



# GIBSON DUNN

## The Latest on Federal Vaccination Requirements in the Workplace: OSHA's Emergency Temporary Standard

Jessica Brown  
Lindsay Paulin

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# Today's Presenters

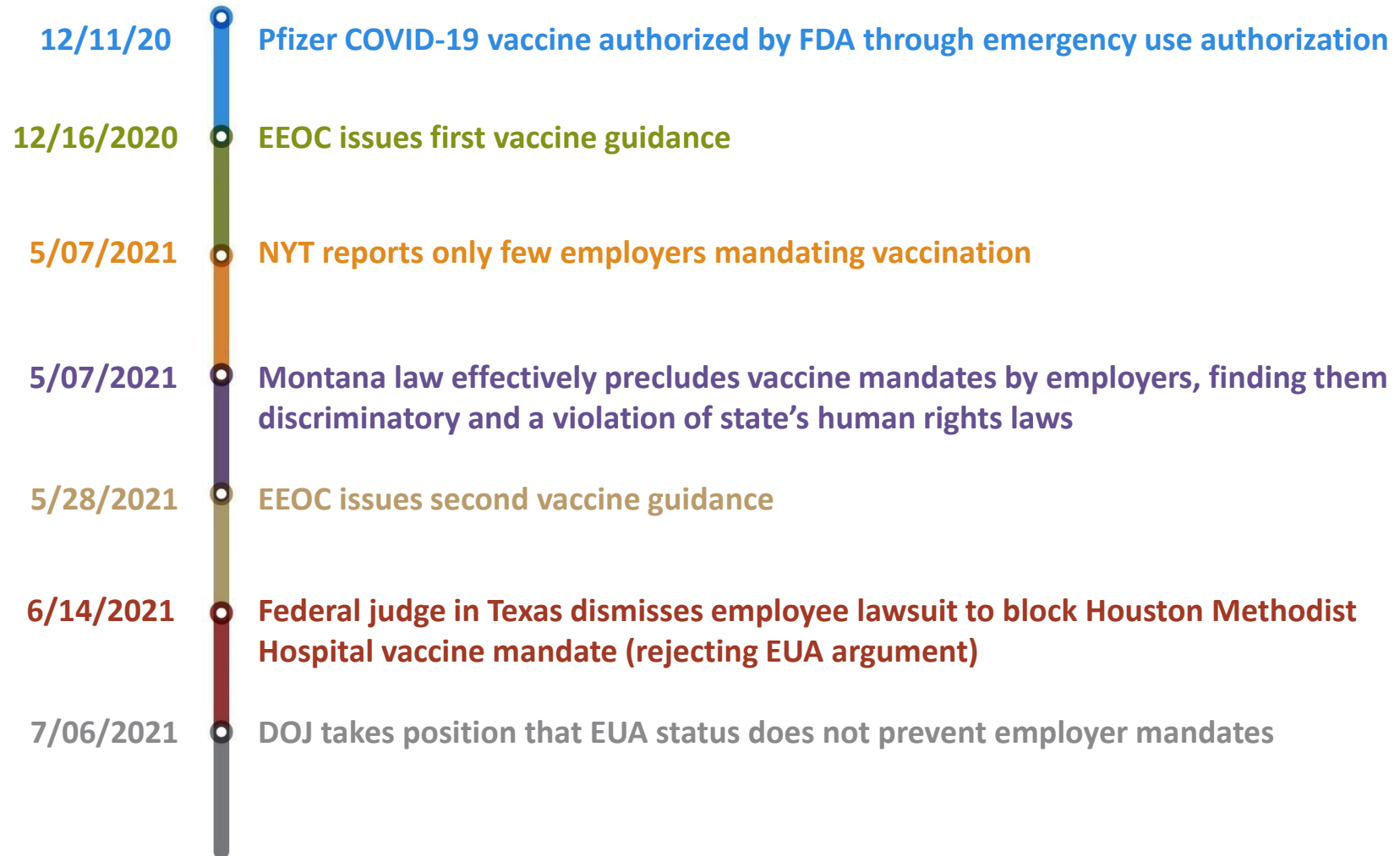


**Jessica Brown**  
*Denver*  
*Partner, Gibson Dunn*



**Lindsay Paulin**  
*Washington, DC*  
*Associate Attorney, Gibson Dunn*

# Vaccine Timeline



# Vaccine Timeline

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- 8/12/21** U.S. Supreme Court refuses to block Indiana University's vaccine mandate
  - 8/23/2021** FDA grants Pfizer vaccine full approval
  - 9/09/2021** President Biden signs executive order to mandate vaccines for federal contractors and announces OSHA ETS for large companies
  - 9/24/2021** White House Task Force issues guidance for covered federal contractors
  - 10/11/2021** Texas Governor signs executive order limiting employers' ability to impose vaccine mandates by expanding exemptions to include personal conscience and prior recovery from COVID-19 (other states follow suit and pass bills limiting vaccine mandates)
  - 11/5/2021** OSHA ETS is published (and on December 6 is stayed by the Fifth Circuit Court of Appeals)

# Executive Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

- Effectuated by directing federal agencies to include a contract clause requiring compliance with Safer Federal Workforce Task Force guidance
- Requires the clause to be included in four types of “covered contracts”
- Vaccine mandate applies to all “covered contractor employees” meaning “any full-time or part-time employee” working ...
  - on a covered contract *or*
  - “in connection with” a covered contract *or*
  - at a “covered contractor workplace”

# Federal Contractor Mandate

- Broad applicability of Executive Order No. 14042:

“In connection with” and “covered contractor workplace” definitions are very broad

Many remote employees are swept in as well

Some contractors will mandate more broadly than necessary, given the wide reach of the requirements

Others will carve out locations where no one who works on or in connection with a covered contract is likely to be present

# Federal Contractor Mandate

## Vaccine Mandate

- “Covered contractor employees” must be fully vaccinated by January 18
- Includes those who previously had COVID-19
- Includes remote employees working from home
- Exception for employees who are “legally entitled to an accommodation” for medical or religious reasons
- Covered contractor is responsible for determining what, if any, accommodations to offer
- Contractor is not responsible for providing vaccines (but may choose to)
- Contractor is not instructed to pay employees for their time to get vaccinated
- But the OSHA ETS is expected to require this
- State law may require this as well



# Federal Contractor Mandate

## Physical Distancing and Masks

- Fully vaccinated employees are not required to distance
- Unvaccinated employees should maintain six feet of distance
- In areas of high community transmission (per CDC), everyone must mask indoors
- In areas of low community transmission, only the unvaccinated must mask indoors (and outdoors in some circumstances)
- Contractors are responsible for checking CDC website weekly
- Masking for vaccinated employees not required after 2 consecutive weeks of low or moderate transmission





# Federal Contractor Mandate (cont'd)

## Safety Coordinator Requirement

- Responsible for coordinating, implementing, and enforcing compliance
- Must provide relevant information to employees and visitors likely to enter a covered contractor workplace
- Responsible to ensure employees show proper proof of vaccination
- Silent as to whether a coordinator is required for each worksite

# OSHA Emergency Temporary Standard



- Applies to employers (but not covered contractor workplaces) with 100 or more employees company-wide; includes part-time, seasonal, and remote employees, but not independent contractors
- Requires employees (except those who work alone or exclusively from home or outdoors) to be vaccinated or test weekly and mask
- Requires employers to pay for employees' time to be vaccinated (four hours per dose) and to recover from side effects
- Does not require employers to pay for tests unless required by state/ local law or a CBA, etc.

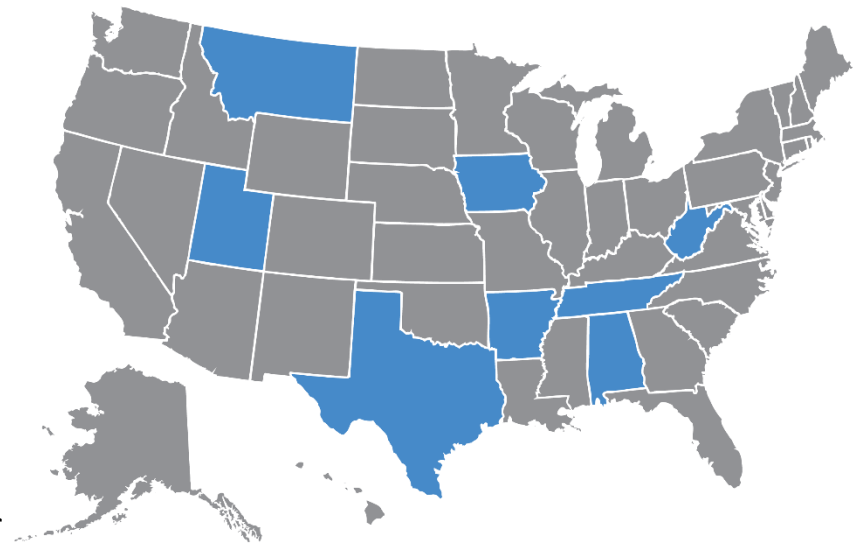
# OSHA Emergency Temporary Standard

Numerous questions finally (mostly) addressed:

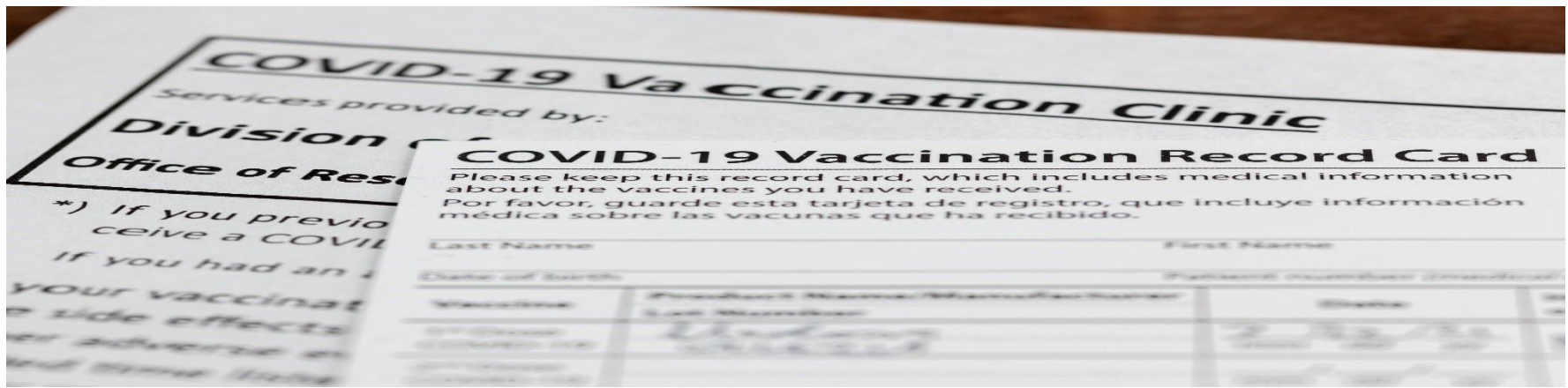
- How will the 100-employee threshold be determined?
- Who pays for testing?
- Can employers just mandate (versus affording a testing option)?
- Will remote workers need to be vaccinated or test? If testing, how often?
- What proof (vaccination, test results) will be required?
- Can employees be required to use existing PTO to be vaccinated?
- Does the ETS explicitly preempt or “supersede” less protective state laws?
- Is there guidance regarding consequences to employees who refuse?
- Is there a masking or distancing requirement, as for federal contractor employees?
- Does the ETS address union negotiations/CBA requirements?
- What about recordkeeping and data privacy requirements?
- What will be the consequence to employers for compliance failures?

# Voluntary Mandates

- Generally optional, apart from federal contractors, larger employers (100+), many healthcare workers
- Pros and cons remain largely the same as set forth in our Playbook last December
- Must abide by more restrictive state and local laws
  - Montana made unvaccinated workers a protected class in early May
  - Alabama, Arkansas, Iowa, Texas, and West Virginia have expanded permissible bases for requesting exemptions
  - Utah has passed a bill doing the same; Tennessee's bill goes further and prohibits compelling employees to provide proof of vaccination



# Collection and Handling of Vaccine Information



## Proof of Vaccination

- Questions about vaccine status, including requests for proof of vaccination, are allowed. They are not medical exams or disability-related inquiries under ADA.
  - Federal contractors are not required to maintain proof of vaccination
  - Employers subject to the ETS are required to maintain the proof – cannot just inspect and track

# Collection and Handling of Vaccine Information

- Written documentation of vaccine status (proof of vaccination) is a confidential medical record under ADA and state medical privacy laws
  - Maintain separate from employee's personnel file and payroll records and protect against unauthorized access internally or externally
    - Store in a secure location (consider encryption, avoid shared folders or unprotected platforms)
    - If stored electronically, implement separate access protocols
    - If hard copies are maintained, store in a locked filing cabinet
    - Limit access on need-to-know basis
  - May use third-party provider to collect and maintain proof of vaccination (and testing)

# Proof of Vaccination Requirements for Contractors (Task Force Guidance)

- Contractors must review and verify, but not necessarily collect or store, proof of vaccination
- Safety Coordinator is responsible for ensuring employees show or provide proper vaccination documentation
- Acceptable documents include:
  - physical or electronic CDC cards
  - state health records
  - private medical records
- Unacceptable documents include:
  - positive antibody tests
  - self-attestations

# Proof of Vaccination Requirements for Larger Employers (OSHA ETS)

- Employers subject to the ETS must collect and store proof of vaccination
- May maintain a physical or digital copy of the documentation
- Acceptable documents include:
  - the record of immunization from a health care provider or pharmacy;
  - a copy of the U.S. COVID-19 Vaccination Record Card;
  - a copy of medical records documenting the vaccination;
  - a copy of immunization records from a public health, state, or tribal immunization information system; or
  - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).



# Recordkeeping Requirements for Larger Employers (OSHA ETS)

- Employers also must keep a roster reflecting all employees' vaccination status
- Roster must group all employees into one of four categories:
  - fully vaccinated
  - partially (not fully) vaccinated
  - not fully vaccinated because of a medical or religious accommodation
  - not fully vaccinated because they have not provided acceptable proof of their vaccination status.

Employees who do not wish to be vaccinated (and opt to test instead if provided that option) are in category 4 above.

# Navigating Reasonable Accommodations

## Medical Exemptions

- Under the ADA, if an employee seeks a medical exemption, the employer must engage in an “interactive process” to arrive, if possible, at a “reasonable accommodation.”
  - Unless known or obvious, employers can request documentation for a health care provider
  - May ask about the condition requiring the exemption and whether it is temporary or permanent
- Reasonable Accommodations for Medical Exemption
  - Must “reasonably” accommodate the disability AND
  - Must not impose an “undue hardship” on the employer’s finances or operations
    - Causes “significant difficulty or expense” OR
    - Poses direct threat to health and safety that cannot be sufficiently mitigated

# Navigating Reasonable Accommodations

## Religious Exemptions

- Under Title VII, an employee can seek an accommodation based on sincerely held religious beliefs or practices
  - Includes religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others
  - Does not include personal preferences or political, economic, or social beliefs (such as “vaccines are dangerous,” “employers cannot require employees to be vaccinated,” belief that vaccine contains a microchip).
- A belief should not be questioned or rejected merely because it does not fit into the scriptures, teachings, or doctrines of a traditional organized religion.

# Navigating Reasonable Accommodations

## Verification of Religious Exemptions

- “[I]f the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee’s claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.”
  - Very little verification required
  - Can be a letter from a pastor or just a family member or friend who is familiar with the employee’s belief system
    - Reports of certain pastors selling such letters for \$100.
    - Internet forms also available regarding fetal stem cell objections
  - Should you challenge the sincerity of the religious belief? Per the EEOC, there needs to be an “objective basis for questioning either the religious nature or sincerity of particular belief”

# Navigating Reasonable Accommodations

## Reasonable Accommodation for Religious Exemptions

- Silver lining for employers?: Employer “undue hardship” under Title VII is less demanding than under ADA: “de minimis” burden or expense.
- But state law may impose a higher standard – similar to ADA
- Seeing a wide range of reactions and approaches from employers to requests for religious accommodations
- EEOC has said to look at their guidance outside the vaccine context – has been encouraged to issue additional guidance soon

# Reasonable Accommodations for Contractors

- Task Force and OSHA have provided little guidance to contractors
- OMB in a 10/12 briefing suggested contractors needing help should refer to federal employee accommodations guidance
  - The government has issued accommodation request forms – quite rigorous
  - Has said additional questioning also may be warranted
  - Consider factors such as these:
    - the basis for the claim;
    - the nature of the employee’s job responsibilities;
    - the reasonably foreseeable effects on operations, including protecting other employees and the public from COVID-19
  - Such assessments will be fact- and context-dependent
  - Contractors are encouraged to consult their offices of general counsel with questions

## Union Issues

- Unionized employees who are covered contractor employees must be vaccinated
- Unions will expect to bargain regarding implementation/“effects”
  - May mean working with union to sweeten the deal for their members, *e.g.*,
    - Paid time off to get vaccinated offsite
    - Incentive payments, drawings/lotteries
    - Terminated employees allowed to return if they get vaccinated later
  - May mean union is involved in discussions regarding accommodations
  - Unionized employees of large employers may insist on testing option and certainly will insist employers pay for testing if not required by OSHA to do so
  - Already see clashes/litigation with unions over vaccine mandates

# Managing Consequences for Noncompliance

- Task Force guidance is silent on this issue
- Employees should, however, expect consequences if they refuse to comply
- Some employers may follow their progressive discipline policies to try to give employees a chance to comply
- Because of the labor shortage, some are considering docking pay or bonuses instead of terminating (check bonus plan)
- Some employers are terminating workers; others are opting for unpaid leave
- Generally cannot terminate employees who are not vaccinated for a protected reason
- In that case, unpaid leave is probably a last-resort “accommodation”
  - Might be viewed as appropriate for a short-term issue
  - Otherwise, should try to find an accommodation that allows the employee to work.



## Evolution/Impact of Litigation

- Bloomberg Law reports that, as of 10/13, 39 federal cases were filed this year contesting vaccination requirements imposed by employers or governments; 85% of them were filed after August 1.
- First round of lawsuits (early this year) argued that, because of their emergency authorization status, the vaccines cannot be mandated.
  - Texas federal judge rejected this argument in lawsuit brought against Houston Methodist Hospital
- A number of courts have sided with hospitals and universities (e.g., Cincinnati Children's Hospital, Indiana University) in upholding vaccine mandates, but cases continue to be filed (e.g., University System of Maryland).
- Recent cases focus on denial of medical and religious exemptions.
- Numerous challenges have now been filed challenging EO 14042 and the ETS.
- Employers subject to those requirements should continue preparing to comply but, given all the uncertainty, postpone large expenditures if possible

# OSHA ETS Challenges

## Procedure

- Challenges to OSHA must be filed in courts of appeal as a petition for review.
- Have been filed in circuit courts around the country – all but the Tenth so far.
- The Fifth Circuit issued the stay order and is likely to issue a lengthier decision soon.
- Lottery court likely to be chosen on Tuesday; additional stay orders are possible in the meantime.

## Likely Next Steps

- The issue is likely to be presented to the Supreme Court in the coming weeks.
- The Supreme Court may decline to be involved.
- A majority of the Justices are likely to view OSHA's action and authority with some skepticism – but a majority may also be hesitant to intervene.

# Questions?

For questions, please contact the presenters:



*Partner*

Phone: 303.298.5944  
Email: JBrown@gibsondunn.com



*Associate Attorney*

Phone: +1 202.887.3701  
Email: LPaulin@gibsondunn.com