

OSHA ETS Vaccination Mandate

Additional Analysis and Considerations

Some **legal considerations** that may affect the implementation / enforcement of the OSHA ETS include the following:

The ETS defines unvaccinated employees as the grave danger and not some other safety issue inherent to the workplace;

What about the pandemic today poses a greater “grave danger” than circumstances of the past 20 months; and

Why this “grave danger” only affects employers with 100 or more employees and not smaller employers.

To issue a legally valid OSHA ETS, the agency must show that it acted consistent with its statutory authority, which includes establishment that there is a “grave danger” in the workplace that must be addressed.

Industry groups, unions, and trade associations have said they have lawsuits ready to file to seek an injunction against the OSHA ETS. Possibly, a federal court will issue a nationwide injunction against the OSHA rule, but legal precedent in this area suggests any such injunction may not be issued until the eve of the final enforcement deadline (i.e., January 4, 2022). As a result, **employer reliance on court intervention may be a risky strategy.**

Additionally, the rule may pose significant challenges to the federal contractor community. While the rule has exempted workplaces covered by the Safer Federal Workforce Task Force’s guidance, that exemption poses challenges for federal contractors and subcontractors that may be awaiting coverage—but are not yet covered—by the Safer Federal Workforce Task Force guidance by virtue of not yet having the federal contractor vaccine mandate clause added to their contracts. Similarly, employers with some, but not all, of their workplaces covered by the Safer Federal Workforce Task Force could end up subject to differing vaccine mandate strategies at different work locations.