

Toolkit for COVID Vaccine Mandate

Last updated on 10-21-21

Executive Summary

On September 9, 2021, President Biden directed his Administration to implement a COVID-19 vaccine or testing mandate for all private sector employers using the Occupational Safety and Health Administration (OSHA) and the government's federal contracting authority.

OSHA has not released its emergency temporary standard (ETS) to date, but the initial statements suggest the rule will require private employers with 100 or more employees to “ensure their workforces are fully vaccinated or show a negative COVID-19 test twice a week” and provide paid time off for obtaining or recovering from vaccination. We expect that it may include other non-medical interventions, such as masking, social distancing, etc. at covered workplaces where not everyone is vaccinated. Finally, based on the general orientation of the Administration, we suspect employers to bear the costs associated with testing workers who refuse vaccination.

For federal contractors or subcontractors, all employees of federal contractors and subcontractors who work on or in connection with a federal contract will need to be vaccinated by December 8, 2021 (absent a legally compelled religious or medical exemption) or on the first day of performance on the contract, whichever is later. Any worker who may come in contact with those working on or in conjunction with the government contract must also be vaccinated. Covered contractors must also designate a person or persons to coordinate COVID-19 workplace safety efforts and comply with regionally appropriate levels of masking, social distancing, etc.

Timelines

As noted OSHA has not released its rule to date. It is currently being reviewed at the White House and could issue as soon as next week. Based on a similar requirement for the health care industry issued earlier this year, the **worst case** scenario could be as follows: **Within 14 days** after issuance, employers will need to comply with less onerous provisions like implementing a policy allowing paid time off for employees to get vaccinated or recover from a vaccination. **Within 30 days** after issuance, employers may have to have implemented more onerous aspects (training, purchasing tests, IT systems) including a mechanism to verify vaccine status and conduct regular tests of employees who are not vaccinated.

It is **more likely** both the federal contractor mandate and the OSHA rule will have proximately contemporaneous requirements meaning on or about **December 8** will be the first compliance date. Because testing will be difficult to implement and there are nowhere near enough tests currently available to meet the anticipated mandate that provision will likely be on a longer timeframe.

Federal contractors will need to comply when they enter a contract, option, extension or amendment with a contractual clause requiring vaccination and should be informed of the requirement as part of the contracting process. The government has stated they want all contractor employees vaccinated by **December 8** generally but some agencies have been giving additional leeway in certain instances.

Good Faith Safe Harbor

When it issues a new rule, OSHA will in most instances announce that it will use its enforcement discretion for employers who are making a good faith effort to comply. They did exactly that when they issued a similar emergency rule on health care earlier this year. This “non-enforcement policy” means even if someone has not met all requirements by the deadlines set in the rule, OSHA will not cite them as long as there is evidence of good faith (for example, document attempts to order tests if you cannot purchase and/or do not receive them by the compliance deadline). The key is documentable good faith activity to implement the requirement.

Common Employee Questions About Federal Vaccine Mandate:

Q: What is the vaccine mandate?

A: On Sept. 9, 2021, President Biden directed the Occupational Safety and Health Administration (OSHA) at the US Department of Labor to create a regulation directing companies with more than 100 employees to enforce a mandate for either COVID-19 vaccination or weekly testing.

(Note: For companies who do federal contracting work, including subcontractors, there is a vaccine mandate for all employees (except those entitled to religious or medical exemptions) working on government contracts after December 8th, 2021. Details are still being refined, and the contracting officer may be able to make accommodations, including the timeline for implementation possibly.)

Q: When will it happen and be enforced?

A: It hasn't happened yet, but we expect the final step to be published in the next few weeks. After it's published, we expect a few weeks at least and hopefully months (1-3) for employers to implement the requirements. When it issues a new rule, OSHA will in most instances announce that it will use its enforcement discretion not to cite employers who are making a good faith effort to comply for several months after the standard issues also.

(Note: Employers in the following states are under state OSHA jurisdiction and likely will have an additional 15-30 days following the federal rule being issued before they implement a similar requirement: Alaska, Washington, Oregon, California, Hawaii, Nevada, Utah, Arizona, New Mexico, Wyoming, Minnesota, Iowa, Michigan, Indiana, Kentucky, Tennessee, South Carolina, North Carolina, Virginia, Maryland, Vermont.

Q: Do I have to get vaccinated to keep my job here? I don't want the vaccine and won't take it.

A1 (fewer than 100 employees): No

A2 (100+ employees): We don't know for sure but the information we have so far suggests that the federal mandate doesn't say you have to be vaccinated or lose your job. If you're not already vaccinated, you also likely won't have to be vaccinated right away. But if you don't want to be vaccinated, the government will likely require you to be tested weekly. The details of what type of

test and how to report it aren't done yet, but we'll share as soon as the Biden Administration issues guidance.

(note: Whether to require vaccination-only is a decision for the employer if they have more than 100 employees and are not a government contractor. It is unclear that enough testing will be available, feasible or reportable, and we await details.)

Q: Does anybody else in my family have to get the vaccine?

A: Not because you work here. If they work for a company subject to the mandate (100+ employees or a federal contractor or subcontractor), their company will likely be responsible for the same federal mandate.

Q: If I caught COVID, do I still have to be vaccinated or tested?

A: OSHA may make a different decision possibly, but given that the federal contractor requirement does not allow natural immunity to meet its requirements, it is very likely that even those who contracted COVID and recovered will either need to be tested or vaccinated.

Q: If I get the vaccine, and if I get sick, do I get paid time off?

A: President Biden said he will include a requirement for paid time off for getting the vaccine and getting back to work if you have side effects.

(note: this would be an aggressive use of the emergency authority President Biden is trying to use and will likely be litigated in court)

Q: When will this mandate end?

A: The type of rule President Biden is using expires in 6 months. OSHA may try to make it permanent after that but that will require additional notice and opportunity for comment by the public.

Q: What are you and the industry doing to represent us with President Biden?

A: ATA has raised concerns about the impact on trucking and truck drivers and asked that our industry be exempted. It doesn't make sense for trucking and the supply chain, and we believe we can keep drivers, employees and Americans safe with other options – like masks and social distancing. In fact, we've been doing that pretty successfully throughout the pandemic.

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