

# PUBLICATION

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## Federal Agencies Announce Enforcement of Vaccine Rules as Supreme Court Prepares to Hear Arguments in Legal Challenges

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**Recent announcements by the Occupational Safety and Health Agency (OSHA) and the Centers for Medicare and Medicaid (CMS) provide some clarity on next steps for the enforcement of the existing federal vaccine and testing mandates, although the legal landscape is still changing.**

### **What does the OSHA announcement on December 27, 2021 mean?**

In our previous [alert](#) we summarized that as of December 17, 2021, the Sixth Circuit Court of Appeals dissolved the stay previously placed on OSHA's Large Employer Emergency Temporary Standard (ETS) by the Fifth Circuit. Accordingly, OSHA then implemented a new enforcement timeline that required covered employers to be in compliance with the vast majority of the ETS no later than January 10, 2022.

Prior to issuing the Large Employer ETS, in June 2021, OSHA adopted its Health Care Emergency Temporary Standard (Health Care ETS) to protect workers from COVID-19 in settings where they provide health care or health care support services. The Health Care ETS was due to expire on December 21, 2021; however, OSHA remained silent after the expiration date, leaving employers wondering whether or not it remained in effect. On December 27, 2021, OSHA [announced](#) that it had decided to let the Health Care ETS expire while it worked on a permanent standard. However, OSHA said it will continue to "vigorously" enforce the standards within the Health Care ETS, such as the Personal Protective Equipment (PPE) and Respiratory Protection Standards, under its general duty clause.

This is a significant development because the Large Employer ETS did not apply to providers covered by the Health Care ETS as long as the Health Care ETS was in effect. As such, health care providers were generally shielded from mandated compliance with the Large Employer ETS. With the expiration of the Health Care ETS, those providers may now be subject to the Large Employer ETS, which OSHA is currently enforcing. Large employers are expected to comply with most of the Large Employer ETS requirements by January 10, 2022. Note that there are certain "state-plan" states that adopted the Health Care ETS requirements, and some of these state-level requirements have not yet expired. Tennessee, for example, adopted its version of the Health Care ETS in August 2021, with an expiration date of February 20, 2022. Employers in state-plan states may still be subject to their state's health care emergency temporary standards.

### **What does the CMS announcement on December 28, 2021 mean?**

In our previous [alert](#), we summarized that CMS announced it would pause enforcement of the CMS Vaccine Mandate in light of existing federal preliminary injunction orders. As of December 17, 2021, preliminary injunctions against the CMS vaccine mandate exist in 25 states (Plaintiff States). The CMS Vaccine Mandate remains legally effective and enforceable in the remaining 25 states, which are California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington and Wisconsin; as well as the District of Columbia and U.S. territories (Non-Plaintiff States).

On December 28, 2021, CMS announced that it would begin enforcing the CMS Vaccine Mandate in the Non-Plaintiff States that are not subject to stay orders. The timeline for compliance has been modified as follows:

- Phase 1: By January 27, 2022, all eligible staff must have received at least the first dose of a two-dose vaccine, have received their one dose of a single-dose vaccine prior to providing any care, treatment or other services for the facility or its patients, or have obtained an exemption.
- Phase 2: By February 28, 2022, all eligible staff must have completed the vaccine series (if they had the two-dose vaccine) or have obtained an exemption.

On December 28, 2021, CMS also issued a Memorandum to all State Survey Agency Directors. The Memorandum makes clear that surveyors of facilities in the Plaintiff States should not undertake any efforts to implement or enforce the CMS Vaccine Mandate.

For surveyors of facilities located in the Non-Plaintiff States, by January 27, 2022, CMS expects that 100 percent of staff have received at least one dose of COVID-19 vaccine, or have a pending request for, or have been granted qualifying exemption or identified as having a temporary delay as recommended by the CDC, in order to be compliant with the CMS Vaccine Mandate. If a facility has less than 100 percent compliance, it will receive notice of its non-compliance. If the facility is above 80 percent compliance and has a plan to achieve full compliance within 60 days, CMS has directed that no additional enforcement action be taken.

By February 28, 2022, CMS expects that 100 percent of all staff of facilities located in the Non-Plaintiff States have received at least one dose of a single-dose vaccine, or all doses of a multiple-dose vaccine series, or have been granted a qualifying exemption, or identified as having a temporary delay as recommended by the CDC. If a facility has less than 100 percent compliance, it will receive notice of its non-compliance. If a facility is above 90 percent compliance and has a plan to achieve full compliance within 30 days, CMS has directed that no additional enforcement action be taken.

### What happens next?

There may be more changes ahead. The U.S. Supreme Court is scheduled to hear Oral Arguments on January 7, 2022, in the CMS Mandate and OSHA Large Employer mandate cases. It is possible that a ruling from the U.S. Supreme Court could arrive before the initial January 27, 2022, deadline under the CMS Vaccine Mandate. As always, we will continue to monitor these cases as they unfold and continue to provide you regular updates.

Covered health care organizations should be prepared to move forward with compliance with the CMS Vaccine Mandate and/or the Large Employer ETS given that both federal mandates are now legally enforceable in certain jurisdictions, and both federal agencies have announced they are resuming enforcement where legally permissible. As federal agencies survey for compliance, they will likely be looking for detailed documentation of an institution's plans, policies, and programs to increase compliance with the CMS Vaccine Mandate and/or the Large Employer ETS. Therefore, it is important that institutions carefully document their internal policies to mitigate any penalties that may be assessed in the event of a finding of non-compliance. Health care facilities should seek counsel on how to communicate to their staff by discussing your respective state's or states' legal and regulatory environment with a health care or labor and employment attorney.

If you have questions about the CMS Vaccine Mandate, the OSHA Large Employer Mandate, compliance or the legal challenges, please contact [Bahati Mutisya](#), [Matthew Wolfe](#), [Claire Cowart Haltom](#), [Jennifer Curry](#), [Martha Boyd](#), [Melissa Vest](#) or any member of Baker Donelson's [Health Law](#) and [Labor & Employment](#) teams.