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COVID-19 in the Washington Workplace: What Attorneys Need to Know.

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Overview

- Federal Issues (EO's, OSHA's ETS, CMS regulations).
- State Issues (Proclamations, WAC's, guidance from L&I).
- Case Law Update.



Federal Issues

Executive Orders, Emergency Regulation by the Centers for Medicare and Medicaid Services, and OSHA's Emergency Temporary Standard



CMS Regulations

- The Centers for Medicare & Medicaid Services (“CMS”) issued an interim final rule (86 FR 61555) on November 5, 2021, requiring COVID-19 vaccinations for workers in most health care settings, including hospitals and health systems, that participate in the Medicare and Medicaid programs.
- Does ***not*** allow for testing as an alternative to getting vaccinated.
- Under the regulation, all eligible workers must be fully vaccinated by Jan. 4, 2022.
- This interim rule is currently facing several legal challenges, including a lawsuit filed in the U.S. District Court for the Eastern District of Missouri by a coalition of 10 states.

“Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors” (EO 14042)

- **Requirements:** “...Agencies, shall, to the extent permitted by law, ensure that contracts and contract-like instruments include a clause that the contractor and any subcontractors shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force...”
- The Safer Federal Task Force issued updated guidance on Nov.10, 2021.
- The guidance creates four basic requirements for federal contractors and subcontractors:
 - (i) Employees on “covered contracts” or working on “covered worksites” must be vaccinated unless they are entitled to an accommodation.
 - (ii) Ensure that covered contractors and visitors observe masking and physical distancing requirements.
 - (iii) Designate an individual to coordinate COVID-19 workplace safety efforts.



Federal Contractors (con't)

- **Applicability:**
 - (a) This order shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:
 - (i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 - (ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 et seq.;
 - (iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or
 - (iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.
- **General Rule:** If employers have to comply with minimum wage Executive Order for federal contractors (EO 13658), they will have to comply with this Executive Order too.
- **Compliance Deadline:** January 18, 2022.



“Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees”

- **Requirements:** “Each agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law.” The exceptions referenced include religious and medical exemption. Testing is not allowed as an alternative.
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- Directs federal agencies to follow the guidance issued by the Safer Federal Workforce Task Force (Task Force).
- This Executive Order has faced legal challenge, including a lawsuit filed in Florida by a federal corrections officers’ union.
- Other unions have stated that many employees will opt for retirement instead of obtaining the vaccine.



OSHA's ETS

- Ten requirements for covered employers:
- 1) **Policy:** Develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees to elect either to get vaccinated or undergo weekly COVID-19 testing and wear a face covering at work;
- 2) **Vaccine Status:** Determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status;
- 3) **Paid Time Off for Vaccination:** Support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose.



OSHA's ETS (con't.)

- 4) **Testing:** Ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer);
- 5) **Notice of Positive COVID-19:** Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19;
- 6) **Removal of Positive Case:** Immediately remove from the workplace any employee, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider, and keep the employee out of the workplace until return to work criteria is met.
- 7) **Masks:** Ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.



OSHA's ETS (con't.)

- **8) Disseminate Policy and Vaccination Information:** Provide each employee with information, in a language and at a literacy level the employee understands, about the requirements of the ETS and workplace policies and procedures established to implement the ETS; vaccine efficacy, safety, and the benefits of being vaccinated; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false statements or documentation;
- **9) Report Fatality or Hospitalization:** work-related COVID-19 fatalities must be reported to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization; and
- **10) Inspection/Examination:** Make certain records available for examination and copying to an employee or an employee representative.



State Issues



Guidance from the Department of Labor and Industries

- Employers are required to maintain a “safe, COVID-free work environment.”
- All places of public accommodation must require face coverings be worn by customers and employees, regardless of vaccination status.
- All employers must keep employees with possible or confirmed cases of COVID-19 from working around others.
- Employers are required to do contact tracing for employees who may have been exposed to the virus.
- Within 1 business day of a positive COVID-19 case, employer must notify workforce.



Proclamation 20-25.17

- Prohibits business from allowing “any individual to enter or remain in an indoor space” unless the individual is in compliance with the Secretary of Health’s face covering order.
- Individuals participating in sports are exempt, but the exemption does not apply “to indoor gyms and other fitness facilities, such as dance and yoga.”
- Provides that employers may require vaccination as a condition of employment, except where reasonable accommodations are required.
- People who violate the Proclamation are subject to criminal penalties.



Proclamation 21-14.2

- Requires certain employees and on-site volunteers to be fully vaccinated against COVID-19, including “license-exempt youth development programs.”
- Employees are not automatically entitled to unemployment benefits if they separate from employment because they refuse to get vaccinated as required by Proclamation 21-14.2.
- The Employment Security Department has said that “when the employer offered a religious or medical accommodations, but the employee does not qualify for an accommodation and does not comply with the vaccine requirement, a claim would likely be denied.”
- This rule already faced legal challenge in federal court. The court refused to recognize the legal challenges to the Proclamation, and so it currently stands.



Emergency (CR-103E) – COVID-19 Prohibited Business Activities and Conditions for Operations

- Released in October as a response to the mandatory vaccination requirement for some Washington workers.
- Also now recognized as WAC 296-800-14035.
- Prohibits employers from allowing employees to work where a “business activity” has been prohibited by an emergency proclamation.
- In other words, if an employee is required to be vaccinated by an emergency proclamation and does not do so, an employer cannot allow the employee to work in that “business activity” unless they have a reasonable accommodation.



COVID-19 Case Law Update



***Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020), as revised (Jan. 13, 2020).**

- Case predates the COVID-19 pandemic but was an important decision out of the Fifth Circuit.
- Plaintiff/employee firefighter brought a lawsuit against the City and the Fire Chief, arguing that he was discriminated against based on his religion, and retaliated against.
- The City Fire Department that the plaintiff/employee worked for began to require TDAP vaccinations, which the plaintiff/employee objected to on religious grounds.
- The City reasonably accommodated him by requiring him to wear a respirator mask during his shifts, keep a log of his temperature, and submit additional medical testing.
- The plaintiff/employee refused the accommodation, and he was eventually terminated. He sued.



Horvath (con't.)

- The Fifth Circuit upheld the trial court's decision to grant summary judgment to the City.
- The Fifth Circuit reasoned that the accommodations that the City had offered the plaintiff/employee were reasonable and that Title VII does not require an employer to only use means of accommodation preferred by an employee.
- *Note:* the Fifth Circuit also dismissed the plaintiff/employee's free exercise claim, holding that the plaintiff/employee was able to maintain employment with an accommodation or accept a transfer position, but he did neither.



Sambrano v. United Airlines, Inc., No. 4:21-CV-1074-P, 2021 WL 4760645, at *1 (N.D. Tex. Oct. 12, 2021).

- Currently in federal court in the Northern District of Texas.
- United Airlines enacted a policy requiring that all employees be vaccinated by September 27, 2021.
- Employees could be granted an exemption on religious or medical bases. However, those employees that were granted a medical or religious exemption to the vaccine requirement were provided with one choice for a reasonable accommodation: unpaid leave.
- The class sued on the basis of religious and medical discrimination, and retaliation.
- As a preliminary matter, the plaintiffs requested that the court issue a preliminary injunction to prevent United Airlines from placing the employees on unpaid leave while the EEOC was investigating their complaints



Sambrano (con't.)

- The court denied the plaintiffs request for a preliminary injunction, reasoning that the plaintiffs “have not clearly carried their burden on the second element-irreparable harm.”



BST Holdings, LLC v. OSHA, 21-60845

(2021)

- Case has garnered a lot of media attention because it stayed OSHA's ETS.
- The opinion itself is notably scathing of the ETS, calling the pandemic "a purported emergency," and requires employees to make the "choice between their job(s) and their job(s)."
- The case was a consolidation of other lower court cases challenging OSHA's ETS. The petitioners requested a stay (and ultimately a permanent injunction) of the ETS pending a full judicial review.
- The Court reasoned that the petitioners had standing based on the fact that the ETS imposes a financial burden upon them by "deputizing their participation in OSHA's regulatory scheme...and threatens to decimate their workforces."



BST Holdings (con't.)

- Ultimately, the Court granted the stay based mainly on the following reasons:
 - 1) **The ETS is underinclusive and overinclusive.** The Court noted that the ETS is underinclusive because it only includes employers with 100 employees or more and is overinclusive because it doesn't account for various job duties/logistics (i.e., a truck driver who sits in an isolated cab all day).
 - 2) **The ETS Exceeds the Scope of OSHA's Authority.** The statute empowering OSHA to issue an ETS requires a showing that (A) employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) such emergency standard is necessary to protect employees from such danger. The Court determined that since COVID-19 was an airborne virus widely circulating in and out of workplaces, the required showing was not present.
 - 3) **There is a Commerce Clause issue.** The Court reasoned that the ETS "likely" exceeds the federal government's authority under the Commerce Clause "because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic activity."
 - 4) **Irreparable Harm.** The Court held that for the individual petitioners, their constitutional liberties are infringed by being forced to make the choice between "their job(s) and their jab(s)." The Court also held that companies also would be irreparably harmed without the stay because it would place an "immediate and irreversible imprint on all covered employers in America." In contrast, the Court held that a stay would cause OSHA "no harm whatsoever... Any interest OSHA may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate."



Beyond BST

- On November 16, 2021, the Judicial Panel on Multidistrict Litigation chose the Sixth Circuit Court of Appeals to hear the consolidated legal challenges to OSHA's ETS.
- The Sixth Circuit sits in Cincinnati and covers Ohio, Michigan, Tennessee and Kentucky. The current split among active judges is 10-6, favoring nominees of Republican presidents.
- The consolidation will involve legal challenges to OSHA's ETS from court cases in all twelve circuits.
- A three-judge panel from the Sixth Circuit will now be randomly assigned to decide the matter.
- OSHA will undoubtedly ask the panel to review and repeal the Fifth Circuit's stay of the ETS in BST Holdings.
- Regardless of the decision made by the Sixth Circuit, the case will be appealed to the United States Supreme Court.







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