

# Vaccination Mandates, Concerns, and Accommodations

November 4, 2021

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- Business Litigation
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- Employment Law
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- General Liability
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# Introductions



Sarah Bushnell



Beth Prouty



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## Current and Forthcoming COVID-19 Vaccine Mandate Requirements

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## Current and Forthcoming COVID-19 Vaccine Mandate Requirements

- Federal, executive branch employees
- Federal contractors
- Nursing home workers and health care workers at hospitals, nursing homes, and health care providers who participate in Medicare and Medicaid
- Employees of Minnesota agencies (vaccine or testing)
- Hennepin County contractors, employees, and volunteers (vaccine or testing)

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## Current and Forthcoming COVID-19 Vaccine Mandate Requirements

On September 9, 2021, President Biden announced a forthcoming Emergency Temporary Standard (ETS) to be issued by the Occupational Safety and Health Administration (OSHA), which will pertain to private employers with 100 or more employees.

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## The ETS

*TODAY IS THE  
DAY!*



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## Minnesota ETS

Minnesota will need to adopt an identical or “at least as effective as” ETS.

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## The ETS Covered Employers

- 100 or more employees across all U.S. locations anytime the ETS is in effect
- Includes part time employees but not contractors
- Related entities should count all of their employees together if they handle safety matters as one company
- Staffing agency employees are counted only by the staffing agency

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## The ETS Excluded Employees

### **Excluded Employees are Counted For Employer Coverage**

- Employees whose work is entirely remote
- Employees who work exclusively outdoors

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## The ETS Requirements

Covered employers must implement a **written mandatory COVID-19 vaccine policy** that requires all non-exempt workers to be vaccinated, subject to legally-required accommodations . . .

**UNLESS**

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## The ETS Requirements

The covered employer implements a written policy allowing employees to choose **full vaccination or regular testing (every seven days)\* and proper face covering (generally) when indoors.**

**\*Tests may not be required under a testing policy for employees within 90 days of testing positive for COVID-19.**

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## The ETS Requirements

- Employers must require employees to provide proof of vaccine status
- Collect proof of negative test every seven days, if a testing policy is in place
- Maintain **confidentially** records of each employee's vaccine status and test results

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## The ETS Requirements

Employee education, language and literacy level appropriate:

- The ETS requirements and employer's policy
- "Key Things to Know About COVID-19 Vaccines," available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- Employers cannot take action against employees for reporting work-related illnesses and injuries or from exercising rights under the OSH Act
- Criminal penalties for supplying false information/documents

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## The ETS Requirements

Employees must be required to immediately notify employer of a positive COVID-19 test result and must be excluded from the workplace until the employee receives a negative result, return to work recommendation or meets criteria in CDC guidance

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## The ETS Requirements

- Report work-related COVID-19 deaths within **8 hours**
- Work-related COVID-19 inpatient hospitalization within **24 hours**

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## Employer Pays

- Up to four hours of paid time, including travel time, for vaccination
- Paid sick leave to recover from side effects of vaccination
- Does not require employers to pay for testing **but Minnesota law does**

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## The ETS Fully Vaccinated

Two weeks after completing doses with at least the minimum recommended interval between doses in accordance with the approval, authorization, or listing that is:

- (A) FDA approved or EUA;
- (B) "listed for emergency use by the World Health Organization (WHO); or
- (C) administered as part of a clinical trial at U.S. site, if the recipient is documented to have of primary vaccination with the "active" (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board) or" listed for emergency use by the WHO

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## The ETS: Acceptable Tests

- (1) FDA approved, including EUA;
- (2) administered as required by the authorized instructions; and
- (3) “not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.”

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## The ETS IMPORTANT DATES

- Effective November 5, 2021 (or date ETS is published in Federal Register)
- Compliance with everything except testing: 30 days after publication (probably **December 5**)
- Testing compliance: **January 4**

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## The ETS

The ETS will be published in the Federal Register for comment and can remain in place for six months, after which it must be replaced by a permanent standard

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## Legal Challenges

“OSHA must determine that workers are in grave danger due to exposure to toxic substances or agents determined to be toxic or physically harmful or to new hazards and that an emergency standard is needed to protect them.”  
Emphasis Added.

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## What About Employers Not Required to Mandate Vaccines?

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## Resources

- ETS (unpublished): [2021-23643.pdf \(federalregister.gov\)](#)
- OSHA FAQs: [COVID-19 Vaccination and Testing ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#)
- Who pays for testing?
  - [Minn. Stat. 181.61](#) (the test itself)
  - [MN DOLI Guidance, page 5](#)
  - [Federal DOL Guidance](#) (employees' time)
- [Executive Order 14042 \(federal contractors\)](#)
- [Safer Federal Workforce Task Force Guidance](#)
- [COVID-19 County Data Tracker](#) (for transmission rates to follow CDC guidance)

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# Disability and Religious Accommodations Step by Step

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## Accommodations Requests

- Consider each request individually
- Have same person or persons consider each request.
- Document
- Be consistent

## Disability Accommodations

- Documentation from health care provider regarding nature of condition that prevents vaccination.
- Duration of the condition
- Interactive Process
- Undue hardship (“significant difficulty or expense”) or direct threat to safety of others.

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## Possible Accommodations Include

- Weekly covid testing
- Mask wearing
- Social distancing from other employees
- Job reassignment
- Remote work
- PTO
- Unpaid leave

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## Religious Accommodations

- Sincerely held religious belief, practice, or observance
- Political or personal beliefs not considered “religious”
  - Belief that mandate infringes individual liberty
  - Belief that vaccines came out “too fast”

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## Religious Accommodations

- Generally assume the stated religious belief is sincere unless good-faith basis for questioning the stated belief.
- Not required to submit letter from faith leader.
- Not required to be member of faith community.

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## Religious Accommodations

- Stated belief can differ from teaching of religious authority.
- Religious beliefs can change over time

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## Religious Accommodations

1. Please describe the nature of your objection to the COVID-19 vaccination requirement.
2. Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise? If so, please explain how.

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## Religious Accommodations

3. How long have you held the religious belief underlying your objection?
4. Please describe whether, as an adult, you have received any vaccines against any other diseases (such as a flu vaccine or a tetanus vaccine) and, if so, what vaccine you most recently received and when, to the best of your recollection.

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## Religious Accommodations

5. If you do not have a religious objection to the use of all vaccines, please explain why your objection is limited to particular vaccines.
6. If there are any other medicines or products that you do not use because of the religious belief underlying your objection, please identify them.

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## Religious Accommodations

7. Please provide any additional information that you think may be helpful in reviewing your request.

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## Religious Accommodations

- EEOC Religious Accommodations form available at:  
<https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20for%20web.pdf>

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## Religious Accommodations

- Safer Federal Workforce Task Force Religious Accommodations form available at:  
[https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM\\_FINAL%20REVIEW\\_20211003%2010.29%2011am.pdf](https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM_FINAL%20REVIEW_20211003%2010.29%2011am.pdf)

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- Interactive process
- An undue hardship is one that requires more than a “de minimus” cost or burden to the operation of your business. (The ADA “undue burden” standard is “significant difficulty or expense.”)

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## Legality of Mandate

- *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) upheld smallpox vaccination mandate.
- Challenges to implementation more likely (United Airlines).

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## Employers Required to Mandate COVID-19 Vaccines/Testing

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# Covid Litigation Alleging Wrongful Termination

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## OSHA

Employees have a right to:

- Work free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees.
  - Minn. Stat. § 182,653, subd. 2
- Work in a workplace which complies with occupational safety and health standards.
  - Minn. Stat. § 182,653, subd. 3
- Be free from discrimination for exercising their rights authorized above.
  - Minn. Stat. § 182.669

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## OSHA

- Can an employer refuse to perform work they consider puts them in imminent danger (an immediate threat of death or serious physical harm)?
  - Employee must first present concern about the hazardous condition to his or her employer and seek a correction
  - If an employer refuses to take corrective action, there must be insufficient time to report the condition to OSHA and ask OSHA to investigate
- If both of these conditions present, an employee has a right to refuse to work and a claim for discrimination if the employer should take some adverse against as a result

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## NLRA

### National Labor Relations Act (NLRA)

- Protects the rights of all employees (union and non-union) to take action for their mutual aid and/or common protection.
  - Protects action taken by two or more employees acting together.
  - In some cases, can protect a single employee acting on behalf of other employees; but not just an individual's personal complaint.
- Protects rights to discuss workplace safety, file a complaint with the NLRB, and in some cases walk off the job.
  - Includes speaking out in public about workplace safety, including on social media.

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## MN Whistleblower Act

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee ... because:

- (1) the employee ... in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;
- Minn. Stat. § 181.932, subd. 1

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## *Phipps* Exception to the At-Will Employment Doctrine

Minnesota recognizes a narrow public policy exception to the at-will employment doctrine for employees who refuse to participate in an activity that the employee, in good faith, believes violates any state or federal law or regulation.

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## Employee Remedies

- File claims with OSHA or NLRB
- Civil Suit
- Damages
  - Reinstatement
  - Lost wages and benefits
  - Future wage loss and benefits
  - Emotional distress
  - Punitive Damages
  - Attorney fees and costs
  - Other considerations

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## How the Claims Play Out

### McDonnell Douglas framework

- Employee must demonstrate a prima facie case of retaliatory discharge.
- The employer must provide evidence that it had a legitimate, non-discriminatory reason for terminating the employee.
- The employee has the burden to demonstrate the employer's proffered reason was pre-textual.

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## *McDonnell Douglas Framework*

### McDonnell Douglas – Prong 1

- Was the employer engaged in statutorily protected conduct?
- Was there any connection between the conduct and the termination?
  - An employer can lawfully terminate an employee based on the manner of the communication, even if the content of the communication is protected.

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## *McDonnell Douglas Framework*

### McDonnell Douglas – Prong 2

- The employer must provide evidence that it had a legitimate, non-discriminatory reason for terminating the employee.

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## Tips for Employers

- Establish a clear chain of command and process for employees to report concerns.
- Take concerns seriously; respond; document your response.
- Document your employee files
- Depending on employee, consider a warning before a termination.
- Handle any termination carefully

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## Thank You For Attending!



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