



How the New Federal Vaccine Mandate May Affect Your Business

September 16, 2021

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

Agenda

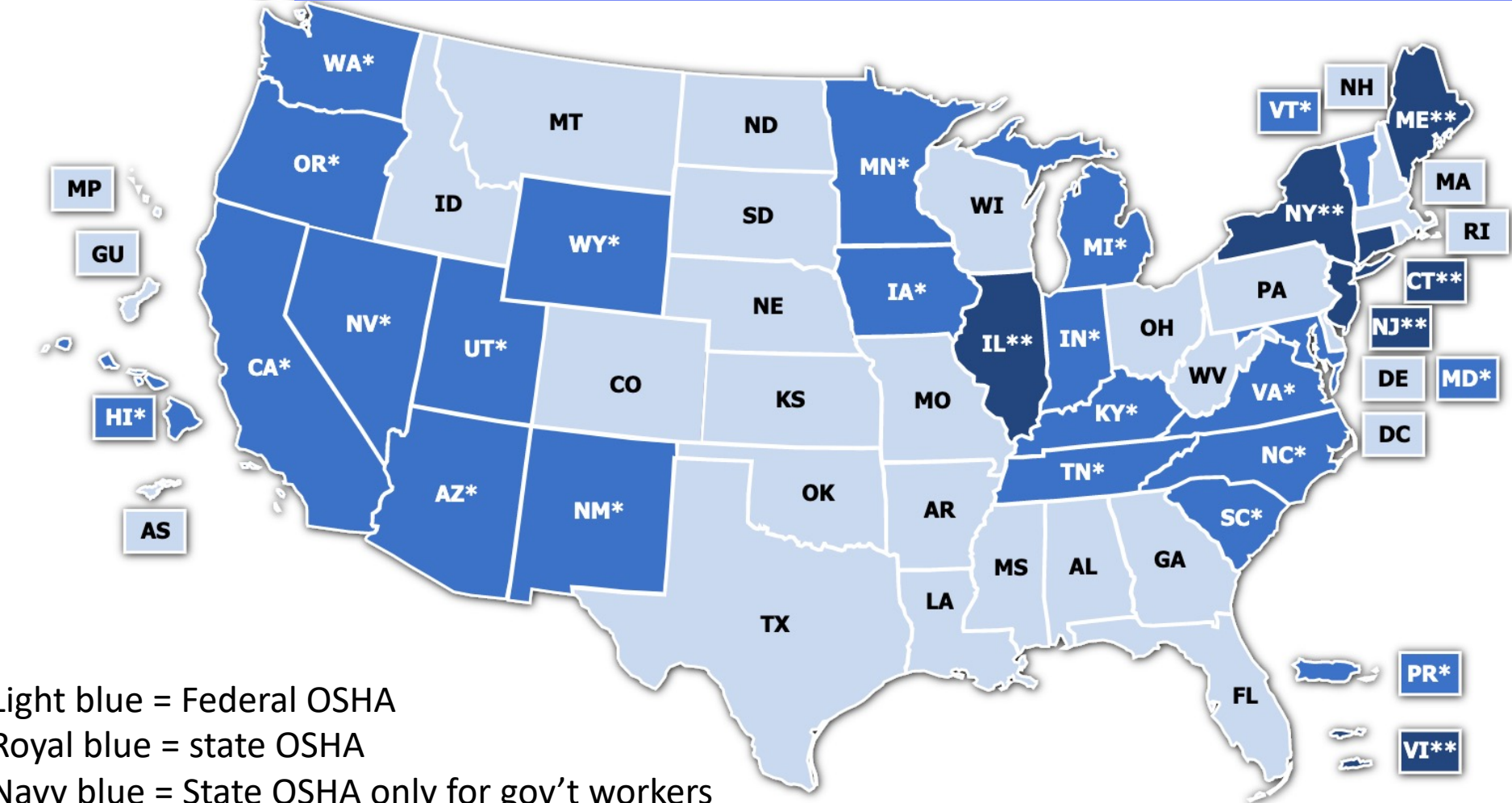
- **Introduction**
- **What We Know About the ETS**
- **Potential Legal Challenges**
- **Impact on Large and Small Businesses**
- **Implementation of the ETS**
- **Q & A**
- **Conclusion**

Definitely
100 EE



- 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

*Federal ETS des not apply in states with their own OSHA



Light blue = Federal OSHA
Royal blue = state OSHA
Navy blue = State OSHA only for gov't workers

Definitely
100 EE



- ETS = Emergency Temporary Standard
- OSHA press briefing:
 - ETS will be issued “in the coming weeks”
 - OSHA’s June ETS required healthcare providers to provide PTO and recovery time for vaccinations
- Labor Department officials stated:
 - Employers must provide PTO for employees to receive and/or recover from the vaccine, and
 - Employers can require employees to use their existing PTO

What is an ETS



- Issued by the Secretary of Labor
- Does not have to go through notice & comment
 - Can be in effect for 6 months
 - Then goes through the regular process
- ETS can be issued if:
 - Employees are exposed to grave danger from substances or agents determined to be toxic or physically harmful or from new hazards, AND
 - Emergency standards are necessary to protect employees from such danger

Maybe
100 EE



- Not applicable to remote employees
- Applicable to hybrid employees
- Employer bears cost of testing* but can put rules in place for how it is obtained
- Phase in requirements
- Violations = Serious/Willful: \$13,653 per
- Employers may choose not to allow testing option
- Flexibility in how vaccination status is collected:
 - Maintain a record of actual card
 - Maintain a record that proof was shown
 - Employees self-attest
 - Employees who refuse to report must be treated as unvaccinated

Executive Order



- Federal Workers
 - All executive agencies will implement a mandatory vaccination program
 - No testing alternative
 - “Exceptions required by law”
 - Religious Exemptions
 - Medical Exemptions
 - Safer Federal Workforce Task Force will issue guidance on implementation today

Executive Order



- Federal Contractors
 - New clause getting added to contracts
 - Specifies the contractor will comply with all guidance from the Task Force
 - Task Force will issue requirements by Sept. 24
 - Agencies will take steps to make sure contracts are lined up to comply by 8 October and that any entered after 15 October comply

Potential Legal Challenges

Part 1



- Texas, Florida, Ohio, Arizona, and at least 13 other 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.

Impact on Large Businesses



- Coordination with different OSHA standards
- Written Policy
- Collect Vaccine Status
 - Methods
 - Proof and company retains a copy
 - Proof and company does not retain a copy
 - Self-attestation
 - Logistics
- Collect Test Results
- Retain Vaccine Status and Test Results

Impact on Large Businesses

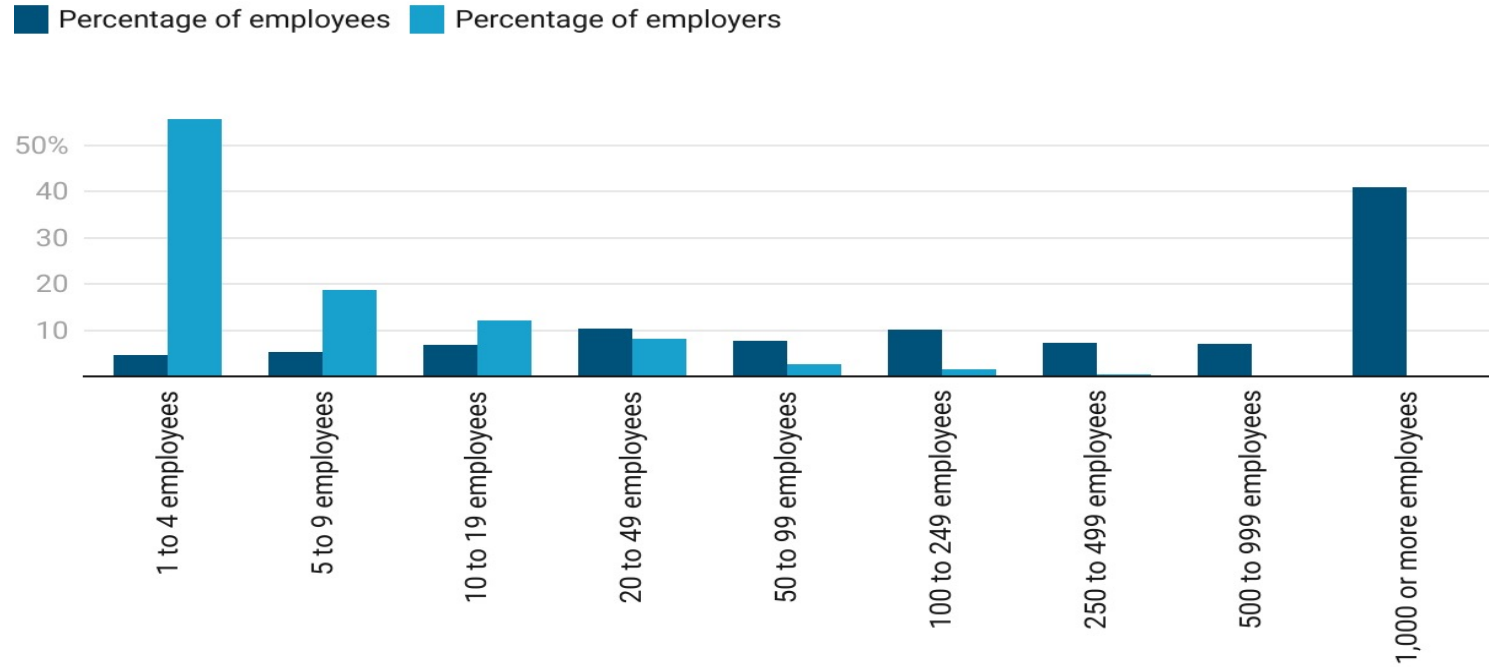


- Track Employees
- Provide Information to Employees
- Provide Paid Time Off
 - For Vaccination and to Recover from Side Effects of Vaccination
 - For Testing
- Update Mask Mandates
- Retain Workforce
- Monitor Changes

Impact on Small Businesses

Distribution of U.S. Private-Sector Employees and Employers

Biden's proposed vaccination mandate would affect employers with 100 or more employees, representing about two-thirds of private-sector employees (80 million workers), but only around 2.5 percent of private-sector employers (133,000 companies).



Distribution of private-sector employment as of 2020/Q1, not seasonally adjusted.

Chart: Mauro Whiteman • Source: Bureau of Labor Statistics. • Created with Datawrapper

Impact on Small Businesses

- ETS threshold of employees may be lower in some states
- Companies should have written policy
- The ETS affects companies that work with large businesses
- The ETS increases the comfort of smaller employee to implement a vaccine or test requirement



Implementation



- Ways to prepare for ETS
 - Think through the relevant issues
 - Prepare to create a strong policy foundation
 - Create clear communication channels

Questions and Answers

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