

The Firehouse Lawyer

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November 2021 Extra

OSHA ISSUES EMERGENCY TEMPORARY STANDARD FOR LARGER EMPLOYERS

The federal Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") in the first week of November, applicable to employers with 100 or more employees, and has again left health-care employers with less than 100 employees with little clarity as to the applicability of *other executive orders*.¹ The ETS,² at page 6, states as follows:

This ETS applies to employers with a total of 100 or more employees at any time the standard is in effect...OSHA is confident that employers with 100 or more employees have the administrative capacity to implement the standard's requirements promptly, but is less confident that smaller employers can do so without undue disruption. OSHA needs additional time to assess the capacity of *smaller employers*, and is seeking comment to help the agency make that determination.

¹

<https://firehouselawyer.com/Newsletters/September2021ExtraFINAL.pdf>

² <https://public-inspection.federalregister.gov/2021-23643.pdf>

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(emphasis added).

The lack of clarity is further evident in the express exclusion of the ETS at Page 4: “This ETS *does not apply to* workplaces subject to EO 14042 on Requiring Coronavirus Disease 2019 Vaccination for Federal Contractors.” (emphasis added). And again, we discussed in our September 2021 article (see Footnote 1) that Executive Order 14042³ *does* apply to fire departments with “contracts” with the federal government.

Additionally, the media has stated that despite the current 100-employee threshold of the ETS, “[H]ealth care providers are covered by a different OSHA rule, and *government contractors* and *Medicare and Medicaid* providers have separate mandates they must comply with.”⁴

Until such time as OSHA, the Task Force⁵ or some other agency such as CMS, issues guidance stating that 14042 does not apply to fire departments with contracts with the federal government, then we remain confident that all employees of such “federal contractor” departments must be vaccinated or deemed

³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

⁴ <https://www.nytimes.com/article/vaccine-mandate-biden-osh.html?referringSource=articleShare>

⁵ See the previously issued guidance as to 14042, here: https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf

exempt from vaccination, by December 8, 2021—see Footnote 1 above.

It should be noted that the ETS, *not* 14042, has been blocked by a federal appeals-court judge.⁶ Importantly, once a health standard is necessary to avoid a “significant risk of material health impairment,” federal law gives the Secretary of Labor “almost *unlimited discretion* to devise means to achieve the congressionally mandated goal” of protecting employee health, subject to the constraints of feasibility. See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1230 (D.C. Cir. 1981) (emphasis added).

Questions of executive authority in the context of vaccine mandates aside, it is the *ETS* that has been blocked by a federal court,⁷ *not* 14042, which we have already discussed as being applicable to fire departments having contracts

⁶ <https://www.nytimes.com/2021/11/06/world/americas/biden-osh-vaccine-mandate-blocked.html>

⁷ See the link below to a recent case in which a federal court upheld the validity of a state vaccine mandate:

<https://www.courthousenews.com/wp-content/uploads/2021/07/klaassen-indiana.pdf>

And the United States Supreme Court denied review of the above case:

<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-supreme-court-denies-review-vaccine-mandate.aspx>

The Supreme Court also denied review of a Maine vaccine-mandate case:

<https://www.supremecourt.gov/opinions/21pdf/21a906j37.pdf>

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with the federal government—see Footnote 1 above.

MEANWHILE, CMS HAS ISSUED AN INTERIM RULE THAT DOES NOT APPLY TO EMS AGENCIES THAT RECEIVE MONEY THROUGH MEDICARE OR MEDICAID

On Friday, November 5, 2021, the Center for Medicare and Medicaid Services (CMS) issued an interim rule,⁸ and is receiving comment through January 4, 2022, concerning the vaccine requirements for a long list of agencies or entities that participate in Medicare or Medicaid. The list does not, repeat does not, include emergency medical agencies (or private ambulance services) that render EMS to Medicare or Medicaid patients, such as those agencies that participate in the GEMT program. GEMT is the abbreviation for Ground Emergency Medical Transport. See Page 2 of the interim rule for an outline of the entities to which the rule applies.

Incidentally, we have noticed that in recent publications, the federal government has stressed that only one rule will be applied to each employer. This reduces the administrative burden on employers, who might otherwise have to comply with different rules for different types of employees or groups within their work force.

But again, until such time as OSHA, the Task Force or some other agency such as CMS, issues guidance stating that 14042 does not apply to fire departments with contracts with the federal government, then we remain confident

that all employees of such “federal contractor” departments must be vaccinated or deemed exempt from vaccination, by December 8, *even* if the ETS and the CMS Rule do not apply to your EMS agency.

Case Note: A Public Agency’s property may not be acquired by “adverse possession”

Under Washington law, generally, a private landowner’s property can be taken by “adverse possession,” i.e. by another person coming onto their land and effectively using it as their own without objection of the landowner for a period of ten years or more. See RCW 7.28.085; See Also RCW 4.12.020. This is not the case with land held by a municipality for “any public purpose,” pursuant to RCW 7.28.090. And it has been found, as of November 8, 2021, that the aforementioned statute prevents adverse possession of public property whether the purpose for which it is used is *governmental or proprietary*, according to Division I of the Washington State Court of Appeals in *Michel v. City of Seattle*.⁹ We could spend several more paragraphs on what constitutes a “governmental” versus a “proprietary” function, but instead we will state public property may not be taken by adverse possession.

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⁸ <https://www.govinfo.gov/content/pkg/FR-2021-11-05/pdf/2021-23831.pdf>

⁹ <https://www.courts.wa.gov/opinions/pdf/820737.pdf>