

The webinar will begin shortly





COVID Policies: A Look Back and Forward

January 20, 2022

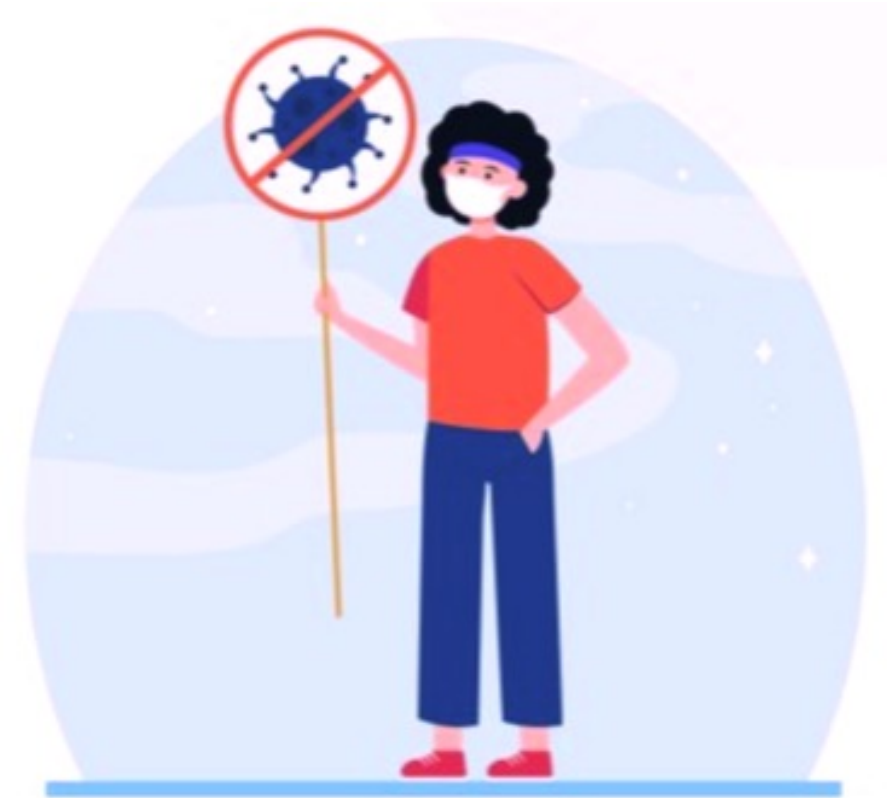
* Although we will be providing legal information during this webinar, we will not be providing legal advice.

Agenda

- The Supreme Court's decision on the ETS
- Are vaccine mandates still allowed?
- Have masking rules changed?
- How to handle exemptions and accommodation requests
- Recordkeeping requirements
- Best practices

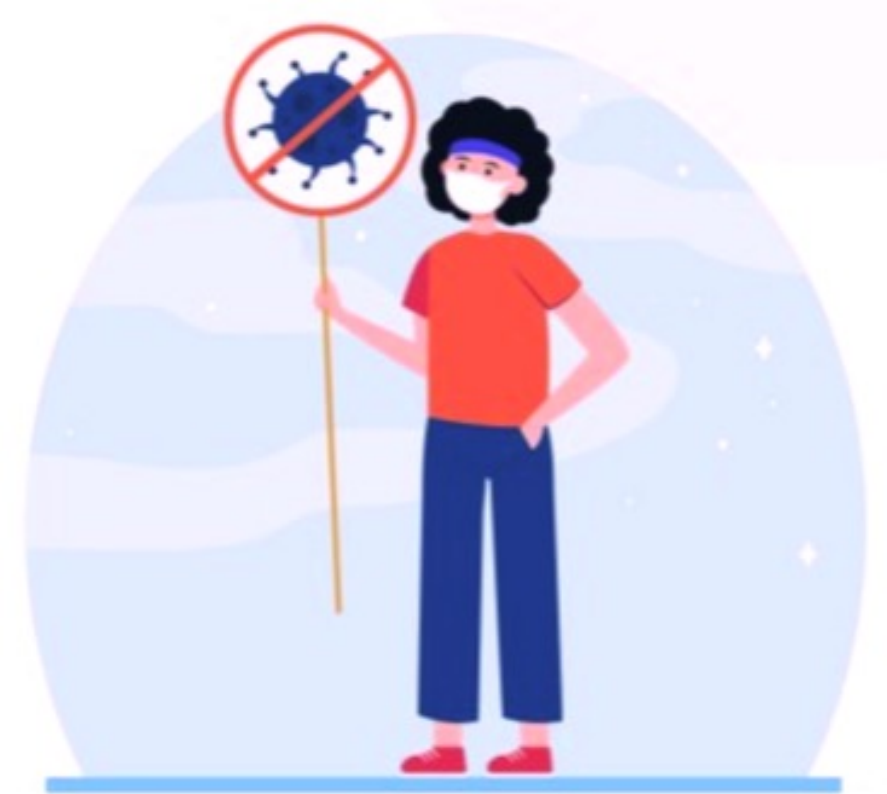
COVID-19 Timeline – Part 1

- December 31, 2019 – First cases of COVID-19 reported to the WHO.
- January 20, 2020 – First laboratory-confirmed case of COVID-19 in the U.S. in Washington state.
- March 11, 2020 – WHO declares COVID-19 a pandemic; NBA shuts down after Utah Jazz player Rudy Gobert tests positive for COVID.
- March 13, 2020 – President Trump declares a national emergency.
- March 15, 2020 – NYC School System, largest in the U.S., shuts down.
- April 20, 2020 – CDC recommends that people wear masks outside their homes.



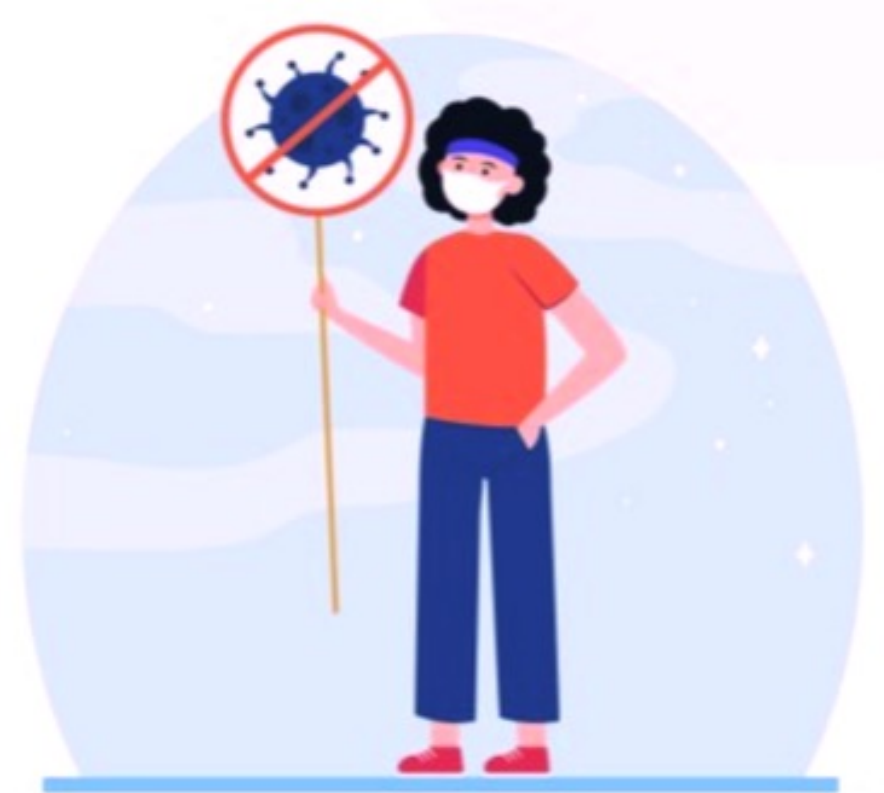
COVID-19 Timeline – Part 2

- May 20, 2020 – U.S. COVID-19 death toll surpasses 100,000.
- November 30, 2020 -- Cal/OSHA's Emergency Temporary Standard (ETS) becomes effective.
- December 14, 2020 – A nurse in NY becomes the first American to receive a COVID-19 vaccine outside of a clinical trial.
- May 5, 2021 -- The New York Hero Act is signed into law, requiring businesses to adopt safety and health plans.
- June 1, 2021 – The Delta variant becomes the dominant strain of COVID-19 in the U.S.



COVID-19 Timeline – Part 3

- November 5, 2021 – OSHA publishes a federal Emergency Temporary Standard (ETS) applicable to business with at least 100 employees; it is immediately challenged in federal circuit courts across the country.
- December 2021 – Omicron becomes the dominant strain of COVID-19 in the U.S.
- January 11, 2022 – U.S reports record numbers of new COVID-19 cases (1.35 million) and hospitalizations due to COVID-19 (136,604).
- January 13, 2022 -- The Supreme Court pauses the federal ETS while the legal challenges proceed.



Trends

- The threat posed by COVID-19 continues to evolve.
- Business must track multiple layers of changing COVID-19 guidance.
 - Federal: CDC, OSHA, EEOC
 - States: California and New York set trends
 - Local: Counties and Cities
- Businesses continue to be faced with uncertainty because of changing circumstances, new COVID related rules, and ongoing legal challenges to COVID rules and regulations.



The Supreme Court's Decision on the Federal ETS – Part 1



The Road to the Supreme Court

November 5, 2021 - The Federal Emergency Temporary Standard (ETS) is published. Suits are filed in Federal Circuit Courts across the country.

November 6 – The U.S. Court of Appeals for the Fifth Circuit pauses the ETS.

November 16 – The Judicial Panel of Multidistrict Litigation consolidates all ETS cases (including the Fifth Circuit ruling) before the U.S. Court of Appeals for the Sixth Circuit.

December 17 – The U.S. Court of Appeals for the Sixth Circuit dissolves the Fifth Circuit's pause on the ETS. The parties challenging the ETS immediately appeal the Sixth Circuit's decision to the United States Supreme Court.

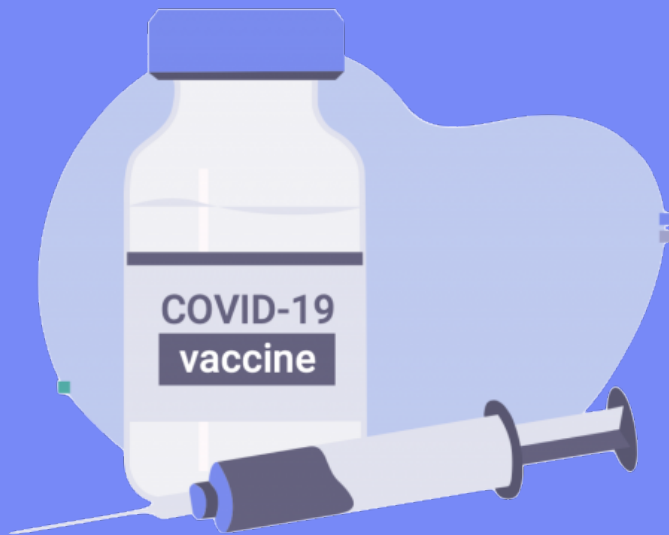
The Supreme Court's Decision on the Federal ETS – Part 2



The Supreme Court's Decision

- January 13, 2022 – The Supreme Court published its decision, staying the ETS while the cases continue in front of the Sixth Circuit.
 - The decision was 6-3, with Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett voting to stay the ETS and Justices Breyer, Sotomayor, and Kagan dissenting.
- As part of the decision, the Court determined that the parties challenging the ETS were likely to prevail.
- The consolidate cases were sent back to the Sixth Circuit to be decided on the merits.
- Regardless of how the Sixth Circuit rules, the Supreme Court is likely to strike down the ETS.

Vaccine Mandates – What's Allowed?



- Nothing in the Supreme Court's decision prohibits employers from voluntarily implementing a vaccine or testing requirement.
- Many businesses across the country have already implemented vaccine or testing requirements as a best practice.
 - Must provide reasonable accommodations
- CAVEAT: Do you have employees in a state that bans or limits vaccine mandates?
 - Alabama, Arkansas, Florida, Iowa, Kansas, Montana, North Dakota, Tennessee, Texas, Utah, West Virginia

State Examples – Bans on Vaccine Mandates



TEXAS

- Gov. Abbott issued an executive order prohibiting “any entity in Texas” from compelling employee vaccination if the employee objects “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”

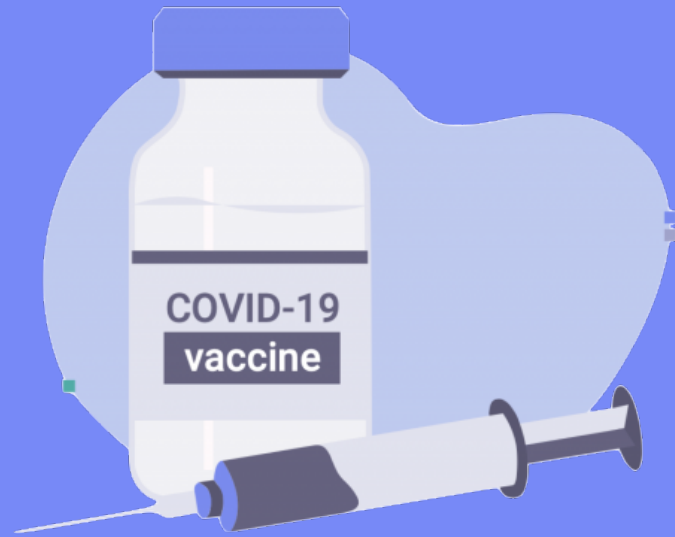
MONTANA

- State statute (1) prohibits discrimination in employment based on vaccination status and (2) bans employers from requiring COVID-19 vaccines “whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.”

TENNESSEE

- State statute prohibits employers from requiring proof of vaccination or taking any adverse action for employee’s refusal to provide vaccination status if the employee “objects to receiving a COVID-19 vaccine for any reason.”

State Examples – Limits on Vaccine Mandates



- Other states with limits: Alabama, Arkansas, Florida, Iowa, Kansas, North Dakota, Utah, and West Virginia
- Employers must provide certain exemptions/opt outs to vaccine. Notable examples:
 - AR, FL, ND, WV - Proof of immunity (i.e. antibodies)
 - WV – previous COVID-19 infection
 - FL – use of employer-provided PPE
 - UT – “sincerely held personal belief”
 - ND - “philosophical or moral beliefs”
 - Most of the states provide for broadened religious exemption; only requirement is statement from the employee.

Legal Challenges to State Vaccine Mandates



So far, the U.S. Supreme Court has allowed state vaccine mandates to go into effect:

- August 2021 – Justice Barrett denied emergency appeal from students at Indiana University to block the school’s vaccine mandate
- October 2021 - the full U.S. Supreme Court declined a request to block Maine’s requirement that certain healthcare workers be fully vaccinated, despite no exception for sincerely held religious beliefs
- October 2021 – Justice Sotomayor denied a group of NYC public teachers’ request to block the city’s vaccine mandate for public school employees
- November 2021 – Justice Breyer denies request from MA hospital workers that the Court block the hospital’s vaccine mandate
- December 2021 – the full Supreme Court denied a request to block New York state’s vaccine mandate for healthcare workers, despite no religious exemption

Masking Requirements



- Employers can require masks and treat vaccinated and unvaccinated employees differently by requiring unvaccinated employees to wear masks.
 - The one exception: Montana
- Competing state and local requirements put businesses in a hard place.
 - For example, Harris County, TX has a mask mandate for private employers, despite Gov. Abbott's executive order prohibiting mandates like this. Currently in litigation.
- Employers need to monitor state and local masking requirements.
 - **California:** Masks required for everyone over 2 yr. old in indoor public spaces, regardless of vaccination status, through Feb. 15.
 - Examples of counties that have mask mandates: Alameda, San Diego, Marin, Santa Clara
 - LA County requires employers to provide employees with medical-grade masks.
 - **Utah:** No state-wide mandate, but Salt Lake and Summit counties require masks in indoor public places.
 - **Maryland:** Lifted state-wide mandate in July 2021, but Montgomery County has a mandate in place for indoor public places.

The Future



What is a Reasonable Accommodation?

- “A change in the work environment or the way things are customarily done that would enable a qualified individual ... to enjoy equal employment opportunities.”
- Not reasonable if it imposes an undue hardship:
 - More than a minimal burden on operations (Title VII) or
 - Significant difficulty or expense (ADA)
- **ADA** (applies if 15 or more employees)
 - Physical or mental impairment or
 - Regarded as having such impairment
 - Meets the skill, experience, education, or other requirements and can perform the essential functions of the role
- **Title VII**
 - Religion/Sincerely held Religious Belief defined broadly
 - Religious practice may be sincerely held even if not consistently observed
 - Does not include: social, political, or economic philosophies, or personal preferences

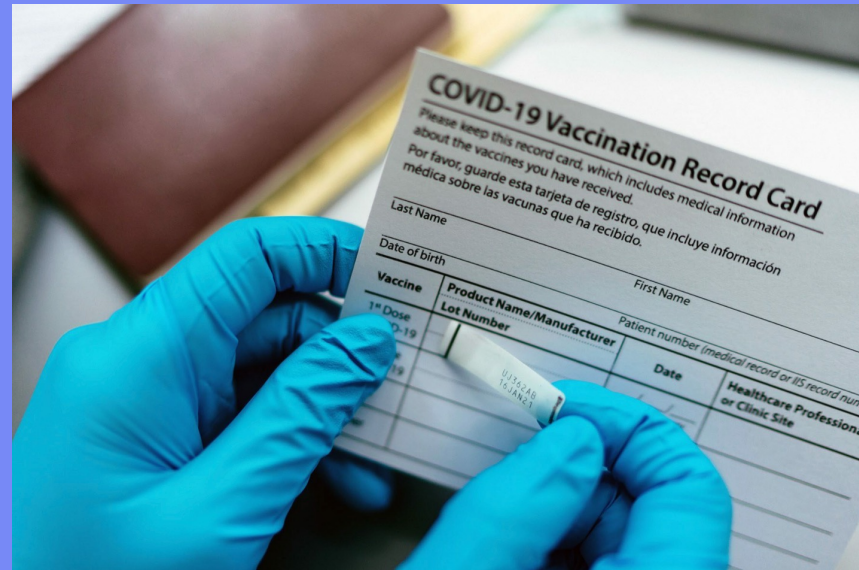


Reasonable Accommodations

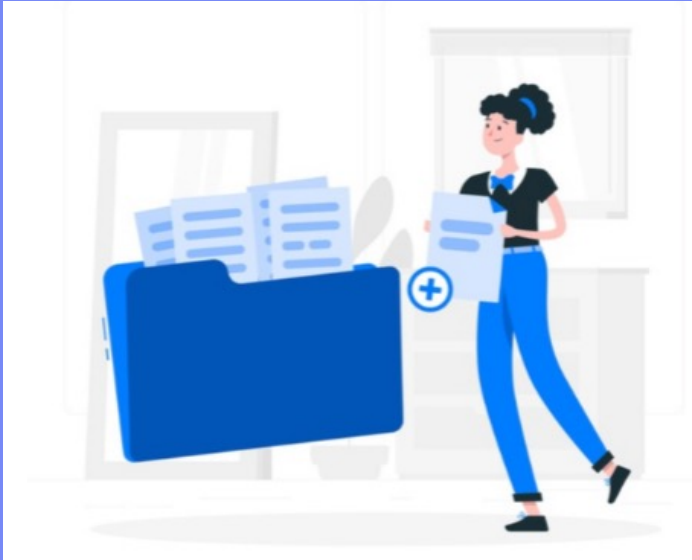
- Testing
 - ETS recommendations could be used to create a robust testing program as an accommodation
 - Account for availability of tests in your area
 - Decide who pays for them
- Remote Working
 - Implement days in/days out
- Limiting Employee Interaction with other individuals on site
 - Same job description but adjust the physical location
 - Change job description in a way that allows for the company to meet safety concerns
 - Implement rules around common spaces
 - Improve ventilation/air filtering
- Require PPE



Recordkeeping



Recordkeeping Best Practices



- Keep medical records separate from personnel files
- Keep medical records confidential
 - Limit access to individuals with a job-related need to access
 - Only disclose to the individual or as required by law
- Retain Securely
 - OSHA has a 30-year medical record retention rule
 - Federal ETS and Cal-OSHA exempt vaccine cards from the 30-year requirement ... without the ETS, it appears we lose the exemption outside of CA
 - All vaccine and testing records and rosters required by the ETS are considered employee medical records
 - ADA has a 1-year medical record retention rule
 - Self-screeners are subject to the 1-year rule but don't qualify as medical records under Fed OSHA

Best Practices



Written COVID Policy

- Written policy
 - Company values guiding the policy
 - Include:
 - Vaccination Policy
 - Exemptions if applicable
 - How to request an exemption
 - Masking Policy
 - Acceptable masks
 - When they can be removed
 - Restrictions on gatherings
 - For meetings
 - In Common Spaces
 - Instructions on Reporting Cases
 - Instructions for returning to worksite after exclusion due to COVID case or exposure
 - Clear statement that the policy is subject to change
- Communicate, Communicate, Communicate!
 - Be succinct



Writing COVID Policy

- Start by creating a team
 - Include members from across levels
 - Incorporate experiences
- Determine the company values most important to the COVID decisions – should be reflective of company culture
- Train supervisors on handling inquiries about the policy
 - Be sure supervisors are not making ad hoc decisions
- At least one team member tasked with reviewing jurisdictional requirements (SixFifty can help!)
- Create a clear line of authority if one does not already exist – being on the team ≠ being the decisionmaker in specific employee cases

