



Welcome to the SIG University Webinar Series
OSHA Mandate Back in Play!
What Employers Need to Know!

Doug Desmarais, Esq. | *Smith & Downey*

January 13, 2022





Questions?

During the webinar if you have any questions, please feel free to...

- 🗨 Zoom Chat: Enter questions via the “Chat” feature in the Zoom meeting

Reminders

1. Slides and resources will be emailed after the webinar and are available on

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2. Complete our 2-minute post webinar [SURVEY](#)** All completed surveys will be entered to win a \$100 Goldbelly gift card!

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**Britt Johnson, CACI International, Inc.
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UPCOMING

[Update on Reference Based Pricing](#)

January 19th, 2 PM – 3 PM EST

[Employee Benefits Landscape: 2021 Recap, 2022 Forecasts](#)

January 20th, 2 PM – 3 PM EST

[“No Time to Buy” with Recognized Economist Anirban Basu](#)

February 3rd, 8:30 AM – 9:30 AM EST

Speaker: Anirban Basu

Webinars





PREPARING FOR OSHA'S COVID-19 VACCINATION ETS: EMPLOYER CHECKLIST

The Occupational Safety and Health Administration (OSHA) has been directed to issue an emergency temporary standard (ETS) imposing vaccine mandates for private employers. This checklist is a jumping-off point for your organization as you prepare for the upcoming rule.

[Click here to see the checklist!](#)



Welcome

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The OSHA ETS Update The Story Continues to Unfold . . .

January 13, 2022



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Note that this presentation is intended as a
general discussion of the law and is not
intended as legal advice for any particular
situation.

COVID-19 in 2022 – Still Deadly

- COVID-19 first appeared in the U.S. in early 2020.
- COVID-19 has currently accounted for more than 11,500 Marylander deaths since the start of the pandemic.
- Maryland surpassed a 20% positivity rate on December 30, 2021.
 - More infections now than at anytime during the pandemic.
- January 2022 positivity rate: ~27%
 - Surpassed 30% on Jan. 5, 2022.

Vaccinations

- Three vaccines are available to most of the population.
 - Vaccines were available starting in December 2020.
 - Pfizer is available and authorized for anyone who is 5 years and older.
 - Moderna and J&J are available and authorized for anyone who is 18 and older.
- Booster shots are currently available and recommended for anyone who:
 - Is 18 years and older (or 12 and older for the Pfizer booster) and last received the second shot of a Pfizer or Moderna vaccine at least 6 months ago; and
 - Is 18 years and older and last received his/her J&J vaccine at least 2 months ago.
- Individuals may mix and match booster shots – i.e., someone who received the Pfizer vaccine may receive the Modern booster shot.
 - Those who received the J&J vaccine are advised to get the Pfizer or Moderna booster shot.

A Long Time Ago, In a Galaxy Far, Far Away...

- Before the arrival of COVID-19, employers' workplace health and safety mandates were primarily dictated by the Occupational Safety and Health Act. That law was administered by the Occupational Safety and Health Agency ("OSHA"), although states were allowed to establish OSHA-approved State Plans.
- Maryland is one of 28 OSHA-approved State Plans and is referred to as "MOSH."
- Many industries (e.g., health care; construction; etc.) are highly regulated, with numerous industry-specific requirements.
- **All** industries and professionals are governed by the General Duty Clause, which requires employers to furnish to each employee "a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm..."

OSHA General Duty Clause & 300 Log

- The General Duty Clause requires employers to comply with all occupational safety and health standards
- OSHA 300 Log
 - Employers (with 10 or more employees) must keep a Form 300 to record work-related injuries and illnesses
 - Injury/illness is considered work-related if an event or exposure in the work environment caused or contributed to the condition
- Employers must also report a work-related death within 8 hours, and a work-related hospitalization within 24 hours

OSHA Bloodborne Pathogen Policy

- Employers must take certain steps to protect employees who are occupationally exposed to blood or other potentially infectious material
 - Meaning, employees who can reasonably be anticipated to come into contact with such infectious material
- Employers administering on-site COVID-19 tests should consider creating and enforcing an OSHA-compliant Bloodborne Pathogen Policy
 - This includes a policy which:
 - Implements universal precautions;
 - Identifies and uses engineering controls and work practice controls;
 - Provides for PPE for employees;
 - Makes available hepatitis B vaccinations;
 - Makes available post-exposure evaluations and follow-ups to those exposed;
 - Uses labels to communicate hazards; and
 - Provides information and training to workers.

Executive Orders:

Healthcare and Federal Contractors

- Healthcare Vaccine Mandate
 - Applies to Medicare-certified health care facilities, providers, and suppliers.
 - It covers nearly all staff of these entities, including their full- and part-time employees, licensed practitioners, trainees, contractors, volunteers, and student workers who are providing care, treatment, and other services.
 - Testing is an alternative **only** if an employee needs a reasonable accommodation.
- Federal Contractor Vaccine Mandate
 - Applies to a federal contractor who is a party to a covered federal contract.
 - A covered contractor must ensure that employees are vaccinated if they are performing work on a covered contract.
 - Testing is an alternative **only** if an employee needs a reasonable accommodation.

Executive Orders:

Entities with 100 or more Employees (OSHA ETS)

- Applies to entities with 100 or more employees.
 - Must include all full- and part-time workers.
 - All employees employed by a single corporate entity must be counted together.
 - If two entities are not the same corporate entity, they may still be considered the same for calculation purposes if they share in handling safety responsibilities.
 - Once an employer has 100 or more employees during the effective period of the OSHA ETS, they will be covered.
 - The entity is covered regardless of whether it had 100 or more employees at the time of the ETS' effective date or whether the count falls below 100 employees during the rule's effective period.
- Unlike contractor vaccine mandate or healthcare mandate, testing can be used as an alternative to vaccine mandate.
 - Regardless of the employee's need for a reasonable accommodation from the vaccine.

Healthcare Vaccine Mandate Overview

- Applies to Medicare-certified health care facilities, providers, and suppliers.
- Covers nearly all staff of these entities, including their full- and part-time employees, licensed practitioners, trainees, contractors, volunteers, and student workers who are providing care, treatment, and other services.
- **Dates:**
 - January 27, 2022 – all covered staff must have received their first dose;
 - February 28, 2022 – all covered staff must have received their second dose.
- Mandate also requires covered entities to develop and implement a plan to ensure vaccination compliance, accommodation review, and proper documentation procedures.
- Stayed in 25 states, but will be enforced (*pending SCOTUS ruling*) in MD

Federal Contractor Vaccine Mandate Overview

- Applies to a federal contractor who is a party to a covered federal contract.
 - A covered federal contract must include vaccination mandate clause if the contract is awarded, or renewed, on or after November 14, 2021.
- A covered contractor must ensure that employees are vaccinated if they are performing work on a covered contract.
 - Requires a contractor's employees to be fully vaccinated if they perform work on a government contract, regardless of whether they actually visit a federal worksite.
- Also applies to subcontractors.
 - Prime contractors are obligated to include vaccine mandate clause in the subcontract.
 - And government agencies are authorized to prohibit unvaccinated individuals from agency premises.
- Mandate is currently **stayed** nationwide (**not currently pending SCOTUS review**).

OSHA ETS – Paused

- OSHA ETS was stayed by a federal appeals court.
 - Fifth Circuit paused the ETS on November 6
 - The appeal process took a while and prevented the ETS from going into effect.
- **Prior** deadlines included:
 - December 6, 2021 – deadline to implement vaccine and testing policies; and
 - January 4, 2022 – deadline to ensure compliance with the vaccine and/or testing mandate.

OSHA ETS – Stay Lifted

- A federal appeals court lifted the stay on December 17, 2021
- OSHA announced a slight delay to the start of enforcement
 - Previous deadlines of December 6 and January 4 are now January 10 and February 9, respectively.
- **New** deadlines:
 - January 10, 2022 – deadline to implement vaccine and testing policies; and
 - February 9, 2022 – deadline to ensure compliance with the vaccine and/or testing mandate.

OSHA ETS – Supreme Court

- Supreme Court heard arguments on the ETS on January 7
 - *National Federation of Independent Business v. Department of Labor*
 - Justices seemed willing to strike down the OSHA ETS, but could be struck in whole or in part
 - Medical facility mandate seems more likely to withstand current challenge
- Unless the ETS is struck down, the January 10 deadline is still controlling

OSHA ETS – Vaccine Mandate

- If covered by the OSHA ETS, the employer must:
 - Develop and implement a mandatory COVID-19 vaccine policy;
 - Determine the vaccination status of each employee;
 - Support vaccinations by providing reasonable time off; and
 - Require employees to provide prompt notice when they have tested positive for COVID.
- Does not apply to employees who:
 - Do not report to a workplace where other individuals are present;
 - Work exclusively from home; or
 - Work exclusively outdoors.

OSHA ETS: Penalties

Here are the maximum penalty amounts, with the annual adjustment for inflation, that may be assessed:

Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	\$13,653 per violation
Failure to Abate	\$13,653 per day beyond the abatement date
Willful or Repeated	\$136,532 per violation

Testing Under the OSHA ETS

- Employers ***may*** (but are not required to) permit employees to undergo testing for COVID-19 ***instead*** of being vaccinated
- Testing timing:
 - Must be tested at least ***weekly***, if in the workplace at least one per week
 - Must be tested within 7 days before returning to the workplace, if away from the workplace for a week or longer

Testing Under the OSHA ETS (cont.)

- Employers may require employees to pay for the cost of weekly COVID-19 testing.
- IF POSITIVE:
 - Employees must promptly report their status to the employer.
 - Employees must stay home and quarantine.
- Privacy:
 - Status of employee's COVID test must remain confidential – shared only with those on a “need to know” basis.

Mask Requirement

- All unvaccinated employees **MUST** wear face coverings when indoors and when occupying a vehicle with another person for work purposes
- Limited exceptions:
 - When an employee is alone in a room with floor to ceiling walls and a closed door.
 - For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
 - When an employee is wearing a respirator or facemask.
 - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (e.g., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

Mask Requirement (cont.)

- Must completely cover the nose and mouth and be secured to the head with ties, ear loops, or elastic bands.
- Must be made of two or more layers of breathable fabric.
- Must fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face.
- Must be a solid piece of material without slits, exhalation valves, visible holes, punctures, or other openings.

CDC Quarantine Guidelines

- Exposed to COVID-19:
 - 5 days of quarantine, followed by mask use for 5 more days, if:
 - Unvaccinated;
 - More than 6 months from Pfizer/Moderna vaccine; or
 - More than 2 months from J&J vaccine.
 - 10 days of mask wearing if quarantine is not feasible.
 - No quarantine necessary if boosted.
- Positive for COVID-19:
 - 5 days of quarantine and, if asymptomatic after 5 days, strict mask use for the next 5 days.

Accommodations: ADA

- The ADA requires that employees receive a reasonable accommodation due to a disability.
 - This requirement extends to vaccines.
- If the employee has a disability that would prevent him/her from safely receiving the COVID-19 vaccine, a reasonable accommodation might be required.
 - A reasonable accommodation in lieu of being vaccinated could be to allow the employee to continue working from home, or to require the employee to wear a mask while in the office.
- An employer need not provide a reasonable accommodation under the ADA if it would create an undue hardship.
 - “Undue hardship” under the ADA means a significant difficulty or expense in providing the accommodation.

Vaccinations – Title VII

- Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- Like the ADA’s reasonable accommodation requirement, the same reasonable accommodation (work from home or required to wear a mask while in the office) can also be used if the employee has a religious objection to the vaccination.
- However, Title VII’s “undue hardship” definition is any accommodation that would result in more than a de minimis cost to the employer.
 - This is a lower standard than the undue hardship definition under the ADA.
 - But should still be used with caution.
- An employee may object due to his/her sincerely held religious beliefs.
 - But determining what is a true, sincere religious belief is often tricky.
 - Supporting information verifying the employee’s sincere beliefs may be requested.

Confidentiality

- Information about an employee's **medical status** must be kept confidential!
- An employee's **religious accommodation request** must be kept confidential!
- Only personnel with a **significant need to know** should be made aware of an employee's medical status and/or religious accommodation request, including vaccination status and including COVID-19 and/or flu infection status.
- A “significant need to know” means a person to whom a supervisor reports and/or authorized human resources personnel. That person, in turn, can report any such information to the individual(s) to whom they report.

The Family and Medical Leave Act

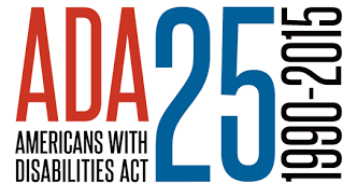
- **Application:** Covers all private employers that employed 50+ employees for at least 20 workweeks in current or preceding calendar year
- **Requirements:** Employer must grant up to 12 weeks of unpaid leave to employees in a 12-month period, for the employees to use for a variety of reasons including their own or family member's serious health condition
- **Employee Eligibility:**
 - Work for a covered employer
 - Have worked for the employer for 12 months (need not be consecutive)
 - Have worked 1,250 hours in 12 months prior to the start of leave
 - Work at a location where the employer has 50 + employees in a 75-mile radius

Substitution of Paid Leave: FMLA

- Employees can choose **OR** employer can require employees to substitute accrued but unused paid leave for unpaid FMLA
- Any paid leave runs concurrently with FMLA
- Employers may not discriminate against employees on FMLA in the administration of paid leave policies
- Leave taken under disability plan:
 - Not considered “unpaid” leave
 - Neither employer nor employee can require substitution
 - Voluntary agreement by both parties to substitute ok

The Americans with Disabilities Act

- **Application:** Employers with 15+ employees
- **Requirements:** Employers are required to provide “reasonable accommodations” to employees with qualifying disability
- **Eligibility:** Employees are protected by ADA if they have: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record (or past history) of such impairment; or (3) are regarded by employer as having a disability.



Sick Leave and ADA, Cont.

- ADA may require employer to provide additional leave even after all available sick leave has been used
- Employer must engage in “interactive dialogue” to determine if there are any reasonable accommodations that would allow employee to perform essential functions of the job without causing undue hardship
- **Is attendance an “essential function”?**

Maryland Reasonable Accommodations for Disabilities Due to Pregnancy Act

- **Application:**
 - 15+ employees in the state of Maryland
- **Eligibility:**
 - All pregnant employees, regardless of amount of time worked for employer or amount of hours regularly worked
- **Requirements:**
 - If a pregnant employee requests a reasonable accommodation, the employer must explore with the employee all possible means of providing the accommodation, including:
 - (1) changing the employee's job duties or work hours;
 - (2) relocating the employee's work area;
 - (3) providing aids such as an ergonomic chair;
 - (4) transferring the employee to a less strenuous or less hazardous position; or
 - (5) providing leave.

Questions?



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Appendix

Maryland Healthy Working Families Act

- The MHWFA requires Maryland employers to provide paid sick and safe leave to employees (unpaid leave if employing fewer than 15 employees)
- Employees must earn at least 1 hour of leave for every 30 hours they work
- Leave may be used for a variety of health-related reasons, even for health events of family members

*For Alera clients not located in Maryland, you can reference your state laws on AleraHR



Amount of MHWFA Leave

- Employees must receive 1 hour of leave for every 30 hours they have worked
- Employees can earn up to 40 hours of leave per year
- Up to 40 hours of unused leave must *carryover* to the next year, *unless* the employer makes available the employee's full annual allotment of leave at the beginning of the year
- Employer may award leave as it accrues, or they can award the full amount an employee would earn at the beginning of the calendar year
- Employers can limit the amount of leave earned at any given time to 64 hours (once employee hits this mark, they stop earning leave until they use some of it)

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MHWFA Leave Usage

- Employees must be able to use leave for the following reasons:
 - To care for their own mental or physical illness, injury, or condition
 - To care for a family member's mental or physical illness, injury, or condition
 - Obtaining preventive medical care for themselves or their family member
 - Maternity or paternity leave
 - An absence caused by domestic violence, sexual assault, or stalking committed against either the employee or their family member, and the leave is being used:
 - To obtain medical or mental health attention,
 - To obtain services from a victim services organization,
 - For legal services or proceedings, or
 - Because the employee has temporarily relocated as a result of the incident

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MHWFA Requirements for Employees

- Employees must provide up to 7 days notice for a use of leave that is *foreseeable*
 - If unforeseeable, must provide notice as soon as practicable
 - Employer may deny leave use if the employee fails to provide required notice *and* the absence will cause a “disruption”
- Employer can request verification of the use of leave if an employee uses leave for more than 2 consecutive shifts
 - Verification may also be required if the employee uses leave between the 107th and 120th calendar days of being employed (if it is a term agreed to at time of hire)
 - If employee fails to provide verification, subsequent requests to take leave for the same reason may be denied
- An employee *cannot* be required to find a replacement

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Maryland Flexible Leave Act

- Applies to employers with 15+ employees
- Employees must be allowed to use any earned “leave with pay” to care for illness of a child, spouse, or parent.
- “Leave with pay” includes vacation leave and sick leave
- Employees must be allowed to elect the type and amount of leave with pay to use

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