



ETS Litigation and How to Prepare to Collect Vaccine/Testing Information

September 23, 2021

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

Agenda

- **Introduction**
- **Potential Legal Challenges to the ETS**
- **Vaccine Policy Options and Best Practices**
- **Collecting and Storing Information**
- **Q & A**
- **Conclusion**

Potential Legal Challenges

Part 1



- 24 states have already threatened to sue.
- The Attorney General of Arizona Mark Brnovich hurried to federal court to file the first suit.
 - Mark Brnovich also happens to be running for a senate seat.
- These types of suits can be successful.
 - Federal judge recently enjoined New York State vaccine requirement that medical workers be vaccinated because there is no religious exemption.

Potential Legal Challenges

Part 2



- Once the ETS are released, the OSHA Act allows plaintiffs to file petitions for review directly in a federal court of appeals.
- Types of potential legal challenges:
 - **Constitutional Challenges:**
 - Commerce Clause
 - Equal Protection
 - Medical Condition
 - Religious Belief
 - **Statutory Challenges**
 - Grave Danger to Employees
 - Necessary to Protect Employees from the danger

Potential Legal Challenges

Part 3



Outcomes of Challenges to OSHA Emergency Temporary Standards

Year	Emergency Temporary Standard	Outcome
1973	Organophosphorous Pesticides	Challenge successful
1973	14 Carcinogens	Challenge successful
1976	Diving Operations	Challenge successful
1977	Benzene	Challenge successful
1978	Acrylonitrile	Challenge unsuccessful
1983	Asbestos	Challenge successful

Source: Bloomberg Law

Bloomberg Law

Potential Legal Challenges

Part 4



TAKEAWAYS

- There is likely to be a significant amount of litigation of the new ETS.
- Cases could ultimately reach the Supreme Court.
- Enforcement may not be stayed during the review process.
- Businesses should prepare to comply with the ETS.

Vaccination Policy Options



When it comes to vaccine policies, companies have 4 basic options:

1. **Require employees to be vaccinated or tested weekly to enter worksite;**
2. **Require employees to be vaccinated to enter worksites;**
3. **Encourage employees to get vaccinated; or**
4. **Don't act** by choosing not to adopt a vaccination policy.

Policy Requiring Vaccinations 1.1



- Vaccines required for:
 - Healthcare workers at facilities/ organizations that receive Medicare or Medicaid reimbursements
 - Executive Branch federal employees
 - Government Contractors
- Employers with 100 or more employees will require employees to either:
 - Be vaccinated OR
 - Be tested weekly
 - Employers will be required to give PTO for employees to get vaccinated

Policy Requiring Vaccinations 1.2



- Emergency Temporary Standard (ETS) will be issued in the next 1-4 weeks
- Policy will address:
 - Who must be vaccinated
 - Likely only employees reporting to a worksite/interacting with others
 - How PTO applies
 - For being vaccinated
 - For recovery from vaccination

Policy Requiring Vaccinations 1.3



- Policies need to address:
 - Types of Employees
 - In-person employees
 - Remote & Hybrid employees
 - Exemptions
 - Medical or Religious
 - Working from home or Testing?
 - Paid time off
 - Cost of testing
 - Process for collecting Vaccination/Testing information
 - Notice
 - Transparency

Policy Requiring Testing or Vaccination 1.1



- Avoid the exemptions issues
- Still must provide PTO for shots and recovery time
- Policy will address:
 - Potential differences in office procedures for vaccinated vs. unvaccinated
 - Differences in information collection
 - Procedures for testing and for excluding positive cases from workplace

Policy Encouraging Vaccination 1.1



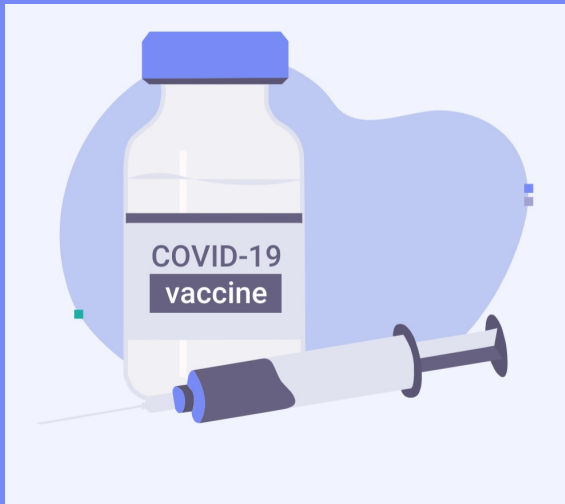
- Only available to small employers
 - May not be available to small employers in states with more strict OSHAs
- Policy should address:
 - Potential differences in office procedures for vaccinated vs. unvaccinated
 - Differences in information collection
 - Procedures for testing and excluding positive cases from workplace
 - Incentives (if any)

No Policy



- Not recommended
- Leaves company vulnerable
- Outbreaks
- Hazard Mitigation
- Employee Confusion
- Likely subject to some type of state or county rules that are easiest to address in a methodical way

Collecting Information



- Collect Vaccine Status
 - Methods
 - Proof and company retains a copy
 - Proof and company does not retain a copy
 - Self-attestation
- Collect Test Results
 - More frequent
 - Methods
 - Proof and company retains a copy
 - Proof and company does not retain a copy
 - Self-attestation
- Logistics

Sample Vaccine Status Survey



20% completed

Please select the statement below that most accurately describes your vaccination status:

- I am fully vaccinated.
- I received my second dose of the Pfizer or Moderna vaccine or my single dose of the Johnson & Johnson vaccine less than two weeks ago.
- I received my first dose of the Moderna or Pfizer vaccine, and my second appointment is scheduled.
- I have not yet been vaccinated, but I have already scheduled an appointment to receive a COVID-19 vaccine.
- I have not been vaccinated.
- I decline to answer whether I have been vaccinated.

Cancel

← Previous

Continue →

Sample Vaccine Status Survey



40% completed

Please [click on this link here](#) to upload proof of your COVID-19 Vaccination Record Card, and check the box below to confirm that this step is complete.

I confirm this step is complete.

Cancel

← Previous

Continue →

[Privacy Policy](#)

Sample Vaccine Status Survey



50% completed

Please provide the following information:

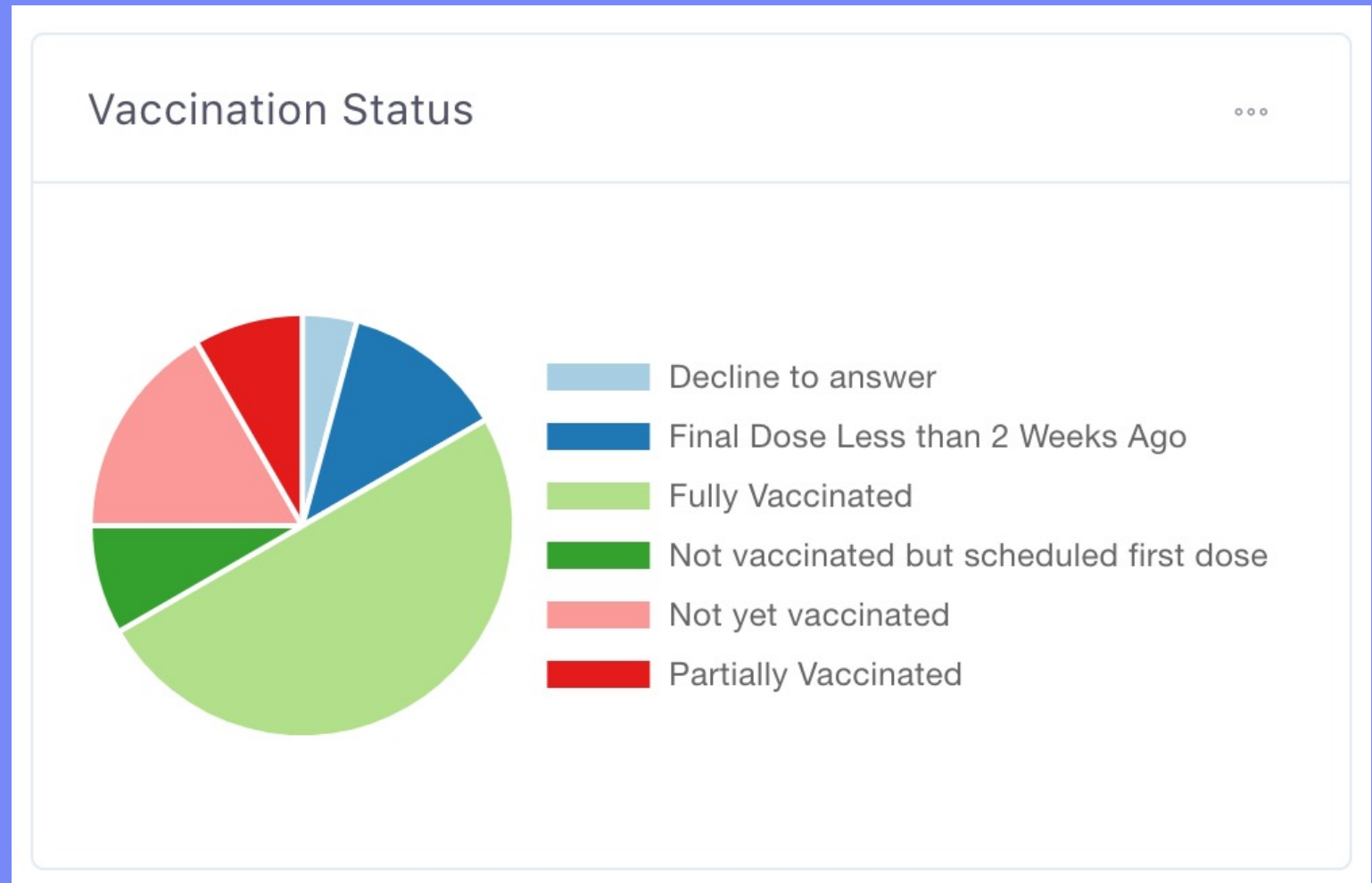
Date of 2nd and final dose. For those who received the Johnson & Johnson (Janssen Ad26.CoV2.S) vaccine, please provide the date of your single dose.

Date on which you received your 2nd and final dose, or for those that received the Johnson & Johnson (Janssen Ad26.CoV2.S) vaccine, please provide the date on which you received your single dose.

Please provide the Lot Number indicated on your COVID-19 Vaccination Record Card.

For help in finding your Lot Number, please [click here](#).

Analytics about Vaccine Status



Storing Information



- Keep as confidential medical information
 - Stored separately from employee file
- Limit access
- Store for appropriate period
 - Current Cal/OSHA standard: maintain records for the length of time necessary to establish compliance with the regulation
 - Potential Cal/OSHA standard: maintain records for two years beyond the period “in which the records are necessary to meet the requirements” of the proposed regulations

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