

The background of the slide is a photograph of wide, grey stone steps leading down. The steps are made of large, rectangular stone blocks. The lighting is soft, and there are some fallen leaves scattered on the steps.

Vinson & Elkins

Navigating

Returning to Work: Navigating Vaccination,
Testing and Masking Requirements

November 18, 2021

Navigating Conflicting Legal Mandates

OSHA's Emergency Temporary Standard

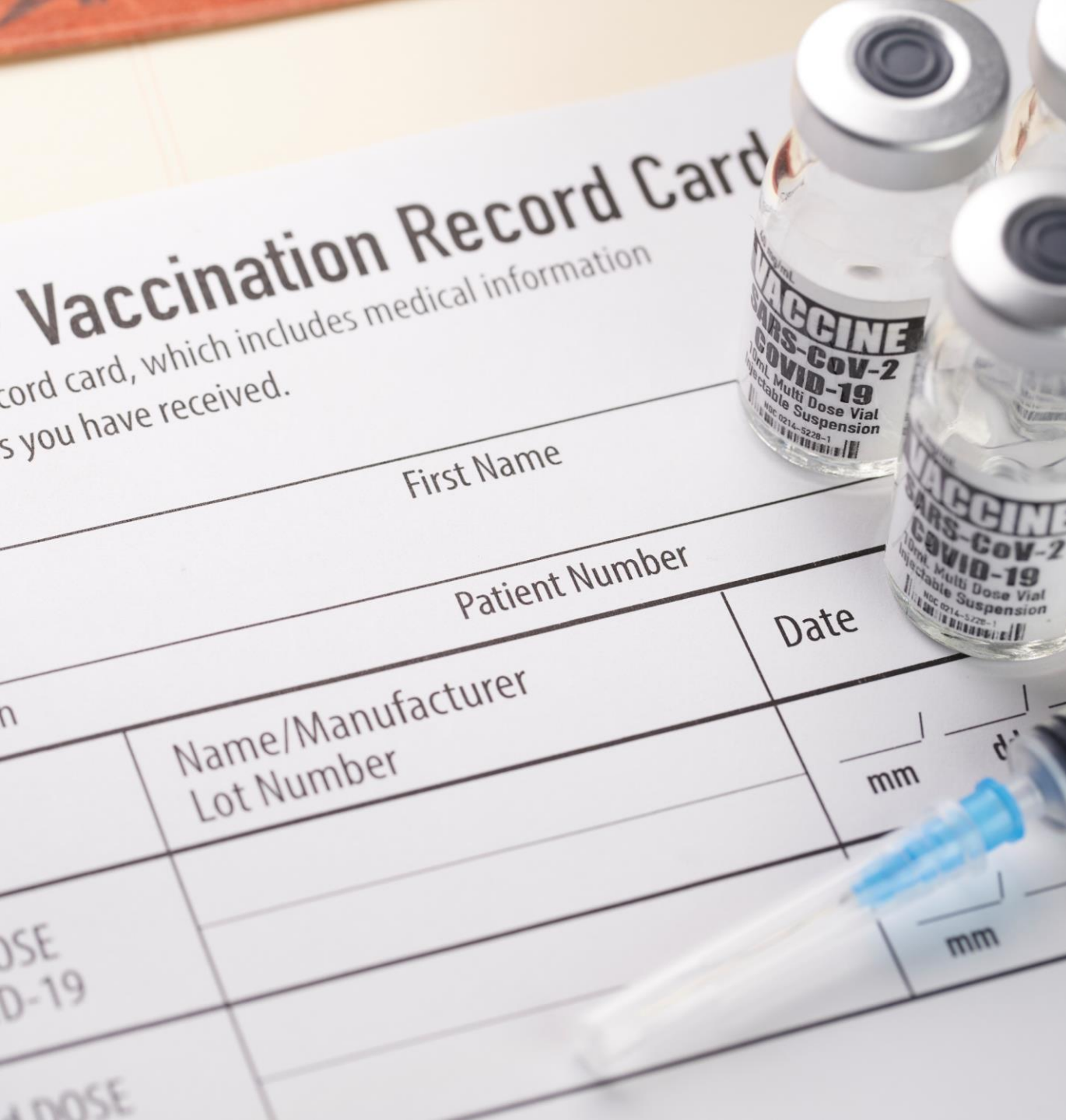
Executive Order on Adequate COVID-19 Safety Protocols

Accommodations for medical and religious exemptions under the ADA and Title VII

NLRB obligations to bargain over vaccination, testing and masking protocols

State laws limiting employers from mandating certain protocols

State laws requiring employers to adopt certain protocols



OSHA Emergency Temporary Standard

Employers Have a Choice

The ETS provides a choice, as employers may institute:

- 1) a written mandatory vaccination policy; and/or
- 2) a written policy providing employees with a choice of (a) full vaccination or (b) providing proof of regular testing and wearing a face covering.

The ETS provides for exemptions for employees legally entitled to a reasonable accommodation due to a disability or for religious reasons, or for whom the vaccine is medically contraindicated or is required to be delayed due to medical necessity.

OSHA Emergency Temporary Standard

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard

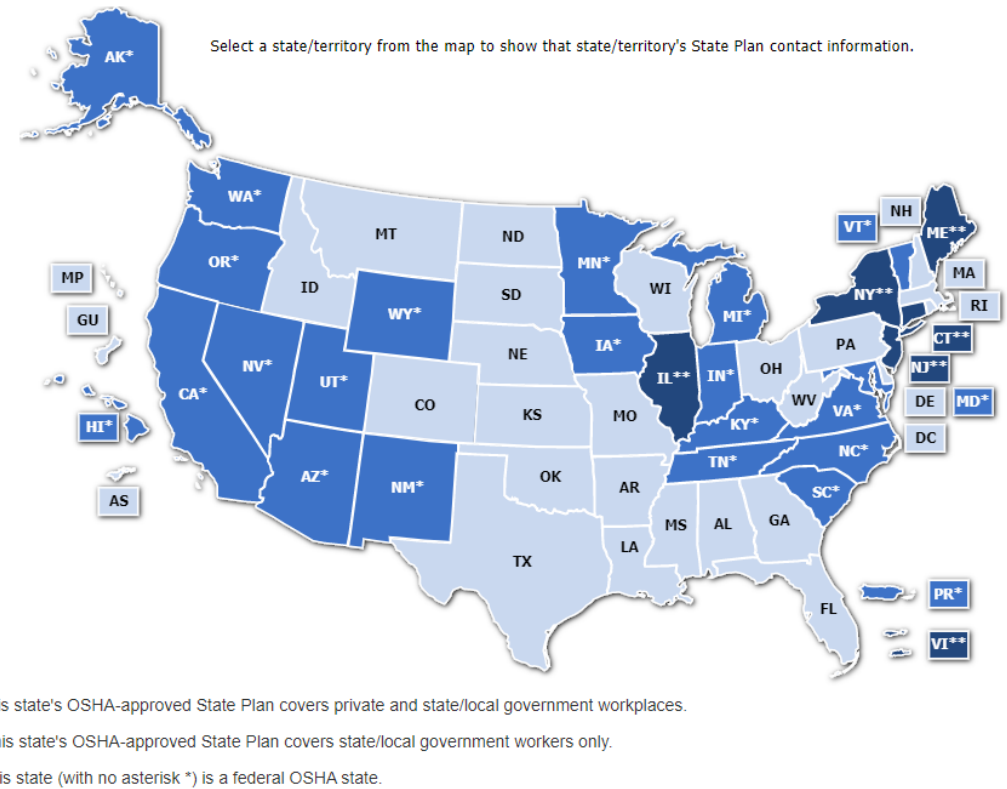
Which employees are covered?

- All employees, excepting (i) those who do not report to a workplace where there are other individuals; (ii) while working from home; or (iii) who work exclusively outdoors.

Which workplaces are covered?

- Any employer with 100 or more employees, excepting those workplaces covered by the Federal Contractor Mandate or employers covered by the Healthcare ETS.
- “A physical location (e.g., fixed, mobile) where the employer’s work or operations are performed. It does no include an employee’s residence.”

Contact a State Plan



Current Status of the ETS

“

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order."

While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

”

United States Department of Labor

(as of 11/15/21)

<https://www.osha.gov/coronavirus/ets2>

Upcoming Deadlines

- 30 Days
 - Establish, implement, and enforce a written vaccination policy or “vaccination or testing” policy
 - Get proof of vaccination status and establish a recordkeeping system, including for test results
 - Provide paid time off
 - Institute notification requirement
 - Require face coverings
 - Inform employees
- 60 Days
 - Ensure compliance with a testing program for those not fully vaccinated



Approximately how many employees are in your company's workforce?

- a) Less than 100 (21%)**
- b) 100 – 1000 (38%)**
- c) More than 1000 (41%)**



Federal Contractors and Executive Order 14042

Executive Order 14042: Three Prongs

Mandatory Vaccination:

ALL covered employees must be fully vaccinated.

Masking and Distancing:

ALL covered workplaces must comply with certain masking and distancing requirements.

Safety Officer:

Each covered contractor and subcontractor must designate a person (or persons) to coordinate its COVID-19 safety protocols.

Executive Order 14042: Scope

Which employees are covered?

- Employees of a covered contractor or subcontractor who are either:
 - i. Working on a covered contract;
OR
 - ii. Working at a covered workplace.
- Excluding any employees working only outside the U.S.

Which workplaces are covered?

- Any workplace:
 - i. that is controlled by the contractor or subcontractor;
AND
 - ii. An employee working on a covered contract is likely to be present there during the contract.



Duty to Bargain

Duty to Bargain Under the NLRB

1. Employers have bargaining duties with respect to bargain over anything that affects terms and conditions of employment. This would include vaccine, testing and masking requirements.
2. Employers MAY be relieved of their duty to bargain where a specific change is statutorily mandated.
3. HOWEVER, employers may not act unilaterally if the statute or regulation allows some discretion in how the employer implements it.
4. ETS allows some discretion so employers should bargain over its implementation.

Has your Company already implemented a mandatory vaccination policy?

- a) Yes (31%)**
- b) No, but we are considering it (25%)**
- c) No (44%)**



Medical and Religious Exemptions



Medical and Religious Exemptions

Medical Exemptions

- Accommodations For...
 - Reasonable accommodation under federal civil rights laws
 - Those for whom a vaccine is “medically contraindicated”
 - Those for whom “medical necessity requires a delay in vaccination

See definition of “Mandatory Vaccination Policy”, 29 CFR 1910.501(c).

Undue Hardship

“ Significant difficulty or expense incurred by a covered entity, when considered in light of the[se] factors: ”

- i. The nature and net cost of the accommodation ... taking into consideration the availability of tax credits and deductions, and/or outside funding;
- ii. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- iii. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- iv. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- v. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(29 C.F.R. 1630.2)

Religious Accommodation

“

[M]oral or ethical beliefs as to what is right and wrong which are **sincerely** held with the strength of **traditional** religious views. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

”

29 C.F.R. 1605.1



Undue Hardship

“

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require “more than a de minimis cost”. The Commission will determine what constitutes **“more than a de minimis cost”** with due regard given to the identifiable cost in relation to the **size** and **operating cost** of the employer, and the **number of individuals** who will in fact need a particular accommodation.

”

29 C.F.R. 1605.2(e)(1)



Does your company require any employees or visitors to wear masks in the workplace?

- a) Yes, all employees and visitors are required to wear masks (36%)**
- b) Yes, but only unvaccinated employees and visitors (42%)**
- c) No (22%)**



State Laws Limiting Protocols

State Laws Limiting Protocols: Case Study

- Only a handful of states have limited what safety protocols employers may impose on employees and workplaces
- Executive Order GA-40 (signed by Gov. Abbott, Oct. 11, 2021):
No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination
 - i. for any reason of personal conscience,
 - ii. based on a religious belief, or
 - iii. for medical reasons, including prior recovery from COVID-19

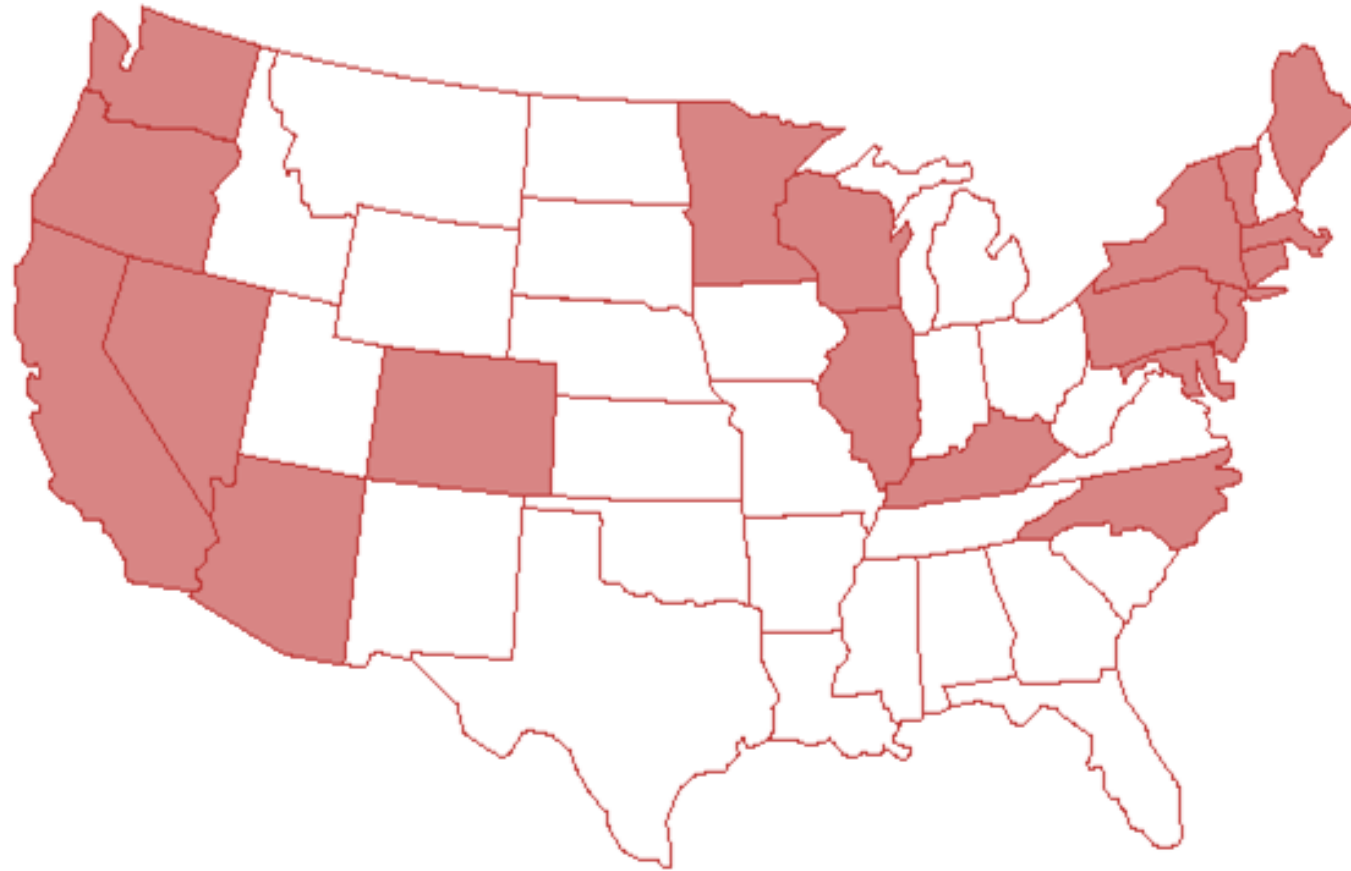
What percentage of your workforce is fully vaccinated?

- a) 0-50% (3%)**
- b) 50-75% (19%)**
- c) 75-100% (28%)**
- d) I don't know (50%)**



State Laws Requiring Protocols

States with Limited Vaccination Requirements



Questions?

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