account ongoing state and local mandates and local orders that vary over time and with the latest surges. Some employers may still opt for a vaccine mandate. Others may opt for a vax or test approach. Yet others may reject both approaches and continue with health and safety protocols designed to minimize the risk of workplace infection, such as masking, social distancing, environmental barriers, and similar approaches.

Shannon Farmer:

On the issue of vaccines, for those who do opt for a vaccine policy, remember that the law requires accommodations for sincerely held religious beliefs and disabilities or medical conditions that prevent an individual from being able to get a vaccine. So you have to have a process that allows people to request and evaluate those accommodations. Also remember to check state and local rules. The federal OSH rule would have preempted any conflicting state or local rules, but now that the ETS has been withdrawn employers have to be sure they maintain compliance with these rules. And keep in mind also that the OSHA ETS and any OSHA rule only apply in those states that are governed by OSHA. There are a number of states who have their own state OSHAs that apply instead, many which follow OSHA but not always exactly. And some impose additional requirements, even through their state OSHA statutes.

Shannon Farmer:

For those employers who incorporate some sort of testing into their policy, consider who will pay for the testing and how will testing time be treated for non-exempt employees. How will the testing be administered? Is it going to be employees doing it on their own, or are you going to do it on site? And what steps will be in place to maintain the confidentiality of medical records?

Shannon Farmer:

Keep in mind on the testing piece, that under the OSHA ETS it specifically provided that employers were not required to pay for the testing, although they could choose to do so. And there were arguments to be made that these were not tests being required by the employer. However, in the absence of the ETS, this is likely to be considered a medical exam required by an employer. And under case law and DOL guidance that predates the pandemic, generally medical exams that are required by an employer have to be treated as compensable time and employers may be required to pay for both the testing time and the cost of the testing. Additionally, state laws may impact that as well.

Shannon Farmer:

And the records that are being maintained for the testing, those are going to be confidential medical records under the ADA. So you're going to have to keep those confidential, separate from personnel files, and limit access to them.

Shannon Farmer:

So there's a lot for employers to keep in mind as you're trying to develop your own testing program if you haven't done one already. However you go, if you do decide to adopt a vaccine or testing program, the OSHA model policies may provide a useful framework and starting point for creating your own policy. It seems clear that following one of the OSHA-sanctioned approaches would be deemed adequate from OSHA's perspective under the General Duty Clause.

Lila Sevener:

So Brian, how does the invalidation and withdrawal of the OSHA ETS impact employers with unions?

Brian Pedrow:

The bottom line is it likely expands the duty to bargain with unions over these issues. When OSHA issued the ETS, the National Labor Relations Board issued a memorandum, OM22-03, that addressed employers duty to bargain with unions over the OSHA ETS rule. The NLRB in that memo took the position that where employers had room to make decisions within the ETS, they would have a bargaining obligation over those decisions. So in essence, where the ETS mandated certain actions, there was not a duty to bargain. But where the ETS left aspects to the employer's discretion, there may be a duty to bargain, unless, of course, the bargaining agreement in question confers the right to act unilaterally per the Board's decision in MV Transportation. It should be noted though, that that 2019 decision is subject to change under the Biden Labor Board.

Brian Pedrow:

Now that the vaccine or test rule from OSHA is not mandatory, the NLRB will almost certainly take the view that employers have to bargain with unions over a lot more aspects of any vaccine or testing requirements given that they are no longer federally mandated. In other words, it's all left to the employer's discretion at this point.

Lila Sevener:

That's great advice. Thank you. Now, I understand that the OSHA ETS was not the only federal rule or mandate that has faced legal challenges. Brian, can you remind us about the federal contractor mandates?

Brian Pedrow:

Sure. Let me start with a little bit of history, Lila, on this federal mandate. The Federal Contractor Executive Order was signed on September 9, 2021. So it's been around for about six months now. In early October, the FAR Council issued guidance and a clause to incorporate the requirement into covered contracts. The guidance required covered federal contractors to mandate vaccination of contractor employees subject to the rule. Unlike the ETS, no testing option was made available. Covered employees must be vaccinated unless they're entitled to a medical or religious exemption, and employees who are entitled to an exemption should be accommodated. But the rule doesn't specify what that accommodation needs to be.

Brian Pedrow:

The guidance also addressed compliance with masking and physical distancing based on the levels of transmission in the area at the time. And the guidance required the designation of a person to coordinate COVID-19 workplace safety.

Lila Sevener:

Okay. So what is the current status? Shannon, do you want to update us?

Shannon Farmer:

On December 7th, the Southern District of Georgia issued a nationwide injunction of the rule. On December 17th, the 11th Circuit upheld that injunction. So as of now, the rule remains stayed, although additional litigation is almost certain.

Lila Sevener:

Okay. So next, let's turn to healthcare providers. Shannon, what requirements do we need to think about for them?

Shannon Farmer:

So we have two different rules that can impact healthcare providers. We have an OSHA ETS that was specific to healthcare workers, and we have the Centers for Medicaid and Medicare Services Regulation. We'll refer to that as CMS.

Shannon Farmer:

The OSHA Healthcare ETS was aimed at protecting workers in settings where they provide healthcare or healthcare support services. It was issued in June of 2021, but it expired six months later in December of 2021. OSHA announced on December 27th that it plans to develop a permanent standard rather than the Emergency Temporary Standard, which has now expired. The significant of that is that it's going to place permanent responsibilities on covered employers as opposed to an Emergency Temporary Standard, which also has different legal thresholds for when OSHA can do that.

Shannon Farmer:

OSHA has estimated that it will take six to nine months for them to issue the permanent rule. In the meantime, OSHA is continuing to enforce the COVID-19 log and reporting provisions, but it has withdrawn the non-recordkeeping proportions of the healthcare ETS.

Shannon Farmer:

OSHA has stated that it will vigorously enforce the General Duty Clause and its general standards, including the personal protective equipment, PPE, and respiratory protection standards while OSHA works towards a final rule. Notably, OSHA stated that it will accept compliance with the terms of the healthcare ETS as satisfying employers obligations under the General Duty Clause, respiratory protection, and PPE standards.

Shannon Farmer:

So my advice to my clients who've been covered by the OSHA Healthcare ETS is while it has lapsed, backing off of the plans that they had to adopt under that program may be seen by OSHA as not being fully compliant even under the General Duty Clause. And my recommendation generally has been to keep with the same COVID protection programs that were required by the Healthcare ETS in this interim as a safeguard against OSHA actions, finding that the employer has not done enough to protect personnel who because of their jobs are considered to be at high risk.

Shannon Farmer:

Now, it's important to note that a coalition of labor unions has challenged OSHA's decision to let the Healthcare ETS lapse. The United States Court of Appeals for the District of Columbia Circuit recently announced that the challenge will be submitted to a merits panel. That means there's going to be argument, and we expect there to be a decision on whether OSHA had the authority to let it lapse, as opposed to just a procedural ruling. The unions are seeking to have OSHA reinstate the emergency rule and more quickly issue a permanent one.

Lila Sevener:

Brian, can you remind us about the CMS rule and its status? I understand that it too has faced legal challenges.

Brian Pedrow:

Indeed, it has. The CMS rule requires a broad swath of people providing in-person services at 21 categories of healthcare facilities to be vaccinated. Covered individuals include not just employees, but students, volunteers and trainees, non-employee providers and even contractors who regularly perform services on the covered premises. CMS estimates the rule covers some 10.4 million healthcare workers in 76,000 facilities across the United States.

Brian Pedrow:

Like the federal contractor mandate, there is no opt-out provision for testing. In fact, the CMS rule makes clear that covered entities can only grant religious and medical exemptions when required by federal, state, or local law. The rule was initially enjoined by more than one court, but the injunctions ultimately only covered about half the states in the US, leaving CMS with plans to move forward with enforcement in the remaining states starting this month.

Brian Pedrow:

However, on January 13th, the same day that the Supreme Court decided the OSHA ETS case, the court also upheld the CMS rule, finding that CMS, unlike OSHA, in fact did have the authority to promulgate the rule. As a result, the court lifted the injunctions and today the rule is in effect nationwide. Key to the court's decision was its finding that the federal government properly determined a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. And that a vaccine mandate is necessary to promote and protect patient health and safety in the face of the ongoing pandemic. CMS now has issued a schedule for enforcement in the remaining states beginning later this month.

Lila Sevener:

Are there employers out there that may have some employees subject to the CMS rule and not others?

Shannon Farmer:

Absolutely. In fact, there are some employers with portions of their staff may be subject to the CMS rule, portions covered by the federal contractor mandate, if it takes effect, and portions now not covered by any federal government mandate with the OSHA ETS having been withdrawn.

Shannon Farmer:

In fact, some employers may have even this mix of employees in the same building or campus because they are specific to the type of work being performed. So for example, the CMS rule will affect hospital facilities, but not necessarily cover outpatient offices, doctors' offices, things like that.

Shannon Farmer:

Employers who have a mix of employees who are covered by the mandate and those that are not will want to think carefully about the best approach to take here. Imposing different policies on different employees could affect morale and also raise equity questions. There are also safety issues to be considered. And again, as we discussed earlier, vaccine or testing requirements may raise the duty to bargain for employees who are not subject to the CMS mandate. There are no easy answers for employers here.

Lila Sevener:

Are there other mandates that employers may have to worry about?

Shannon Farmer:

Yes. Some states and cities have passed their own vaccine mandates for certain industries or even widely. Some examples. The city of Philadelphia has been mandating vaccines for healthcare workers and university employees since the fall of 2021. The definition of healthcare workers is very broad and only employees with religious and medical accommodations can be exempted. For those who are exempt, they must mask and test regularly, either once or twice a week, depending on whether they're covered by the medical or university rule.

Shannon Farmer:

The states of New York and Maine have imposed their own vaccine mandates for healthcare workers, notably neither of them permit religious exemptions. And those rules have been challenged up to the US Supreme Court, who has refused to stay their implementation. The New York state one also now is going to require booster shots. And the city of New York has gone the furthest of any locale that I'm aware of, mandating vaccines for anyone who performs in-person work or interacts with the public.

Lila Sevener:

I think that gets us up to date on all of the current rules and standards. Brian, and any last advice?

Brian Pedrow:

Sure. Employers need to think about what is going to be the best approach to mitigate COVID-19 risks in their workplaces while also balancing the need to hire and retain workers, which has been no easy tight rope to walk these days.

Brian Pedrow:

If anyone needs assistance in preparing your COVID-19 policy, we can help. Reach out to your Ballard Spahr labor and employment lawyer, or to any of us on this podcast. We'd be happy to help you.

Lila Sevener:

Thank you for listening to our podcast. We hope this provided useful information as you attempt to navigate this rapidly changing legal landscape.

Steve Burkhart:

Thanks again to Lila Sevener, Brian Pedrow, and Shannon Farmer. Make sure to visit our website, www.ballardspahr.com where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.