

NEWS & INSIGHTS

OSHA issues COVID-19 vaccination mandate rules: Employers may face imminent compliance deadlines

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The below information is current as of the publication date listed. Because COVID-19 response measures on all fronts are continually evolving, clients should stay alert to new developments and consult with counsel on any critical questions.

On November 4, 2021, the United States Occupational Safety and Health Administration (OSHA) announced its long-

delayed emergency temporary standard (ETS) which implements the Biden Administration's decision that private, nonhealthcare employers with more than 100 employees mandate their employees receive the COVID-19 vaccine. The final rule is scheduled to be published in the Federal Register on November 5, 2021.

OSHA's Emergency Temporary Standard

What does the ETS require?

The ETS requires that all employers with 100 or more employees compel their employees to receive the COVID-19 vaccination. The ETS sets forth an extensive list as to what documentation qualifies as proof of vaccination status.

How does the ETS define "100 or more employees"?

For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold for coverage, regardless of employees' vaccination status or where they perform their work. Further, two or more related entities may be regarded as a single employer if they handle safety matters as one company.

Are there exemptions to the vaccination requirement?

As we have advised clients previously, the EEOC expressly permits an employer to mandate that all employees physically entering the workplace to be vaccinated for COVID-19. However, this permissible mandate remains subject to an employer's obligation to exempt individuals who may require an accommodation due to a disability under the Americans with Disabilities Act or a sincerely held religious belief as required under Title VII. Under the ETS, these exemptions remain. Exemptions may also apply to teleworkers and individuals who work exclusively outside.

What are the alternatives to the vaccination requirement?

Employees who choose not to receive the COVID-19 vaccination will be required to wear a face covering in the workplace and each worker who is not fully vaccinated must be tested for COVID-19 at least weekly. Employers are not required to pay for employee testing or facemasks.

What are employers' obligations under the ETS?

In addition to ensuring the entire workforce is vaccinated and masking and testing requirements are met with respect to unvaccinated employees, covered employers must also:

- Implement a mandatory vaccination policy.
- Provide up to four (4) hours paid time to each employee for each of their vaccination doses. The maximum of four (4) hours of paid time that employers must provide under the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.
- Provide "reasonable" time and paid sick leave to recover from side effects experienced following any primary

vaccination dose. Generally, OSHA presumes that, if an employer makes available up to two (2) days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this provision. Covered employers may require an employee use accrued sick leave or leave pursuant to a general “PTO policy” for purposes of this requirement. However, employers cannot require employees to use vacation leave for this time off, nor may they require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects. Generally speaking, if the employee does not have available sick leave, leave must be provided for this purpose.

- Notify employees of the ETS requirements and any employer policies implementing the ETS.
- Provide employees with a CDC document entitled “Key Things to Know About COVID-19 Vaccines” (which can be found on the CDC website).
- Advise employees as to the anti-retaliation provisions of OSHA.
- Maintain records of employee’s vaccination status and, with respect to unvaccinated employees, records of negative tests.
- Report to OSHA each work-related COVID-19 fatality within 8 hours of the employer learning about the fatality.
- Report each work-related COVID-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.
- Immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19.

What are the penalties for noncompliance?

An employer’s failure to comply with the ETS will result in a fine of approximately \$14,000 per violation. In the event of subsequent or “willful” violations, fines may increase exponentially.

What is the effective date for compliance?

While the testing requirement for unvaccinated workers will begin after January 4, 2022, employers must be in compliance with all other requirements – such as providing paid-time for employees to get vaccinated and masking for unvaccinated workers – by December 5, 2021.

How will the ETS be enforced?

Ultimately, it is unclear as to how OSHA plans to enforce the rules. Prevailing wisdom suggests that enforcement will be complaint-based. In other words, an employee complaint would generate a visit from OSHA versus a planned or random audit of the workplace.

Will the ETS actually take effect?

Many State Attorney Generals have already filed lawsuits challenging the Biden Administration’s requirement that

federal contractors be vaccinated by December 8, 2021. That deadline has now been extended to January 4, 2022.

With respect to the ETS issued regarding private employers, many additional states and private entities have indicated they will be filing lawsuit (and some have already) challenging the vaccination mandate based on constitutionality and rulemaking authority. The primary hurdles for OSHA in defending these challenges will be to explain: (1) why the ETS has suddenly been issued now, when the pandemic began nearly 18 months ago; (2) if the justification is the “grave danger” standard, why the two month delay in issuing the ETS after the Administration’s announcement and an additional two month delay as to the effective date; and (3) if the “grave danger” standard is used to justify the ETS, why are employers with less than 100 employees exempt from the ETS.

What steps do employers need to take now?

While a stay with respect to implementation may be possible, despite the fact lawsuits are being filed seeking a halt to enactment, until informed otherwise, employers should immediately take the following steps:

1. Evaluate your workforce to determine the rough percentage of the workforce who may not be vaccinated;
2. Gauge the expected response by employees to a vaccination mandate (e.g., are some employees “on the fence,” have employees indicated that they will resign if a vaccine mandate comes to fruition, etc.);
3. Prepare a draft communication to employees regarding the ETS and its requirements, as well as the other materials required under the ETS to be provided to employees;
4. Develop a mandatory vaccination policy;
5. Establish a protocol and procedure for verification of vaccination status, as well as retention of both vaccination and testing records; and
6. Review your leave policies to determine whether the “reasonable” leave required under the ETS would be encompassed under your current leave policies.

Seek legal advice before implementing policy mandates or responding to enforcement action

Knowledgeable legal counsel can be critical for navigating today’s challenging regulatory environment for employers. Saxton & Stump’s [Labor and Employment](#) team, led by attorney [Richard L. Hackman](#), is available to assist and has extensive experience representing and counseling entities of all sizes and types including healthcare organizations, manufacturers, retailers and service industry businesses. Saxton & Stump also provides businesses with legal services for their industry whether it is [Construction](#), [Hospitality](#), [Healthcare](#), [Senior Care Services](#) or [Banking and Financial Services](#). Our focus is helping our clients achieve their business goals.

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