

# Business Better (Season 1, Episode 49): The Patchwork of Federal Vaccine Mandates

Speakers: Brian Pedrow, Shannon Farmer, Jessica Federico, and John Wright

John Wright:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. After serving nearly 15 years as senior vice president and general counsel at Triad Group Incorporated, a Global Aerospace component supplier. I'm now a member of the Securities and M & A groups at Ballard Spahr, a national law firm with clients across industries and across the country. Today's episode features a discussion of the current array of federal COVID 19 vaccine mandates, their effectiveness and requirements, the scope of their coverage and what employers should consider in responding to them. Leading this discussion is Jessica Federico an associate at Ballard's Denver office. With Jessica are Brian Pedrow and Shannon Farmer. Both of whom are partners in Ballard's Philadelphia office. Jessica, Brian and Shannon, all focus on representing employers in labor and employment litigation and investigations and counseling them on employment policies and practices. So with that, I'll turn the episode over to Jessica Federico to kick up the discussion with Brian and Shannon.

Jessica Federico:

Thank you for joining us today for this podcast on the various new federal vaccine mandates. My name is Jessica Federico and I'm joined by two colleagues who I'll let introduce themselves.

Brian Pedrow:

Hello, I'm Brian Pedrow. I'm a partner in the labor and employment group at Ballard Spahr.

Shannon Farmer:

I'm Shannon Farmer. I'm also a partner in the labor and employment group at Ballard Spahr.

Jessica Federico:

And our goal on today's podcast is to introduce you to the current patchwork of federal vaccine mandates from OSHA to CMS, to the Federal Contractor Executive Order and where each stands from a legal perspective. So let's jump right in with the discussion of the OSHA Emergency Temporary Standard or ETS that applies for large employers. Before we talk about the potential vaccination or testing requirements. Shannon, can you explain where this rule stands? I understand that it's stalled.

Shannon Farmer:

Absolutely. So the Fifth Circuit granted a temporary stay of the rule on November 6th, which had then affirmed in a pretty strong opinion on November 12th. It directed OSHA to, quote, take no steps to implement or enforce the ETS until further court order. On the 16th of November, OSHA announced that it had suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation. And that's important because when the Fifth Circuit order was issued, some people had a question about whether it applied only in those states that are covered by the Fifth Circuit or whether it's a nationwide injunction. And every time we get an injunction to a federal rule like this, it's always a question about whether the court can go beyond its own jurisdiction. So OSHA made clear that it was treating it as a nationwide injunction. At the same time, we then had a lottery to determine which court of appeals was going to hear all of the cases that have been filed, challenging the ETS.

Shannon Farmer:

And there are dozens of them now and they were filed in 11, at least 11 Federal Circuits. So when that happens, there's a lottery to decide that one court is going to hear them all together. That lottery was held a few weeks ago and the Sixth Circuit won that lottery. Now we don't know when we're going to get a decision on the merits but last week, the Federal Government filed a motion with the Sixth Circuit, asking it to immediately lift the Fifth Circuits stay, arguing that OSHA properly determined that the virus causes employees to be, quote, exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards. And that language is important because that is what gives OSHA the authority to issue an emergency temporary standard.

Shannon Farmer:

Now on the same day that OSHA filed that motion with the Sixth Circuit, the court issued a briefing order on the motion to dissolve the stay with responses due on December 7th and replies to them due on December 10th. The important part of that is it means that the court does not appear to be inclined to issue any decision on the motion to lift the stay until after the first part of the rule was scheduled to go into effect on December 6th. And we know that there will be the potential and probably the likelihood for somebody to take this issue to the Supreme Court. So we've got a ways to go before we know what's going to happen with this ETS.

Jessica Federico:

So Brian, given what Shannon just explained, how should employers proceed?

Brian Pedrow:

What a great question, Jess and a question many employers are asking themselves right now. If I were to get out my crystal ball, there's a number of factors I'd see swirling around here. One is that a majority of the active judges on the Sixth Circuit are Republican appointees. So the odds are that if this case is heard by a three judge panel of active judges, it's going to be a conservative leaning panel, Democratic Presidents, Clinton and Obama appointed five of the 16 active judges on that circuit. Whereas Republican Presidents, George W. Bush and Donald Trump appointed the other 11. So that means there are about 70% Republican appointees on that court.

Brian Pedrow:

It's also possible the court will hear the case En banc, meaning that all 16 active judges that are sitting on that court will hear the case. On November 23rd, four separate groups of petitioners challenging the standard, including a coalition of 27 states, asked the court to hear the challenge En banc arguing that the case involves a question of exceptional importance in that it is an unprecedented mandate of COVID vaccines based on a rarely used law of questionable applicability to quote the actual petition.

Brian Pedrow:

Another factor swirling in my crystal ball is the fact that historically when challenged in court, OSHA hits about the 50% mark in terms of winning or losing. OSHA has issued 10 standards in the past 50 years that were subject to legal challenge, four of them were overturned and a fifth was partially vacated. So right now, if you go by those odds, it's about 50 50, the standard will be upheld versus vacated. So going back to your original question, it is difficult to predict how quickly OSHA will resume implementation and enforcement assuming the standard survives legal challenge. So employers with a hundred or more employees, who are not federal contractors or are otherwise subject to another federal vaccination mandate like the Center for Medicare and Medicaid Services Mandate, which we'll discuss in a moment, may very well wish to continue preparing so that they're ready to comply if in fact the standard is upheld.

Brian Pedrow:

I suspect if the standard is upheld, employers may not have the same lead in time, which was between 30 and 60 days that were provided in the initial release of the standard. This may be particularly true if the Omicron variant that has now made its appearance is as suspected, much more virulent than other variants have been. Don't forget that OSHA does have template policies available and other resources on their website to help you get ready to comply. While these templates are a starting point, they are not required to be used and we have been advising clients and helping them prepare what I think are better policies.

Jessica Federico:

So as you said, there are certainly lots of factors swirling around in your crystal ball but if employers are covered and they do want to prepare to comply, I understand employers can either establish a mandatory vaccination policy or implement a policy that requires either vaccination or testing and masking. What sorts of things should employers keep in mind as they're considering these options?

Brian Pedrow:

You're right, Jess, those are the basic two options under the OSHA ETS, as it exists today. And that's the threshold decision employers need to make, which way are you going to go with a mandatory vaccine policy or offering employees the alternative of being vaccinated or testing and masking up? As to the mandatory vaccine option, let's address that first. There are a number of issues employers will need to consider. One of them is how to handle the issue of compensable time for the vaccine. The OSHA ETS does require employers to provide up to four hours of paid time to get the primary vaccination dose or doses. In addition to that, employers have to provide a reasonable amount of time to recover from the side effects of a vaccine, if there are any and OSHA has said, that must be at least two days.

Brian Pedrow:

For the latter side effects leave employers can require employees to use accrued paid sick leave but not any as yet unaccrued time. So step one is employers have to adopt a vaccination leave policy as part of their overall policy that complies with the ETS. Another big issue to consider is how to deal with potential exemptions. The standard does recognize vaccine exemptions under the Americans with disabilities act such as allergy or other chronic conditions and perhaps even pregnancy or under title seven for sincerely held religious beliefs. Employers need to develop policies and procedures to address these exemption issues.

Brian Pedrow:

Keeping in mind that the interactive process is as important or maybe even more important than the final outcome of that process. Accommodations, according to OSHA, that might be relevant here, include things like remote work, additional protective equipment in the workplace or other safety protocols, staggering start times for employees and of course, testing and masking. If an employer's going to allow unvaccinated individuals to enter the works base, such as those who are subject to an exemption, then it does have to address the testing and masking requirements of OSHA's ETS. But, I'll turn it over to Shannon to discuss those issues and the alternative approach to mandating just the vaccine.

Shannon Farmer:

Great, thanks Brian. So if somebody is going to have a vax test role, what you have to do there is you're going to have to require that people test at least every seven days when they are entering the workplace and provide documentation of that. So a couple of questions that a lot of employers are asking is, do we have to pay for the test? And what about the time spent testing? The ETS does not require employers to pay the cost of testing for employees who choose not to be vaccinated. However, I will say that a lot of my clients are thinking about doing that because if the ETS goes into effect and they choose a vax or test option, employers are worth that if employees don't get on the ball to get these tests in every week, they can't let

people come to work. So given the tight labor market, a number of employers are saying, "We are going to make arrangements for onsite testing. We're going to pay for the cost of testing."

Shannon Farmer:

Or other things to make it easier, just to make sure that they have enough of a work force come to work everyday. Even if you're thinking about not paying for the cost of testing, you want to make sure that you look at any state law requirements. Also keep in mind that if testing is an accommodation that you're offering as an alternative to vaccination, for example, if you've got a mandate in effect, then you likely do have to pay for the cost of testing because it is part of the accommodation and it's being required there as part of the accommodation, as opposed to OSHA's formulation of either the vac or test option, it's the employee's choice to test instead of being vaccinated. The second question that comes up is do you have to spend for the time, pay for the time that people spend getting tested?

Shannon Farmer:

It is not entirely clear. I think it is very clear that if you are providing testing as an accommodation, then you need to spend that time. The EEOC has taken that position. The Department of Labor also has in non COVID related prior guidance about required medical exams. However, if you are in fact not requiring the testing and it's again, employee choice, then there is certainly an argument to be spent that the time spent testing is not compensable but I am certain that we will see lawsuits about it just as we have a number of lawsuits about things, for example, like employee screening. And also here, we especially want to keep in mind state laws, where a lot of, for example, the screening, whether that's bag screening, security screening, we've already got cases that have found that time compensable and keep in mind, especially if you're doing it on the work site that may affect the compensability of the time as well. So build that into your plan, if you're doing it.

Shannon Farmer:

In addition, employers need to just think about the administrative aspects of all of this. You've got to retain the records of all of these testing in a confidential manner, like any other medical record. Now, interestingly, OSHA did say that they have to be kept confidential but you don't have to treat them under the normal 30 year rule that OSHA has for records related to an OSHA incident but it's not only for the duration of the ETS. We should at the very least we need to be following the ADA medical record rule, which is at least a year. And I would suggest they're probably going to fall under the default, unless we get more guidance on it, the five year rule. So you have to think about the administrative burden.

Shannon Farmer:

How are you getting these test results to you? How are you keeping them and making sure that they're secure? We've got to create a roster of each person's vaccination status and their testing records. This is all subject to inspection and OSHA and particularly if you're in an industry or OSHA shows up to inspect regularly, you now have to think about being able to produce these records as well in addition to any other records OSHA may show up and want to inspect. And then making sure that you're reporting any fatalities or inpatient hospitalizations related to COVID, particularly if you've made that determination that this is a potential for a work related exposure because those existing OSHA rules didn't go out the window because of that.

Jessica Federico:

That's great advice. Thank you to you both. Now, setting aside the OSHA ETS, I know there have been some recent action as to federal contractors but Shannon, wasn't the federal contractor guidance issued a while ago? Is there something new that we should be aware of?

Shannon Farmer:

So the rules didn't change but the timing did. The compliance date was pushed back from December 8th to January 4th, so that it would line up with what was supposed to be the effective date of the vaccination or testing requirement of the ETS and

also of the CMS rule, which we'll talk about in a few minutes. So the Executive Order for Federal Contractors was originally signed in September to follow COVID workplace safety protocols. Now that didn't even mention specifically vaccination, it just talked about COVID workplace safety protocols but everybody believed that, that was the implication of it. Ultimately then the council that does the federal contracting requirements known as the FAR Council was directed to issue guidance and clauses to incorporate the provision into covered contracts by October 8th, that actually happened in advance. And what ultimately was issued is vaccination of covered contractor employees. Now, note, this is not a vaccine or test rule.

Shannon Farmer:

If you are covered by it, they must be vaccinated unless they're entitled to a medical or religious exemption. Employees who are entitled to an exemption should be accommodated but unlike the ETS, the rule doesn't specify what the accommodation should be. Testing is not required for UN vaccinated employees specifically, it's up to the employer to determine the accommodation. There's also a requirement to comply with masking and physical distancing with the level depending on the area of transmission, I'm sorry, with the transmission rates in the local area. And you also have to designate a person to coordinate the COVID 19 workplace safety plan.

Jessica Federico:

Okay, so let's say I'm a federal contractor. I assume these rules apply to me.

Brian Pedrow:

Well, it depends. And it depends on a number of factors, including the type of federal contract you have and the type of worker that you are for that contractor. The scope of coverage is actually narrower than what we were initially hearing in the media. The federal contract requirements do not apply to an organization unless the FAR clause, the Federal Acquisition Regulation clause is incorporated into a covered contract and also it only covers new contracts, which include new solicitations, extensions or renewals of an existing contract and exercise of an option on an existing contract. But once you have a covered contract, the definition of who among your employees is a covered worker is quite broad.

Brian Pedrow:

It's going to cover those working directly on the contract, of course but it also covers those working in connection with the contract, which includes certain overhead employees like human resources, billing and legal. It also covers remote workers. They're subject to the vaccine requirements but not the masking or physical distancing requirements. And finally, it also covers employees working at a covered contractor workplace, even if they're not working on or in connection with the covered contract. And this could include, for example, certain employees of a covered contractor who work at affiliate locations.

Jessica Federico:

Brian, can you expand on the important dates that I should be keeping in mind if I'm a covered federal contractor?

Brian Pedrow:

You bet. As of November the 14th, the FAR clause was to be included in all new contracts, the Safer Federal Workforce Task Force issued updated guidance on November the 10th, confirming that the date a covered employee has to be fully vaccinated is January the 18th, 2022, which is exactly 14 days after the new effective date of January 4th. Covered employers also should comply with CDCs masking and social distancing requirements and designate a COVID 19 coordinator immediately. And it's also worth noting that the FAR Council recommended but did not require including the FAR clause in contracts that are beyond the scope of the executive order, like supply contracts. These changes are supposed to be bilateral but it seems so far that the agencies are trying to strong arm non-covered contractors into compliance.

Jessica Federico:

So we've now talked about the OSHA ETS and this federal contractor rule but what happens if I'm covered by more than one rule?

Shannon Farmer:

The ETS does not apply to workplaces, subject to the Federal Contractor Mandate. However, it's not really that simple because if you have numerous workplaces across the US and only portion are covered by the Federal Contractor Mandate or in, and you have more than a hundred employees, then the ETS will bridge the gap. In addition, even if you only have a single workplace but maybe it's a campus with multiple buildings, then you still may have facilities within that campus that may be subject to the federal rule or may not be depending on your position of what you take about what is a covered work site under the federal rule. And Brian talked about how broad some of that is and there are provisions about where federal work is done and what about if you run into people in the lobby or elevators or things like that.

Shannon Farmer:

So even within a building, you could take the position that only some portions are covered but certainly if you have multiple buildings, you could take that position. So you can be in a situation where you have facilities that are covered by the OSHA ETS and others that are covered by the Federal EO. However, you will not have the same employees be covered by more than one rule but it is going to be some work to figure out if you've got within the workforce, different sets of rules that may apply within your same workforce.

Jessica Federico:

So earlier we talked about the ETS being stalled, is the Federal Contractor Rule being challenged at all? And should employers be prepared to comply?

Brian Pedrow:

Several lawsuits have already been filed to challenge the constitutionality of executive order 14042 and the related Federal Contractor Vaccine Mandate. There are several Federal District Court challenges from at least 19 different states that could at any time result in these requirements being at least temporarily enjoined. In fact, we saw that occur on Tuesday, November 30th, when a federal judge in Kentucky, enjoined the Contractor Mandate from taking effect in Kentucky, Ohio and Tennessee, finding that the President had exceeded his procurement authority in issuing the order. Arguably the Federal Contractor Mandate should have a less twisted road to survival than the OSHA ETS. The Federal Government generally has broad discretion to impose requirements associated with federal contracts. Although as the judge in Kentucky noted, not absolute power, also US companies are not required to do business with the Federal Government if they don't want to, for these reasons, the arguments challenging the Federal Contractor Mandate ultimately may not be as successful. So the bottom line is to keep an eye on these developments but take steps now to be in compliance in accordance with the mandate.

Jessica Federico:

Thanks Brian. My last set of questions is for our clients who are healthcare providers. Shannon, what are the specific requirements for those employers?

Shannon Farmer:

Thanks Jess. We have two different sets of requirements for healthcare employers, the OSHA Healthcare ETS, which was issued in June of 2021. Not to be confused with the OSHA ETS on the vaccine or test rule that we were talking about earlier and the newer CMS interim final regulation. The OSHA ETS for healthcare employers, that's the one that has been in effect since June, requires the development of a COVID 19 plan that includes policies and protocols to minimize the of risk of transmission of COVID 19 to employees. This concludes conducting a workplace specific hazard assessment. It does not include a vaccine mandate. So this hasn't changed. This rule remains in effect and OSHA has said that it's reviewing monthly,

the ongoing need for it and it'll remain in effect until it determines that there's no longer the standard is met for having an emergency temporary rule in effect. The CMS regulations, which are recently issued in turn do have a vaccine mandate.

Shannon Farmer:

It impacts 21 different types of providers and suppliers, including hospitals, home healthcare, Hospice, et cetera but only those categories. So the OSHA ETS for healthcare is actually broader than the CMS rule. So some healthcare in some healthcare businesses are going to be covered by both but not necessarily all. One of the things that's really important to note about the CMS rule for healthcare providers is that it is broader than just employees. Unlike the Federal Contractor rule, which requires federal contractors to pass this down to its subcontractors or the OSHA ETS that applies own only to employees, the CMS rule covers staff, which is defined to include students, volunteers and trainees, not just employees. It also may cover contractors and vendors, especially if you've got contractors and vendors who are regularly on site. We're not talking about the UPS guy but we're talking about providers who are non-employed, who come on site.

Shannon Farmer:

So for example, non-employed physician admitting privileges at a hospital are going to be covered by this requirement. It mandates vaccination, there is no test out option. A policy must be implemented by December 6th and staff must have either received one dose of the single dose vaccine or at least one dose of a primary series vaccine by December 6th, by January 4th, they must receive one dose of the single dose vaccine or have completed all doses required for a primary series, no boosters required at this point, to be considered compliant with the rule. There is no option to test out of this mandate. And in fact, CMS has specifically said that people can be exempted from the vaccine mandate only when legally entitled to an accommodation under the ADA or title seven or another law. CMS has also imposed strict require for the proof required to support a medical exemption.

Shannon Farmer:

Someone can't just show up with a doctor's note that says, "Don't require them to be vaccinated." There's very specific requirements. And in part that's because they didn't want people writing their own doctor's notes since we're talking about healthcare. So you need to look at that carefully. Then if you do grant somebody an accommodation, you must implement additional precautions for employees who are given an exemption from the vaccination as an accommodation. Like the Federal Contractor EO, the CMS rule does not specify what those precautions should be. Testing does not have to be among them but it could be, it's up to the employer to decide. Like the Federal Contractor EO, if a facility is covered by the CMS rule, the employer does not have to comply with the OSHA ETS when it goes into effect for those employees but like the Federal Contractor EO, some healthcare entities, like a large health system are likely to have some facilities that are covered by the CMS rule, such as an acute care hospital.

Shannon Farmer:

And those that aren't like a physician practices, therefore they would be covered by the OSHA ETS. In those situations employers need to decide whether to have different sets of rules for different sets of employees or implement one rule across the workforce that complies with both the OSHA ETS and the CMS rule. Keep in mind that if you do decide to go beyond the minimum requirements of the Federal rule and you have a unionized workforce, some of those decisions are going to be subject to bargaining because they're discretionary and the NLRB has issued a memo about the duty to bargain under the OSHA ETS and what does and doesn't have to be bargained. The same would apply to any discretionary decisions under the Federal EO or under the CMS rule.

Jessica Federico:

Brian, you were just talking about litigation, challenging the contractor mandate. Is there any reason to think this healthcare rule will also be halted? And if a workplace is covered, would you recommend it comply?

Brian Pedrow:

Once again, Jess, we have litigation challenging the CMS healthcare rule, 10 states have filed a lawsuit challenging the rule. They argue the mandate is arbitrary and capricious, contrary to law, in excess of CMS's statutory authority and issued in violation of the Administrative Procedures Act. The suit also raises concerns that many healthcare workers will choose to leave their jobs instead of getting vaccinated, leading to an even greater shortage of healthcare workers. On Monday, November 29th, a Federal Court in Missouri temporarily blocked the CMS rule in the 10 states that had filed that lawsuit.

Brian Pedrow:

Those states are Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming. A day later on November 30th, a Federal District Court in Louisiana issued another injunction halting the CMS rule but this time on a nationwide basis. The Biden administration immediately appealed the nationwide injunction to the Court of Appeals for the Fifth Circuit, that court has 19 out of 26 judges appointed by Republican presidents. And of course that's also the court that enjoined the OSHA ETS. So as of December 1st, when we recorded this podcast, the CMS rule like the OSHA ETS is on hold in all states.

Jessica Federico:

Well that covers the patchwork of Federal vaccine mandates. Keep in mind that we have not talked about any state and local mandates but those certainly exist as well. We hope this podcast has provided you with useful information. As you prepare your workplace to comply with these mandates covering your organizations and our labor and employment group is certainly happy and ready to assist.

John Wright:

Thanks again to Jessica Federico, Brian Pedrow and Shannon Farmer. Make sure to visit our website [www.ballardspahr.com](http://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](mailto:podcast@ballardspahr.com). Stay tuned for a new episode coming soon. Thank you for listening.