

**PRESENT AND FUTURE IMPACTS OF
THE COVID-19 PANDEMIC ON
EMPLOYMENT LAW IN THE
UNITED STATES**

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*No one doubts that the COVID-19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease.*¹

The COVID-19 pandemic has undoubtedly shifted the landscape of employment law in the United States, and it continues to do so. As new COVID-19 variants and challenges arise, so do new questions in the workplace concerning employment policies, government mandates, and compliance. Employers have been forced to constantly adapt to changing legal obligations and keep up with the latest developments.

Beyond the direct threat of the virus, COVID-19 will have a lasting impact on employment law and compliance efforts going forward. This Article addresses the quick evolution of employment law, thus far, during the COVID-19 pandemic with a focus on major congressional legislation and federal agency action impacting employment law. This includes a discussion on the fierce legal battle over COVID-

1. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

19 vaccine mandates and a look at how existing federal agency frameworks were adapted to novel COVID-19 issues. Finally, this Article establishes how key United States Supreme Court determinations and federal agency response on COVID-19 issues may shape the future of employment agency rules and state responses.

I. THE CONSTANT BATTLE FOR COMPLIANCE: THE EVOLUTION OF EMPLOYMENT LAW DURING THE COVID-19 PANDEMIC

Throughout COVID-19 infection surges and widespread virus variants, the shifting landscape of health and safety precautions led to a dizzying whirlwind of new considerations and obligations for employers. From Congress' authorization of financial relief² to local masking ordinances and health directives,³ to state laws limiting the ability of employers to require vaccination,⁴ many responses to the COVID-19 pandemic bled into workplaces across the country and, in many cases, into countless temporary work-from-home set-ups. Beyond federal and local legislation, employers also juggled shifting compliance obligations rising out of executive agency responses. This section explores major congressional COVID-19 legislation impacting workplaces, key federal agency rules, subsequent court decisions, and interpretive guidance relating to COVID-19 employment issues.

A. LANDMARK LEGISLATION: CONGRESS'S WORKPLACE COVID-19 RELIEF

The United States Congress passed several expansive bills geared towards providing COVID-19 relief to American families. This Article focuses on two main pieces of legislation that changed employment

2. One such example was the almost \$2 billion American Rescue Plan Act of 2021 (authorizing, among other things, financial relief payments to millions of Americans) and the Families First Coronavirus Response Act (requiring certain employers to provide paid sick leave or expanded leave for reasons relating to COVID-19). See *The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP'T OF THE TREASURY, (Mar. 18, 2021) <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> (Mar. 18, 2021); *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (last visited Mar. 27, 2022) [hereinafter *DOL Families First*].

3. Like the temporary mask mandate in Omaha, Nebraska instituted on January 12, 2022 by issue of the City Health Director. *Douglas County Health Department Clarifies Omaha Mask Mandate*, WOWT NEWS (Jan. 12, 2022), <https://www.wowt.com/2022/01/12/mask-mandate-effect-omaha/>.

4. For example, Tenn. Covid-19 Code §§ 14-1-101-104 and H.B. 702 67th Leg., Reg. Sess. (Mont. 2021), both examples of legislation that prohibit employers from requiring employee vaccination.

obligations: (1) Families First Coronavirus Response Act,⁵ a \$104 billion package focused on paid sick leave and unemployment benefits, which became known as the “Phase 2” stimulus legislation; and (2) The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”),⁶ known as the “Phase 3” stimulus legislation, a massive \$2 trillion package focused on cash payments to individuals, increased unemployment benefits, and creation of the Paycheck Protection Program that provided forgivable loans to employers. The CARES Act also established the Federal Pandemic Unemployment Compensation (“FPUC”) program, which is the part of the CARES Act discussed in this Article.

i. The Families First Coronavirus Response Act

In April 2020, the Families First Coronavirus Response Act (“FFCRA”) went into effect. This legislation required certain employers⁷ to provide their employees with paid sick leave (Emergency Paid Sick Leave Act)⁸ and expanded family and medical leave (Emergency Family and Medical Leave Expansion Act or “Expanded FMLA”)⁹ for specified reasons related to COVID-19. Under the FFCRA, private sector employers were provided refundable tax credits to reimburse them,

5. 29 U.S.C. 2601 §§ 1101-8001.

6. 15 U.S.C. 116 §§ 9001-9041.

7. The paid sick leave and expanded family and medical leave provisions of the FFCRA applied to certain public employers, and private employers with fewer than 500 employees. *DOL Families First*, *supra* note 2.

8. The Emergency Paid Sick Leave Act entitled workers to up to 80 hours of paid sick time when they were unable to work for certain reasons related to COVID-19. Employees were eligible for up to 80 hours of paid sick leave for their own health needs or to care for others. Qualifying reasons for leave related to COVID-19 included when an employee was unable to work (or telework) because they were:

(1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 (2) advised by a health care provider to self-quarantine related to COVID-19;
 (3) experiencing COVID-19 symptoms and were seeking a medical diagnosis;
 (4) caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
 (5) caring for their child whose school or place of care was closed (or child care provider is unavailable) due to COVID-19 related reasons; or
 (6) were experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. *Id.*

9. Under certain conditions, an employer was required to provide up to an additional ten weeks of paid expanded family and medical leave at two-thirds the employee’s regular rate of pay where an employee was unable to work due to need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. Apart from this Expanded FMLA, the U.S. Department of Labor released FAQs clarifying that eligible employees could be entitled to FMLA leave under certain circumstances if the employee is sick with or caring for a family member who is sick with COVID-19. *COVID-19 and the Family and Medical Leave Act Questions and Answers*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/fmla/pandemic#3> (last visited Mar. 27, 2022).

“dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19.”¹⁰

In March 2021, over a full year into the pandemic, President Biden signed into law the American Rescue Plan Act of 2021,¹¹ which extended these tax credits available to private employers with fewer than 500 U.S. employees that voluntarily provided EPSLA and EFMLEA to their employees.¹² This was expanded through September 30, 2021 and lapsed on that date.

ii. The CARES Act’s FPUC Program

Although the FFCRA provided additional flexibility for state unemployment insurance agencies and additional administrative funding to respond to the COVID-19 pandemic, the CARES Act, signed into law on March 27, 2020, significantly expanded states’ ability to provide unemployment insurance for many workers impacted by the COVID-19 pandemic, including for workers who were not ordinarily eligible for unemployment benefits, in part through its FPUC program.

Under the FPUC program, all individuals who received regular unemployment insurance benefits through their state were also eligible for an *additional* FPUC payment of \$600 per week through July 31, 2020.¹³ As the pandemic progressed, the FPUC amounts were adjusted to \$300 per week,¹⁴ and several states later began declining

10. *COVID-19-Related Tax Credits for Paid Leave Provided by Small and Midsize Businesses FAQs*, INTERNAL REVENUE SERV. (Feb. 24, 2022), <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

11. 29 U.S.C. 2601 §§ 1101-8001.

12. *Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021: Overview*, INTERNAL REVENUE SERV. (Mar. 4, 2022), <https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-overview>.

13. Press Release, U.S. Dep’t of Lab., U.S. Department of Labor Publishes Guidance on Federal Pandemic Unemployment Compensation (Apr. 4, 2020) (<https://www.dol.gov/newsroom/releases/eta/eta20200404>).

14. After the expiration of the \$600 weekly benefit on July 31, 2020, President Trump issued a presidential memorandum on August 8, 2020, creating Lost Wages Assistance (LWA), a grant program that supplemented the weekly benefits of certain eligible UI claimants, with up to \$300 weekly in federal funding. All states ended LWA payments by September 5, 2020. The Unemployment Insurance (UI) provisions contained in Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (P.L. 116-260, enacted December 27, 2020) are titled the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act). The Continued Assistance Act reauthorized and expanded the enhanced unemployment benefits created under the CARES Act and extended the authorization for additional, temporary unemployment provisions first authorized under the CARES Act and the FFCRA by an additional 11 weeks in 2021. KATELIN P. ISAACS & JULIE M. WHITTAKER, CONG. RSCH. SERV., IF11723, UNEMPLOYMENT INSURANCE PROVISIONS IN THE CONSOLIDATED APPROPRIATIONS ACT, 2021 (DIVISION N, TITLE II, SUBTITLE A, THE CONTINUED ASSISTANCE FOR UNEMPLOYED WORKERS ACT OF 2020) (2021). Shortly thereafter, Congress passed the American Res-

FPUC benefits. This was in response to severe labor shortages in some states.¹⁵ It is believed that the enhanced unemployment benefits were keeping people out of the labor market, and as the pandemic progressed, many employers were struggling to fill available job positions because of it. This illustrates how Congress's actions, through FPUC and FFCRA benefits, has impacted and may continue to shape the workforce. Indeed, these laws likely drove what has become known as "The Great Resignation" of our nation's workforce.

B. AGENCY ACTIONS: THE FIGHT OVER COVID-19 VACCINE MANDATES

For many employers, ensuring workplace compliance becomes a time-consuming and costly headache when standards shift in an on-again, off-again fashion. Nowhere has this been more apparent than with federal agency rules on COVID-19 vaccine mandates. For months, employers were strung along as the legal battle over agency-imposed vaccine mandates continued. This section addresses key federal agency rules regarding COVID-19 standards (namely, COVID-19 vaccination requirements), subsequent court decisions, and employer choice in approaching workplace vaccination requirements.

i. The Big Name in Workplace Safety: Occupational Health and Safety Administration

The Occupational Health and Safety Administration ("OSHA") is the agency charged with ensuring "safe and healthful working conditions"¹⁶ as dictated under the Occupational Health and Safety Act of 1970 ("OSH Act").¹⁷ Federal OSHA has jurisdiction over most private sector employers and their workers, however, twenty two states or territories comply with OSH Act standards through an OSHA-approved state plan.¹⁸ As COVID-19 posed significant health and safety risks in certain workplaces, OSHA responded by issuing two major emer-

cue Plan Act of 2021, Pub L. No. 117-2 (Mar. 11, 2021), a \$1.9 trillion economic stimulus bill signed into law by President Biden on March 11, 2021. The American Rescue Plan Act extended expanded unemployment benefits with a \$300 weekly supplement through September 6, 2021. American Rescue Plan Act of 2021, 29 U.S.C. 2601 §§ 9011-9022.

15. See *Federal Pandemic Unemployment Compensation (FPUC)*, IOWA WORKFORCE DEV., <https://www.iowaworkforcedevelopment.gov/fpuc-information> (last visited Mar. 27, 2022) (ending FPUC participation in the state to "address the State of Iowa's severe workforce shortage); and Press Release, Neb. Dep't of Lab., Nebraska Ending Participation in Federal Pandemic Unemployment Programs (May 24, 2021) (<https://dol.nebraska.gov/PressRelease/Details/247>).

16. 29 U.S.C. § 651.

17. 29 U.S.C. §§ 651-678.

18. 29 U.S.C. § 667(c)(2).

agency temporary standards (“ETS”) in addition to using the OSH Act’s General Duty Clause¹⁹ as an enforcement mechanism.

a. What is an Emergency Temporary Standard?

Typically, OSHA (like other administrative agencies) is bound by a formal process for rulemaking under the Administrative Procedure Act,²⁰ which requires public notice and an opportunity for interested persons to comment on the proposed rule.²¹ The OSH Act allows this notice-and-comment rulemaking procedure to be bypassed, however, when circumstances call for immediate action via an emergency rule or ETS.²² To promulgate an ETS, the Secretary of Labor must determine “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and that “such emergency standard is necessary to protect employees from such danger.”²³ Before the COVID-19 pandemic, OSHA had only issued an ETS nine times—all of which were issued prior to 1984 and six of which were challenged in court.²⁴

b. OSHA’s Healthcare ETS

The first and least controversial of OSHA’s COVID-19 related emergency temporary standards was its June 21, 2021 Healthcare ETS applying to settings where any employees provided healthcare services or healthcare support services.²⁵ The Healthcare ETS imposed several key requirements on employers, including requirements to: (1) provide paid leave to employees impacted by COVID-19, (2) support COVID-19 vaccination by providing reasonable time and paid leave, and (3) immediately remove from the workplace any employee

19. 29 USC § 654(a)(1).

20. 5 U.S.C. §§ 551-559.

21. *See* 5 U.S.C. § 553(b)-(c).

22. 29 USC § 655(c)(1). Notably, this temporary standard serves as a proposed rule. It is expected that the Secretary “shall promulgate a [permanent] standard . . . no later than six months after publication of the emergency standard.” 29 USC § 655(c)(1)(3). *Id.*

23. 29 USC § 655(c)(1)(A)-(B).

24. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): COVID-19 EMERGENCY TEMPORARY STANDARDS (ETS) ON HEALTH CARE EMPLOYMENT AND VACCINATIONS AND TESTING FOR LARGE EMPLOYERS app. 19-20 (2022). Out of the six ETSs which were challenged in court prior to the COVID-19 pandemic, one ETS was partially vacated and only one ETS fully remained in effect. *Id.*

25. This ETS generally included settings like hospitals, nursing homes, and assisted living facilities. There were certain exceptions, however, including certain hospital ambulatory or out-patient care and home healthcare settings where (1) all employees were fully vaccinated, (2) the employer screened all non-employees for COVID-19 prior to entry, and (3) people with suspected or confirmed COVID-19 were not present. 29 C.F.R. § 1910.502 (2021).

who has COVID-19 or was in close contact with a COVID-19 positive individual in the workplace.²⁶

Despite some legal challenges, OSHA's Healthcare ETS remained in effect until December 2021—a far cry from OSHA's Vaccination and Testing ETS (discussed below) which encountered severe and continuous roadblocks. The difference between these two COVID-19 ETSs was the scope of each rule. OSHA's Vaccination and Testing ETS was a broad, sweeping mandate covering all industries. This was distinguishable from the Healthcare ETS, which narrowly focused on certain healthcare settings where there is a heightened risk of encountering people with COVID-19 and where additional precautions were needed to address those potential hazards.²⁷

OSHA withdrew much of its Healthcare ETS in December 2021, with the exception of certain record-keeping requirements under 29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r).²⁸ At that time, OSHA announced its intention to soon issue a “final standard that will protect healthcare workers from COVID-19 hazards” in line with the earlier Healthcare ETS requirements.²⁹

c. OSHA's Vaccination and Testing ETS

On November 5, 2021, OSHA issued its COVID-19 Vaccination and Testing Emergency Temporary Standard (“Vaccination and Testing ETS”).³⁰ This Vaccination and Testing ETS was a sweeping mandate for employers with 100 or more employees under OSHA's jurisdiction to require their employees to be vaccinated for COVID-19 or to show a negative COVID-19 test on a weekly basis.³¹ The Vac-

26. The Healthcare ETS also included other requirements outlined in 29 C.F.R. § 1910.502.

27. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61415 (interim final rule Nov. 5, 2021). “Healthcare settings covered by the Healthcare ETS primarily include settings where people with suspected or confirmed COVID-19 are treated, exacerbating the risk present in most workplaces.” *Id.*

28. *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, U.S. DEP'T OF LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Dec. 27, 2021), <https://www.osha.gov/coronavirus/ets>.

29. *Statement on the Status of the OSHA COVID-19 Healthcare ETS*, U.S. DEP'T OF LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Dec. 27, 2021), <https://www.osha.gov/coronavirus/ets>. There was significant confusion over whether the Healthcare ETS had a firm expiration date. An ETS does not automatically expire 6 months after being issued; instead, six months is the timeframe contemplated in the OSH Act for the agency to issue a permanent standard on the topic covered by the ETS. 29 U.S.C. § 655(c).

30. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61555 (interim final rule Nov. 5, 2021).

31. *Id.* The twenty-two states or territories with OSHA-approved state plans were required to adopt the federal OSHA Vaccination or Testing ETS or a similar standard within thirty days. While states like California took the opportunity to implement stringent COVID-19 protective measures for the workplace, other states like Iowa ex-

nation and Testing ETS covered employers who had a total of at least 100 employees (full-time, part-time, and temporary employees) at any time the ETS was in effect.³² The key requirements of the Vaccination and Testing ETS required covered employers to either (1) develop, implement, and enforce a mandatory COVID-19 vaccination policy; or (2) establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.³³

Almost immediately after OSHA published the Vaccination and Testing ETS, it was met with a flurry of legal challenges. On November 6, 2021, the United States Court of Appeals for the Fifth Circuit³⁴ stayed the Vaccination and Testing ETS, citing “grave statutory and constitutional issues” for the states within its jurisdiction.³⁵ As more lawsuits flooded all federal courts of appeal, the United States Judicial Panel on Multidistrict Litigation (“Panel”) consolidated all cases into one case in a court randomly selected by the Panel. Through that lottery process, the United States Court of Appeals for the Sixth Circuit was chosen as the court to hear all consolidated cases challenging

pressly refused to adopt and enforce federal OSHA’s Vaccination and Testing ETS. Compare CAL. CODE. REGS. tit. 8 § 3205 (2022) (imposing requirements for California employers to establish and adhere to a comprehensive COVID-19 Prevention Plan, while not mandating COVID-19 vaccination), with *Gov. Reynolds Applauds Iowa OSHA Decision Not to Implement Vaccine Mandate for Businesses*, OFF. OF THE GOVERNOR OF IOWA, (Jan. 7, 2022) <https://governor.iowa.gov/press-release/gov-reynolds-applauds-iowa-osha-decision-to-not-implement-vaccine-mandate-for> (relaying a statement from Iowa Labor Commissioner Rod Roberts saying “Iowa doesn’t have a standard requiring the Covid-19 Vaccination and Testing. But after closely reviewing the federal OSHA Vaccine Mandate, Iowa has determined it will not adopt the federal standard. Iowa has concluded that it is not necessary because Iowa’s existing standards are at least as effective as the federal standard change.”).

32. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. at 61555. OSHA’s Vaccination and Testing ETS contained a number of exceptions in scope. The Vaccination and Testing ETS specifically exempted those workplaces covered under the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (i.e., covered federal contractors and subcontractors) or in settings where employees provided health-care services or healthcare support services when subject to the requirements of OSHA’s COVID-19 Healthcare ETS. *Id.* Further, certain workers were exempted from the Vaccination and Testing ETS if they: did not report to a workplace where other individuals such as coworkers or customers were present, to employees while they were working from home, or to employees who worked exclusively outdoors. *Id.*

33. §1910.502(d).

34. The OSH Act provides that “(1) Any person who may be adversely affected by a standard issued under this section may . . . file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.” 29 U.S.C. § 655(f).

35. *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 6, 2021 adhered to *sub nom. BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep’t of Lab.*, 17 F.4th 604 (5th Cir. 2021)).

OSHA's Vaccination and Testing ETS. On December 17, 2021, the Sixth Circuit granted the Biden administration's request to dissolve the Fifth Circuit's stay on OSHA's Vaccination and Testing ETS.³⁶ In effect, this lifted the blocked order and cleared the path for OSHA's Vaccination and Testing ETS to go into effect. The majority opinion specifically noted:

[T]he costs of delaying implementation of the ETS are comparatively high. Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs. In a conservative estimate, OSHA finds that the ETS will 'save over 6,500 worker lives and prevent over 250,000 hospitalizations' in just six months. A stay would risk compromising these numbers, indisputably a significant injury to the public. The harm to the Government and the public interest outweighs any irreparable injury to the individual Petitioners who may be subject to a vaccination policy³⁷

Not surprisingly, the Sixth Circuit's ruling was promptly appealed to the United States Supreme Court. On January 13, 2022, the Supreme Court issued its highly anticipated decision that reimposed a stay on enforcement of OSHA's Vaccination and Testing ETS.³⁸ The Court blocked the mandate on the basis that OSHA had no "clear authority" from Congress to issue such a widespread, sweeping mandate. In its ruling, the Court stated:

Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.³⁹

36. *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccination and Testing*, 86 *Fed. Reg.* 6140x, Nos. 21-7000, et al. (6th Cir. Dec. 17, 2021).

37. *Id.* at 37 (citation omitted).

38. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S.Ct. 661 (2022).

39. *Id.* at 6-7.

The Court recognized the mandate could force employers to incur billions of dollars in unrecoverable compliance costs and would cause hundreds of thousands of employees to leave their jobs. Likewise, the Court recognized the mandate could save over 6,500 lives and prevent hundreds of thousands of hospitalizations.⁴⁰ Nevertheless, the Court stated:

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.⁴¹

Following the Court's decision, OSHA withdrew the Vaccination and Testing ETS on January 26, 2022.⁴² While OSHA may have conceded this fight on broad vaccination and testing requirements, the agency has reiterated plans to continue working towards a permanent infectious disease standard for health care workers which would include, but not solely focus on, COVID-19 protective measures.⁴³

d. OSHA's Authority Under the General Duty Clause

While OSHA may not have specific COVID-19 rules to enforce, the agency still retains enforcement authority under what is known as the General Duty Clause of the OSH Act. This clause states that employers are obligated to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."⁴⁴ As COVID-19 is a recognized hazard, which may lead to death or illness, OSHA has the ability to inspect and to issue citations and civil money penalties for what the agency believes it can prove to be COVID-19 hazards that were recognized by the employer

40. *Id.* at 8.

41. *Id.* at 8-9.

42. COVID-19 Vaccination Testing; Emergency Temp. Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022).

43. *Infection Diseases*, OFFICE OF INFO. AND REGUL. AFFAIRS (2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1218-AC46>. This will likely lead to overlapping coverage with certain healthcare entities who are subject to the Centers for Medicare & Medicaid Services (CMS) interim final rule requiring COVID-19 vaccination for healthcare staff. *See id.*

44. 29 U.S.C. § 654.

or others in the employers' industry.⁴⁵ About eight percent of OSHA's inspections are virus-related, and agency data shows that, since April 2020, "OSHA has conducted 3,587 COVID-19 related inspections and issued citations in about 765 cases," many times relying upon the General Duty Clause as its means of enforcement.⁴⁶

ii. *Surviving Vaccine Mandates (Either Alive and Well, or Near Death)*

On September 9, 2021, President Biden announced his plans for aggressive COVID-19 vaccination requirements spearheaded by two federal agencies—OSHA and the Centers for Medicare & Medicaid Services ("CMS")—and by executive order for certain federal contractors and subcontractors. This sweeping three-pronged vaccination plan drew immediate criticisms, mainly on the issue of proper authority. As previously discussed, the OSHA Vaccination and Testing mandate succumbed to Supreme Court scrutiny in January 2022. But what about the other two prongs of President Biden's announced plan? As discussed below, the CMS mandate is alive and well. The same cannot be said for the federal contractor and subcontractor mandate, which faced a long, drawn-out legal battle and eventual death.

a. Centers for Medicare & Medicaid Services Vaccine Mandate

On November 5, 2021, CMS's interim final rule ("IFR") was published in the Federal Register.⁴⁷ The IFR relied on CMS's existing regulatory authority over Medicare and Medicaid certified facilities to require vaccination for such providers and suppliers.⁴⁸ Specifically, covered facilities were required to "develop and implement policies and procedures to ensure that all staff are fully vaccinated for COVID-19."⁴⁹ Unlike OSHA's Vaccination and Testing ETS, CMS's rule does not provide a weekly testing alternative to COVID-19 vaccination.

45. *Id.* OSHA has the burden of proving the existence of a cited violation. Under the General Duty Clause, that burden increases due to the need to prove that the employer or its industry recognized something as being a hazard. *Id.*

46. Bruce Rolfsen, *COVID-19 Regulation Still on Agenda, OSHA Chief Doug Parker Says*, BLOOMBERG LAW (Feb. 14, 2022) <https://news.bloomberglaw.com/safety/covid-19-regulation-still-on-agenda-osha-chief-doug-parker-says-1>.

47. Medicare and Medicaid Programs, 86 Fed. Reg. at 61555.

48. *Id.* Notably, the IFR is made up of separate but nearly identical amendments to conditions of coverage, conditions of participation or other grant funding regulations for the certified providers and suppliers covered by the IFR. *Id.*

49. Medicare and Medicaid Programs, 86 Fed. Reg. at 61555. *See, e.g.*, Conditions for Coverage for End-Stage Renal Disease Facilities, 42 C.F.R. § 494.30(b) (2021) (requiring vaccination of all staff). COVID-19 vaccination is required of all staff, regardless of clinical responsibility or patient contact, who provide any "care, treatment, or other services for the center and/or its patients" which includes employees; licensed practitioners; students, trainees, and volunteers; and individuals who provide care,

Following several challenges to the CMS rule across jurisdictions, CMS's rule found its way to the Supreme Court through two separate challenges from groups of states—one led by Louisiana and one led by Missouri.⁵⁰ On January 13, 2022, the Supreme Court lifted the injunction blocking the CMS rule and allowed the rule to go into effect.⁵¹ Unlike OSHA's Vaccination and Testing ETS, the Court concluded that CMS's rule fell within the authority Congress conferred to the agency to "impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'"⁵² Thus, a COVID-19 vaccination requirement was considered a necessary part of patient health and safety because the vaccine reduces the likelihood that healthcare workers (covered by CMS's rule) would contract and transmit COVID-19 to their patients.⁵³ The Court's decision subjected all states to CMS's rule, although enforcement deadlines varied.⁵⁴

treatment, or other services for the [entity] and/or its patients, under contract or by other arrangement. Some exclusions apply for staff who are not physically present in the facility. Nevertheless, the requirement that "staff" and not just "employees" be vaccinated makes the CMS mandate far-reaching. For example, a photocopying machine technician who regularly visits the facility to repair and maintain office machines falls under the definition of staff. Therefore, to be compliant with the CMS mandate, the facility will need to have on hand proof of the technician's vaccination.

50. On December 13, 2021, the United States Court of Appeals for the Eighth Circuit denied the Biden administration's request to lift a Missouri district court's preliminary injunction that blocked the vaccine mandate in ten states—including Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire. *Missouri v. Biden*, No. 21-2725 (5th Cir. Dec. 13, 2021). Similarly, the Fifth Circuit denied the government's request to lift the stay following a decision out of the Western District of Louisiana imposing a nationwide stay. *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021). However, the Fifth Circuit limited the injunction to just those 14 states party to the action. *Id.*

51. *Biden v. Missouri*, No. 21A240, 595 U.S. 1 (2022).

52. *Biden v. Missouri*, No. 21A240, 595 U.S. 1, 5 (2022).

53. *Id.* The Court stated, "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella." *Id.* at 7.

54. On December 28, 2021, CMS issued additional guidance regarding the enforcement of the vaccine mandate in the states not subject to the appeal to the Supreme Court. *Guidance for the Interim Final Rule - Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, CENTERS FOR MEDICARE & MEDICAID SERVICES, (Dec. 28, 2021), <https://www.cms.gov/files/document/qso-22-07-all.pdf>. States not impacted by the injunctions had compliance deadlines set in a phased approach for January 27, 2022 and February 28, 2022. States impacted by the injunctions (including Nebraska and Iowa) were subject to later deadlines on February 14, 2022 and March 15, 2022 in a similar phased deadline approach. *Id.*

b. Executive Order for Federal Contractors and Subcontractors

Unlike the OSHA and CMS vaccine rules, the COVID-19 vaccination requirement for federal contractors and subcontractors has not had its day in front of the Supreme Court and likely never will. On September 9, 2021, President Biden signed Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (“Order”).⁵⁵ This order directed executive departments and agencies to contractually require enforcement of certain workplace safety standards (like COVID-19 vaccine requirements) as developed by the Safer Federal Workforce Task Force (“SFWTF”). The SFWTF released guidance on September 24, 2021 that required vaccination of covered contractor employees (unless an employee is legally entitled to an accommodation); required masking and physical distancing while in covered contractor workplaces; and required designation by covered contractors of a person to coordinate COVID-19 workplace safety efforts at covered contractor workplaces. Notably, the SFWTF made clear the Order only applied to contracts or contract-like instruments—meaning that coverage would only extend to those employers entering into a contract or sub-contract with the required contract language.⁵⁶

On December 7, 2021, the United States District Court for the Southern District of Georgia imposed a nationwide preliminary injunction to halt enforcement of the SFWTF guidance for federal contractors and subcontractors.⁵⁷ Shortly after, the Office of Management and Budget (“OMB”) issued updated guidance relating to its enforcement of the federal contractor vaccine mandate. OMB specifically stated that the federal government will not enforce the contract clause for any existing contracts already containing the new

55. *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, THE WHITE HOUSE (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

56. The definition of a covered contractor is defined broadly, however, and can include “a prime contractor or subcontractor at any tier who is party to a covered contract.” *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, Safer Federal Workforce, 3 (Nov. 10, 2021), https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf. This “flow down” requirement of the required SFWTF clause to subcontractors at all tiers “except for subcontracts solely for the provision of products.” *Id.* at 11.

57. *Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021). This followed an earlier injunction order from the United States District Court for Eastern Kentucky, which halted enforcement of the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee. *Kentucky v. Biden*, No. C:21-cv-00055-GFVT (E.D. Ky. Nov. 30, 2021).

clause, so long as the place of performance in the contract is a “U.S. state or outlying area” subject to a court order.⁵⁸

On August 26, 2022, The U.S. Court of Appeals for the Eleventh Circuit upheld the district court’s preliminary injunction against the federal contractor vaccine mandate on narrow grounds.⁵⁹ While the Eleventh Circuit agreed the plaintiffs were entitled to preliminary injunction, the court held that the district court’s nationwide injunction was overboard and limited its decision to only the plaintiffs in the case.⁶⁰ On August 31, 2022, however, the SFWTF responded by officially announcing that the federal government would not be taking steps to enforce the federal contractor vaccine mandate nationwide, pending further written notice.⁶¹ While several decisions still await determinations at the circuit court level, the appellate courts appear to be taking their time and did not grant requests for expedited review.⁶² For now, enforcement of the federal contractor and subcontractor rules are suspended and parties still wait for court resolution—and no one seems to be in a hurry.

iii. *A Note on Voluntary Employer Vaccination Policies*

Notably, these court decisions have neither addressed nor placed restrictions on the ability of private employers to implement voluntary COVID-19 health and safety precautions, including employer-specific vaccination mandates. In most states, private employers are free to impose vaccine mandates for employees, if they so choose. While there may be advantages to imposing protective measures against COVID-19 in the workforce, there are also potential costs in doing so—namely

58. These excluded areas are all fifty States; the District of Columbia; the commonwealths of Puerto Rico and the Northern Mariana Islands; the territories of American Samoa, Guam, and the United States Virgin Islands; and the minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll. *For Federal Contractors, SAFER FEDERAL WORKFORCE*, <https://www.saferfederalworkforce.gov/contractors/> (last visited Feb. 17, 2022).

59. *Georgia v. Biden*, No. 21-14269 (11th Cir. 2022).

60. The plaintiffs included Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia, and the construction trade group Associated Builders and Contractors, Inc. *Id.*

61. *Federal Contractors, SAFER FEDERAL WORKFORCE*, <https://www.saferfederalworkforce.gov/faq/contractors/> (last accessed Oct. 9, 2022).

62. This includes the Fifth, Sixth, and Eighth Courts of Appeal. *See Louisiana v. Biden*, 1:21-cv-03867-DDD-JPM (W.D. La. Nov. 4, 2021), <https://www.bloomberglaw.com/public/desktop/document/LouisianaetalvBidenetalDocketNo121cv03867WDLaNov042021CourtDocket/1?1645193692>; *Kentucky v. Biden*, No. 21-6147 (6th Cir. Dec. 6, 2021), <https://www.bloomberglaw.com/public/desktop/document/KYetalv-JosephBidenetalDocketNo21061476thCirDec062021CourtDocket?1645194832>; *Missouri v. Biden*, 4:21-cv-01300-DDN (E.D. Mo. Oct. 20, 2021), <https://www.bloomberglaw.com/public/desktop/document/MissourietalvBidenetalDocketNo421cv01300EDMoOct292021CourtDocket?1645194576>.

the risks in losing valuable, unvaccinated employees in industries already experiencing labor shortages.

Under some state laws, there may be additional considerations for private employers seeking to impose vaccine mandates. In several states, there are already legislative limitations to required employer vaccination programs, and even more states are considering such limitations during upcoming legislative sessions.⁶³ States like Montana and Tennessee have passed legislation banning private employer vaccine mandates entirely.⁶⁴

Beyond possible state legislative limitations, private employers with COVID-19 vaccine mandates must also consider state guidance for unemployment benefits when an employee is terminated for refusing vaccine mandate compliance. For example, the Nebraska Department of Labor released guidance for situations where an employee is terminated due to refusal to receive a COVID-19 vaccination. Under the Nebraska state agency's guidance, employees who were already employed at the time an employer's COVID-19 vaccination mandate was implemented may still qualify for unemployment compensation benefits and those benefits will apply against the employer's experience account.⁶⁵

At this point, most employers have already had conversations about and made decisions regarding COVID-19 workplace vaccinations—whether mandated or not. Throughout the legal battles and shifting compliance requirements with COVID-19 vaccination, challenges to these agency actions and employers in general have gathered key takeaways and have learned through the process. How these decisions will affect new federal agency rules and standards moving forward will be increasingly important to watch.

63. See, e.g., FLA. STAT. § 381.00317 (prohibiting private employers from imposing a COVID-19 vaccination mandate without providing individual exemptions allowing an employee to opt out of vaccination requirements based on one of five identified reasons).

64. See Tenn. Covid-19 Code §§ 14-1-101-104 and H.B. 702 67th Leg., Reg. Sess. (Mont. 2021).

65. *Unemployment Benefit Eligibility for Individuals Discharged for Refusing to Receive a Vaccination Against COVID-19*, NE DEP'T OF LAB., <https://dol.nebraska.gov/webdocs/Resources/GuidanceDocuments/COVID-19%20Vaccine%20Mandate.pdf>. The guidance states that “For all individuals who began work for an employer prior to an employer instituting a COVID-19 vaccine requirement: (1) an individual who is discharged from employment for refusing to receive a vaccination against COVID-19, shall be deemed to have been discharged for reasons other than misconduct and not be disqualified for unemployment benefits on account of such discharge; and (2) impact to an employer's experience account will be determined under Neb. Rev. Stat. §48-652.” *Id.*

C. AGENCY GUIDANCE APPROACHES: OLD CONCEPTS APPLIED TO A NEW PARADIGM

In many cases, frameworks for employment laws already existed even as new issues arose with the COVID-19 pandemic. But those frameworks did not squarely address the unique employment law issues created by the pandemic. In an attempt to make existing employment laws and regulations better “fit” the new paradigm, administrative agencies moved quickly and frequently to issue updated guidance on COVID-19 issues.

Agency guidance are nonbinding documents that allow administrative agencies to share detailed instructions or best practices without subjecting the agency to a rigorous, binding rulemaking process. While guidance does not bear the weight of regulations, it is a useful tool for employment-focused agencies to communicate expectations to employers. In response to COVID-19 issues, several key agencies turned to existing guidance or introduced updated guidance, including the Occupational Health and Safety Administration (“OSHA”), the Equal Employment Opportunity Commission (“EEOC”), and the United States Labor Department’s Wage and Hour Division (“WHD”) for remote work situations.

i. OSHA: Work from Home Safety Considerations

For many workplaces, the COVID-19 pandemic forced the introduction of remote work options or hybrid work models. For certain positions and industries, work from home options quickly became common and those arrangements have persisted as COVID-19 numbers wax and wane. For example, GALLUP reports that forty-five percent of full-time workers were working either partly or fully remote in September 2021, and nine out of ten remote workers want to retain some flexible work arrangements to some degree.⁶⁶

Years before the COVID-19 pandemic, OSHA had issued a directive on home-based worksites in 2000. This guidance stated that OSHA will not: (1) conduct home inspections of employees’ home offices;⁶⁷ (2) hold employers liable for employees’ home offices; and (3) expect employers to inspect an employee’s home office.⁶⁸ For home-

66. Lydia Saad & Dr. Ben Wigert, *Remote Work Persisting and Trending Permanent*, GALLUP (Oct. 13, 2021), <https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx>.

67. Home offices are defined as “The areas of an employee’s personal residence where the employee performs work of the employer.” *OSHA Directive CPL 02-00-125*, U.S. DEP’T OF LAB. (Feb. 25, 2000), <https://www.osha.gov/enforcement/directives/cpl-02-00-125#definition>.

68. *Id.*

based worksites,⁶⁹ OSHA notes that employers are responsible for hazards caused by “materials, equipment, or work processes which the employer provides or requires to be used in an employee’s home.” Notably, OSHA’s recordkeeping obligations for employers are not affected by remote work. However, work from home considerations do not end there—as employers have already or are currently contemplating return to office protocol, the question arises of who (if anyone) gets to continue with remote access privileges or work from home arrangements?

ii. EEOC: Work from Home as an Accommodation

The EEOC enforces workplace anti-discrimination laws including the Americans with Disabilities Act⁷⁰ (“ADA”), the Rehabilitation Act,⁷¹ the Genetic Information Nondiscrimination Act (“GINA”),⁷² and Title VII of the Civil Rights Act (“Title VII”).⁷³ Throughout the COVID-19 pandemic, the EEOC has updated and maintained guidance titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”⁷⁴ In a question and answer format, this guidance covers topics such as disability-related inquiries and medical exams, confidentiality of medical information, return to work implications, and—perhaps most significantly—reasonable accommodation requests, vaccinations, and COVID-19 as a disability under the ADA and Rehabilitation Act.

It has been long established that, under the ADA, reasonable accommodations may be requested by an individual with a disability to apply for, perform, or enjoy the benefits and privileges of employment. If a reasonable accommodation is requested, employers must generally provide it unless the accommodation would pose an undue hardship. Most commonly, reasonable accommodation requests increased during the COVID-19 pandemic as related to remote or telework accommodations and COVID-19 vaccine exemptions.

69. Home-based worksites are defined as “Office work activities in a home-based worksite (e.g., filing, keyboarding, computer research, reading, and writing). Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).” *Id.*

70. 42 U.S.C. § 12101.

71. 29 U.S.C. § 701.

72. 42 U.S.C. § 2000.

73. Title VII prohibits discrimination based on race, color, national origin, religion, and sex (including pregnancy). Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (1964).

74. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Dec. 14, 2021).

The individual assessment of reasonable accommodations is not a new process under the ADA. The EEOC's COVID-19 guidance shed additional light onto remote work options as an accommodation, especially moving forward. For example, telework may not have been a viable pre-pandemic accommodation for certain jobs where "in person" attendance is an essential function of the job. As telework and remote work opportunities become more easily accessible, it may become difficult for an employer to justify in person attendance for certain positions. The EEOC guidance states that "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely."⁷⁵ The key here is the focus on whether telework still permits an employee to perform all the essential functions of their job:

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.⁷⁶

But after extended periods of remote work away from a physical office location, does it become harder for an employer to argue that working in the office is truly an essential job function? This may be an area of increasing ADA litigation in years to come, as employers navigate the transition from COVID-19 remote work arrangements back to in person office arrangements.⁷⁷

iii. WHD: Work from Home and Screening Compensation Issues

Remote work arrangements and COVID-19 workplace safety precautions also prompted questions arising under the Fair Labor Standards Act ("FLSA").⁷⁸ Enforced by the WHD, the FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor require-

75. *Id.* at D.16.

76. *Id.* at D.15. However, employers are still obligated to engage in an individualized determination under the ADA. *Id.* at G.4.

77. Emily Halliday, *ANALYSIS: RTO, Covid Issues to Drive Ramp-Up in ADA Litigation*, BLOOMBERG LAW (Nov. 1, 2021) <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-rto-covid-issues-to-drive-ramp-up-in-ada-litigation> (observing that "Before Covid-19, there was some litigation over whether telework is a reasonable accommodation for employees with ADA-covered disabilities. Employers argued that employees' physical presence at the worksite was an essential job function, and courts were pretty receptive. But the coronavirus pandemic has changed how and where many Americans work.").

78. 29 U.S.C. § 201.

ments.⁷⁹ As many workplaces shifted to telework or remote options, the WHD shared frequently asked questions addressing common issues on proper compensation for hours worked from home.⁸⁰

The WHD also addressed certain workplace safety precautions under the FLSA, like temperature checks, health screenings, and COVID-19 testing. For example, employees required to undergo a temperature check before they begin work must be paid under the FLSA when the temperature check is necessary for the job.⁸¹ Any required COVID-19 health screenings or COVID-19 testing throughout the workday may also be compensable because “WHD’s regulations require that employees be paid for time spent in waiting for and receiving medical attention required by their employer during the workday.”⁸²

The FLSA requires employers to pay employees for all hours worked, regardless of where that work is done—whether at the office, at home, or at a location other than the normal workplace. As applied to COVID-19 remote work arrangements, the WHD clarified that employers are obligated to compensate teleworking employees as long as the employer “knows or has reason to believe that work is being performed,” even if those hours are not specifically authorized.⁸³ This has prompted considerations about how employers may monitor an employee’s worked hours and work performance from remote locations. Remote work undoubtedly offers more flexibility throughout a work day, which poses other challenges. For example, how can hours be effectively tracked for a teleworking employee who begins work, takes time away to care for children, and then returns to working re-

79. *Wages and the Fair Labor Standards Act*, U.S. DEP’T OF LAB. WAGE AND HOUR DIV., <https://www.dol.gov/agencies/whd/flsa> (last visited Feb. 28, 2022).

80. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP’T OF LAB. WAGE AND HOUR DIV., <https://www.dol.gov/agencies/whd/flsa/pandemic#1> (last visited Feb. 28, 2022).

81. WHD specifically notes that:

... under the FLSA, your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. *Id.*

82. *Id.* In addition, employees who are required to put on and take off certain COVID-19 protective gear (like N95 respirators or face shields) may be entitled to compensation for the time spent “donning” and “doffing” when these tasks are necessary for work. *Id.*

83. See 29 C.F.R. § 785.11-13, and *Field Assistance Bulletin No. 2020-5*, U.S. DEP’T OF LAB. WAGE AND HOUR DIV. (Aug. 24, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf (stating “An employer’s obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees’ regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications.”).

motely? WHD advised that “off duty” time, or time where an employee is completely relieved from duty, are not considered hours worked.⁸⁴ Absent a prior arrangement, however, tracking flexible work hours can present its own challenge.

The rise of at-home work stations also prompted the question of who pays for additional expenses an employee may incur while working remotely. Examples include costs for internet access, increased use of electricity, computers, or other office equipment. The FLSA states that employers may not require employees to pay for items that are considered business expenses if doing so reduces the employee’s earnings below the federal minimum wage or due overtime compensation.⁸⁵

iv. EEOC: COVID-19 Vaccine Exemptions

COVID-19 vaccine exemptions have been a key topic of discussion, both as more employers look to mandatory workplace vaccination policies and as CMS’s and OSHA’s COVID-19 vaccination rules were challenged. Federal equal employment opportunity law does not prevent employers from requiring employees entering a workplace to be vaccinated against COVID-19. However, any such vaccine requirement must be subject to the reasonable accommodation provision of the ADA and Title VII.

The EEOC interprets that the ADA requires employers to provide reasonable accommodations to employees who “because of a disability . . . do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business” or would pose a direct threat to the health and safety of others.⁸⁶ When an employee requests a reasonable accommodation related to COVID-19 under the ADA, employers may ask for reasonable documentation about the disability and/or the need for reasonable accommodation. This typically includes information about the individual’s diagnosis, any restrictions or limitations, and about the effectiveness of potential alternative accommodations.

84. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP’T OF LAB. WAGE AND HOUR DIV., <https://www.dol.gov/agencies/whd/flsa/pandemic#1> (last visited Feb. 28, 2022).

85. *Id.* Some states, however, may impose more stringent business expense reimbursement requirements. See CAL. LABOR CODE § 2802 (requiring employers to reimburse employees for “all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. . .”).

86. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, at K.1, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Dec. 14, 2021).

Under Title VII, employers must provide reasonable accommodations or exemptions of a mandatory COVID-19 vaccine policy to employees who “because of a . . . sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship⁸⁷ on the operation of the employer’s business.”⁸⁸ The EEOC’s clarified guidance under religious exemption requests to COVID-19 vaccine policies largely tracked previously-existing guidance for general religious exemptions. Generally, religious accommodation requests are less frequently challenged due to the broad nature of beliefs accepted under the definition of religion. Notably, however, the EEOC stated that Title VII does not protect social, political, or economic views, or personal preferences—meaning objections to COVID-19 vaccination based on social, political, or personal preference, or on non-religious concerns about possible vaccine side effects are not protected “religious beliefs” under Title VII. While an employee’s stated beliefs are typically not disputed, the EEOC also listed several factors that—either alone or in combination—might undermine an employee’s credibility.⁸⁹

v. EEOC: Long-Haul COVID-19 as a Disability

In its latest update to the “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” guidance, the EEOC addressed protections under the ADA for workers who contract COVID-19.⁹⁰ The guidance refers to the Department of Justice’s (“DOJ”) and Department of Health and Human Services’

87. Undue hardship requires more than a “de minimis,” or minimal, cost to employers under Title VII and can include direct monetary costs, the risks of COVID-19 spread, and other burdens on business. *Id.* at L.3. Courts have found undue hardship in Title VII cases where the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work. *Id.*

88. *Id.* at K.1.

89. *Compliance Manual on Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> (last visited Mar. 30, 2022). Those “factors include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.” Again, while the basic framework for reasonable accommodations under the ADA and Title VII already existed, COVID-19 is shaping a new application of that analysis in the workplace. *Id.*

90. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, at N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Dec. 14, 2021).

(“DHHS”) guidance⁹¹ for “long COVID” as a disability under the ADA when it substantially limits one or more major life activities. Long COVID has been defined as a “range of new or ongoing symptoms that can last weeks or months after they are infected with the virus that causes COVID-19 and that can worsen with physical or mental activity.”⁹² Based on DOJ’s and DHHS’s joint guidance, the EEOC identifies four specific examples of when employees with COVID-19 may be entitled to ADA protections for lingering COVID symptoms:

- An individual diagnosed with COVID-19 who experiences ongoing but intermittent . . . headaches, . . . brain fog, and difficulty . . . concentrating, which . . . [is] attribute[d] to the virus. . .
- An individual diagnosed with COVID-19 who initially received supplemental oxygen for breathing difficulties and continues to experience fatigue or shortness of breath. . .
- An individual with COVID-19 who experiences lasting cardiovascular limitations, which may include heart palpitations, chest pain, and shortness of breath due to the virus.
- An individual diagnosed with “long COVID” who experiences COVID-19 related pain or symptoms that linger for many months.⁹³

While the EEOC’s updated guidance provides helpful clarification, there are still practical challenges for employers navigating individualized assessments required by the ADA. With legal gray areas remaining, long COVID-19 could be another increasingly litigated issue in the coming years especially as the full extent of long COVID-19 complications remains unclear.

Administrative agency guidance on work from home issues and accommodations are nothing new, but the COVID-19 pandemic forced new considerations under these existing frameworks. While agency guidance can be a helpful tool for employers to gauge how a federal employment agency considers new topics (like long COVID), the non-binding nature of guidance documents can also complicate obligations

91. *Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557*, DEP’T OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html> (last visited Feb. 19, 2022).

92. *Id.* This could include (but is not limited to) common symptoms like tiredness or fatigue, difficulty thinking or concentrating (“brain fog”), shortness of breath or difficulty breathing, headache, chest pain, cough, joint or muscle pain, fever, depression or anxiety, and loss of taste or smell. *Id.*

93. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Dec. 14, 2021).

where no clear standard exists. As agency actions may become increasingly scrutinized, the weight afforded to agency guidance may also change moving forward.

II. A LOOK AHEAD: THE FUTURE IMPACTS TO EMPLOYMENT LAW

If anything, the COVID-19 pandemic has shown the volatility of labor and employment law and exposed challenges to federal agency practices in particular. This section explores how recent United States Supreme Court determinations may signal a new era where the limits of administrative agency authority may become increasingly challenged. This section also considers how state and local governments may be taking matters into their own hands to preserve individual autonomy.

A. ENCROACHING LIMITS TO FEDERAL AGENCY POWER

The United States Supreme Court's decisions regarding the Occupational Safety and Health Administration's ("OSHA") COVID-19 Vaccination and Testing Emergency Temporary Standard⁹⁴ and the Centers for Medicare & Medicaid Services ("CMS") COVID-19 interim final rule on staff vaccination⁹⁵ shone a spotlight on growing criticism regarding federal agency authority. Beyond issues arising from the COVID-19 pandemic, the Court's opinions on OSHA's and CMS's vaccination standards may indicate forthcoming changes to the level of deference provided to federal government agencies—pandemic or not. There are a growing number of challenges to federal agency authority stemming from two significant angles: (1) arguments to weaken or abandon the *Chevron* doctrine, and (2) arguments to strengthen the major questions doctrine.

i. A Possible Decline of the Chevron Doctrine?

For decades, the *Chevron* doctrine has been a foundation of administrative law. Under the *Chevron* doctrine, federal courts defer to an executive agency's reasonable interpretation of an ambiguous provision of a statute the agency administers.⁹⁶ For example, OSHA would be given deference for its interpretation of ambiguities under the Occupational Safety and Health Act ("OSH Act"), which is the statute that OSHA administers. In *Chevron U.S.A., Inc. v. Natural*

94. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S.Ct. 661, 667 (2022).

95. *Biden v. Missouri*, No. 21A240, 595 U.S. 1 (2022).

96. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984).

Resources Defense Council,⁹⁷ the United States Supreme Court announced:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁹⁸

Those critical of the *Chevron* doctrine have argued that it extends too much interpretive authority to administrative agencies where “courts uphold an agency's reading of a statute – even if it is not the best reading – so long as the statute is ambiguous and the agency's reading is at least reasonable.”⁹⁹ Prior to his Supreme Court appointment, Justice Kavanaugh wrote that “[f]rom my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”¹⁰⁰ This notion was echoed, in a sense, by critics of the Biden administration's three-prong COVID-19 vaccine mandate approach (which included the OSHA Vaccination and Testing ETS, CMS's interim final rule on COVID-19 vaccination, and the federal contractor regulation) who believed the administration was working towards a policy goal to vaccinate as many Americans against COVID-19 as possible, rather than addressing threats specific to each administrative agency's authority. During oral arguments on the stay of OSHA's Vaccination and Testing ETS, Chief Justice Roberts speculated the “government is trying to work across the waterfront and it's . . . going agency by agency” to reach a

97. 467 U.S. 837 (1984).

98. *Chevron*, 467 U.S. at 842-43.

99. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (June 10, 2016) (reviewing JUDGING STATUTES 2014)).

100. *Id.*

policy goal COVID-19 vaccinations in “an effort to cover the waterfront.”¹⁰¹

Notably, the *Chevron* doctrine was not addressed during the Court’s limited review of OSHA’s Vaccination and Testing ETS stay.¹⁰² Ambiguity of the OSH Act was not a question directly addressed in *National Federation of Independent Business v. Department of Labor*,¹⁰³ and the Court’s per curiam determination on OSH Act authority was clear. The Court concluded the OSH Act tasks OSHA with “ensuring occupational safety.”¹⁰⁴ The Court stated that OSH Act empowers OSHA to “set workplace safety standards, not broad public health measures.”¹⁰⁵ The dissent disagreed and posited that this suggested OSH Act limitation is not so clear.¹⁰⁶ While the *Chevron* doctrine was not considered in *National Federation of Independent Business*, the application—or perhaps the decision to decline application—of the doctrine in similar future cases will undeniably have an impact moving forward where challenges to regulatory rule-making authority may become more commonplace.

In recent years, the Court has been reining in the reach of *Chevron*, and more challenges on are the horizon. In November 2021, the Court heard arguments for *American Hospital Association v. Becerra*¹⁰⁷ on whether *Chevron* deference permits the Department of Health and Human Services to set Medicare reimbursement rates. In 2022, a group of Republican-led states¹⁰⁸ and Grand Old Party

101. Transcript of Oral Argument at 79-80, Nat’l Fed. of Indep. Bus. v. Dep’t. of Lab., (Nos. 21A244, 21A247), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_kifl.pdf.

102. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 142 S.Ct. 661, 667 (2022) (Gorsuch, J., concurring). The Supreme Court’s decision on the OSHA ETS was limited to whether to lift the injunction (allowing enforcement of OSHA’s Vaccination and Testing rule) or to stay the rule. This was not a complete review on the merits; however, the Court did broadly consider whether applicants were likely to succeed on the merits of their claim. *Id.*

103. 142 S.Ct. 661 (2022).

104. *Nat’l Fed’n of Indep. Bus.*, 661 S.Ct. at 663.

105. *Id.* (“The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures.”). See 29 U.S.C. § 655(b) (directing the Secretary to set ‘occupational safety and health standards’ (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect “employees” from grave danger in the workplace).

106. *Nat’l Fed’n of Indep. Bus.*, 661 S.Ct. at 673. The dissent argues the majority opinion imposes “a limit found no place in the governing statute.” *Id.* (citing *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2380-81) to state that “When Congress ‘enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can’ do, the Court cannot ‘impos[e] limits on an agency’s discretion that are not supported by the text.’”

107. 141 S.Ct. 2883 (2021).

108. Brief of Indiana, Arizona, and Thirteen Other States as *Amici Curiae* in Support of Petitioner, *Buffington v. McDonough*, No. 21-972, (S.Ct. 2022).

(“GOP”) senators¹⁰⁹ are urging the Court to take the *Buffington v. McDonough*¹¹⁰ case. In *Buffington*, the plaintiff veteran, Thomas H. Buffington plans to challenge a Department of Veterans Affairs forfeiture rule. Specifically, Buffington is asking the Court to consider resolving the statutory ambiguity in this case by either (1) clarifying that a pro-veteran canon should be applied before the *Chevron* doctrine, or (2) overruling *Chevron*.¹¹¹ While the fate of the *Chevron* doctrine remains unclear, challenges to the amount of deference given to administrative agencies are likely to persist. The legal and regulatory landscape of the COVID-19 pandemic seems to have only brought this into sharper focus.

ii. A Major Surge for the Major Questions Doctrine

The major questions doctrine became a centerpiece of the analysis behind OSHA’s COVID-19 Vaccination and Testing ETS and the CMS COVID-19 interim final rule on staff vaccination. This doctrine states that, under the United States Constitution’s separation of powers, Congress must “‘speak clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance.’”¹¹² Instead of the usual broad deference given to an administrative agency, the major questions doctrine allows courts to bypass that deference on these major issues.

As a reminder, *National Federation of Independent Business v. Department of Labor*¹¹³ did not fully review OSHA’s authority to promulgate the Vaccination and Testing ETS. But in considering the likelihood of success on the merits, the *per curiam* opinion and Justice Gorsuch’s concurring opinion both stressed the expectation of Congress to “speak clearly” when authorizing agency action of “vast economic and political significance.”¹¹⁴ The Court determined that OSHA’s vaccine mandate clearly met this “vast economic and political

109. *Id.* Support for Chevron withdrawal has been seen in the legislative chambers of Congress, as well. Congressional representatives (largely led by GOP members) have been attempting to override Chevron deference through proposed legislation. See Separation of Powers Restoration Act of 2021, H.R. 4317, 117th Cong. (2021).

110. Brief of Indiana, Arizona, and Thirteen Other States as *Amici Curiae* in Support of Petitioner, *Buffington v. McDonough*, No. 21-972, (S.Ct. 2022).

111. *Id.* at 2.

112. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S.Ct. 661, 667 (2022) (Gorsuch, J., concurring) (citing *Alabama Ass’n. of Realtors v. Dep’t of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021)) (*per curiam*) (slip op., at 6) (internal quotation marks omitted).

113. 142 S.Ct. 661 (2022).

114. *Nat’l Fed’n of Indep. Bus.*, 142 S.Ct. at 665, 667. Notably, the *per curiam* opinion does not expressly name the majors question doctrine. The Court determined there “can be little doubt that OSHA’s mandate qualifies as an exercise” of authority with vast economic and political significance. *Id.* at 665.

significance” standard, but the limits of this standard still leaves plenty of room for interpretation—particularly outside of the COVID-19 pandemic.¹¹⁵

Prior to 2018, issues involving the major questions doctrine (at least by name) were rarely heard in federal courts.¹¹⁶ The doctrine, however, has seen a major surge in filings in 2021 with the trend expected to continue. COVID-19 related litigation has seemed to serve as a catalyst for the major questions doctrine.¹¹⁷ The Supreme Court has now recently heard several key, highly-publicized arguments that limited agency authority under the major questions doctrine. With this tool in the arsenal, there may be more opportunities to challenge administrative agency action and regulations where Congress has not provided clear authorization.

These trends involving the *Chevron* doctrine and the major questions doctrine are, at the core, centered on the limits of an administrative agency’s ability to act when congressional delegation may be ambiguous. Critics of the broad administrative state celebrated the Court’s OSHA Vaccination and Testing ETS decision as a victory. It seems likely that challenges to agency rulemaking authority, or at least challenges to the scope of certain agency rules, will only increase in the future—even for regulatory topics that are not nearly as polarizing as vaccine mandates. The effect of increased challenges to agency rules may also increase the potential for court-ordered stays or injunctions. Practically speaking for employers, this could lead to more of the on-again, off-again rule status as was seen with OSHA’s vaccine mandate or the headache of navigating different jurisdictional deadlines as seen with CMS’s vaccine rule, which imposes different phased deadlines for those states affected by court injunctions. While

115. *Id.* Gorsuch concurrence states: “Far less consequential agency rules have run afoul of the major questions doctrine. *E.g.*, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (eliminating rate filing requirement). It is hard to see how this one does not.” *Id.* at 668.

116. Erin Webb, *ANALYSIS: Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG LAW (Feb. 1, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-questions-doctrine-filings-are-up-in-a-major-way>.

117. In addition to COVID-19 vaccine mandate issues, the Supreme Court considered the “vast ‘economic and political significance’” of the U.S. Centers for Disease Control and Prevention’s (“CDC”) eviction moratorium in August 2021—a moratorium created as a preventative COVID-19 measure. *Alabama Ass’n. of Realtors v. Dep’t of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021) (*per curiam*). Here, the Court vacated the stay on the CDC’s eviction moratorium because Congress failed to specifically authorize a federally imposed eviction moratorium. *Id.* at 2486. While the Court did not expressly name the major questions doctrine, it determined the federal eviction moratorium qualified as a decision of “vast economic and political significance” because (1) at least 80% of the country fell within the moratorium, (2) Congress provided nearly \$50 billion dollars of emergency rental assistance, and (3) the moratorium intruded on to landlord-tenant legal principles traditionally governed by state law. *Id.* at 2489.

the future remains unclear, the possibility of increased scrutiny to federal agency action and authority is certainly something to keep in mind.

B. CHAMPIONING INDIVIDUAL PROTECTIONS ON A STATE LEVEL

When the federal government (mostly by way of administrative agencies) began its push for broad COVID-19 measures, local governments responded on a state level. The push and pull battle of who has the right to act—whether the state, local, or national government—was seen in many forms throughout the COVID-19 pandemic. When it comes to employment law specifically, however, more states are pursuing legislation to preserve individual autonomy for the employee.

The COVID-19 vaccine mandates have given rise to increased state legislation protecting employee choice. As discussed above, some states have passed laws or proposed legislation to ban employer-mandated vaccine requirements and to allow greater application of certain exemptions to vaccine mandates.¹¹⁸ For example, the Nebraska legislature approved a bill on February 25, 2022 that would allow employees to claim medical and religious exemptions from workplace COVID-19 vaccine mandates.¹¹⁹ This reaction on a state level may demonstrate growing local efforts to clamp down on federal agency or employer actions which encroach on employee choice and individual autonomy. While this sentiment is not new, COVID-19 policies and mandates have brought this sharper relief.

To say that the COVID-19 pandemic has changed the world is an understatement. Like many things, the field of employment law changed and adapted along with the pandemic and will undoubtedly continue to raise new questions and challenges for employers. Understanding how employment law has evolved with the COVID-19 pandemic—through major congressional legislation, federal agency action, and Supreme Court determinations—provides a better look at how the law may continue to grow and change.

118. *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer> (last visited Feb. 23, 2022).

119. L.B. 906, 107th Leg., 2nd Sess. (Neb. 2022).

