

The Federal COVID Vaccine Rule is Here

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In September, as the Delta variant was sweeping the nation, President Biden announced a comprehensive national strategy to get more Americans vaccinated and to set the path out of the pandemic. As part of this plan, the President announced that OSHA would be issuing regulations requiring any employer with 100 or more employees to ensure that workers are vaccinated.

In addition, the Centers for Medicaid and Medicare Services (CMS) and President Biden's Safer Federal Workforce Task Force (SFWTF) have issued their own rules requiring the vaccination of healthcare workers and federal contractors, which we have covered previously [here](#) and [here](#). Those employers covered by the CMS and SFWTF rules do not have to comply with the new OSHA mandate.

Today, OSHA promulgated this rule, via an Emergency Temporary Standard (ETS), covering employers with 100 or more employees. OSHA estimates this will cover approximately 2/3 of all workers in the United States.

Here are some highlights that employers should be aware of:

THE OSHA RULE COVERING PRIVATE SECTOR BUSINESSES

Which employers are covered by the OSHA mandate?

The OSHA mandate applies to all companies that currently have 100 or more employees.

- The number of employees is counted on a "firm or company-wide" basis, rather than just the number of employees at any particular office. Therefore, if a company has 150 employees spread out across 5 locations (each with 30 employees), the rule will still apply to them.
- Part-time employees, employees who work remotely, and employees who work fully outside will count toward the rule's 100-employee threshold. Therefore, if an employer has 105 employees, and 103 of them work remotely, the rule will still apply to them.
- However, independent contractors **do not** have to be included in any headcount.

Which employees are covered:

- The OSHA rule applies to all employees who report to a workplace where other individuals are present. This could be coworkers, customers, or other visitors. This applies to most workers who attend work in an office setting that is not "remote."
- However, it does not apply to employees who work exclusively outdoors, employees who work remotely, or employees who otherwise do not interact with other individuals in the workplace.

With that being said, just because the OSHA rule may not apply to a certain employee does not mean that an employer cannot opt to mandate vaccination for that worker as part of its policy. In other words, an employer could require a person who works outdoors or alone to be vaccinated. However, the OSHA rule does not require that they do so, so the choice to require vaccination for those workers falls on the business.

What are the deadlines?

- **December 6, 2021** - covered employers must have their vaccination compliance program in place in accordance with the rule. This means that they must offer paid time off for vaccinations, require unvaccinated workers to wear masks, and satisfy the other requirements of this rule that are laid out below.
- **January 4, 2022** - all of the workers who have not received their primary vaccination doses must start being tested. If an employee receives one or both vaccinations (depending on the brand) before January 4, 2022, they do not have to be tested **even if they have not completed the two week waiting period.**

OSHA notes that this was put in place to incentivize vaccination by the January 4th deadline. However, if an employee gets vaccinated after January 4, 2022, they would still have to wait the full two weeks to be considered “fully vaccinated” and not have to undergo testing.

This January 4th deadline allows employers to keep unvaccinated workers on the job through the holiday shopping and travel season. This delay is something that business groups had lobbied for. Whether that is a good thing, or leads to a winter COVID-19 surge, will remain to be seen.

What if an employee tests positive for COVID?

- *If any employee tests positive:* Regardless of vaccination status, the company’s COVID protocol must require the employee to notify them of any positive test result. The employer must also remove that employee from the workplace. That employee may not be allowed to return unless they receive a negative confirmatory NAAT test result following a positive antigen test, they complete the CDC isolation protocol for 10 days, or they receive a letter from their doctor.
- *If an unvaccinated employee tests positive:* If an unvaccinated employee tests positive, the same principles discussed above apply. However, the employer may not require that unvaccinated employee to undergo the weekly testing for 90 days after testing positive.
- *Employers must report COVID deaths and hospitalizations to OSHA:* If any employee who was exposed to COVID-19 in the workplace is hospitalized, the employer must notify OSHA within 24 hours of finding out. If any employee exposed in the workplace dies, that notice must be within 8 hours. There are three ways to notify OSHA: by calling your local OSHA office, by calling the national OSHA hotline (1-800-321-6742), and by filling out an online form (found at osha.gov). If the employer is unable to reach someone by phone, the online option is the only method of notice—**leaving a voicemail is not sufficient.**

Other important requirements of the Rule:

- *Workers must get paid time off to get vaccinated:* Employers must pay workers for the time it takes to get vaccinated and must provide sick leave for workers to recover from any side effects.

- *Different testing requirements for frequency of travel in the office:* Unvaccinated employees who come into the office at least once every seven days must be tested at least once every seven days. Unvaccinated employees who are not in the office for more than seven days must provide a test result at least seven days before returning. If an unvaccinated employee can't produce a negative test, employers must remove them from the workplace until the employee is able to provide a negative test result.
- *Companies must get proof of vaccination:* Employers must determine the vaccine status of each employee, obtain proof of the vaccine, and keep records of same. Any employee, or someone with authorized consent of that employee, may request their individual vaccination status or recent test results.
- *Employers don't need to pay for testing:* In a move that appears designed to push workers to choose vaccinations over testing, the OSHA rule does not require employers to pay for or provide testing to workers who decline the vaccine, meaning the unvaccinated employees must pay for their own testing. However, collective bargaining agreements, state and local laws, or an employer's voluntary decision to pay may dictate otherwise.
- *Employers may refuse entry to unvaccinated workers:* While many employers may opt to let employees get tested to work, they are not required to do so. In other words, employers could lawfully opt to say that those who are not vaccinated may not work in person and require those employees to work remotely.
- *Updated mask requirements for businesses:* Under the OSHA rule, all unvaccinated workers must wear face coverings around others while indoors or occupying a vehicle. In addition, businesses may not prohibit any employees or visitors from wearing a mask voluntarily, unless that mask creates a "serious workplace hazard."
- *Employers must post certain notices:* In addition to the vaccination policies, employers must also prominently post information about the OSHA guideline and the company's vaccination policy, CDC-sponsored information about the COVID vaccine found [here](#), information about protections from retaliation or discrimination due to the employee's decision whether or not to vaccinate, and information about laws prohibiting the supplying of false documents.

What happens if a company doesn't comply?

Because OSHA cannot investigate the vaccination records of every single covered employee, enforcement largely depends on employee reporting. At any point, an employee may request the aggregate number of vaccinated employees working with their employer, as well as the total number of employees, which the employer must provide by the end of the next business day.

If that employee reports an alleged violation to OSHA, the agency may also request these same records, which must be produced within 4 hours. In addition to the aggregate numbers (which contain no identifiable information), OSHA has the right to inspect all records pertaining to employees' vaccination without needing permission from the individual employees.

If a company is inspected and the employer can't produce records showing the firm is following the rule—or if they are found to be violating the standard—OSHA has up to six months following that inspection to issue citations. Because OSHA notes the threat posed by COVID-19, all violations of this rule will be serious, willful, or repeat. A "serious" violation is when the hazard could cause serious harm or death, unless the employer had no way of knowing about the violation. A "willful" violation is

when the employer either knowingly failed to comply with the rule or “acted with plain indifference to employee safety.” Finally, a “repeat” violation would be when an employer is found liable for the violating the rule on multiple occasions.

Each serious violation of the OSHA rule could result in a maximum fine of \$13,653. Each willful or repeat violation could result in a maximum fine of \$136,532. However, the proposed version of the Build Back Better Act, if it becomes law, would raise maximum fines for all OSHA rules to \$70,000 for serious violations and \$700,000 for willful or repeat violations. We will monitor this provision to see if and when it ultimately gets enacted.

THE THREE RULES: DIFFERENCES AND CLARIFICATIONS

In a helpful move, the government made clear that an employer subject to the CMS rule or the SFWTF rule does NOT also have to comply with the OSHA rule. Healthcare workers and hospitals should comply with the CMS rule only and federal contractors should comply with the SFWTF rule only. Therefore, it is important to consider your business and which of these categories best describes your business:

- **The CMS Mandate:** CMS states that all health care workers must be vaccinated by January 4, but **with no option for weekly testing in lieu of vaccination**. The rule covers all employees—clinical and non-clinical—at about 76,000 health care facilities that receive federal funding from Medicare or Medicaid.
- **The SFWTF Mandate:** The SFWTF states that all federal contractors and subcontractors must be vaccinated by January 4, and it also provides **no option for weekly testing in lieu of vaccination**. This requirement was placed into the covered employers’ contracts with the government, and it gives these employers much more authority to enforce their vaccination requirements than the OSHA rule (including termination for employees who do not comply).
- **The OSHA Mandate:** Discussed in this post, the OSHA rule states that all covered employees must be vaccinated by January 4. Unlike the other two mandates, the OSHA rule **does provide an option for weekly testing in lieu of vaccination**. This rule is perhaps the most expansive of all of the mandates thus far, as it is estimated to apply to over 66 percent of American workers.

RELIGIOUS ACCOMMODATION AND MEDICAL EXEMPTIONS

Employers should keep in mind that the OSHA rule does not eliminate requirement to comply with Title VII or the Americans with Disabilities Act. In other words, employers will still have to review relevant EEOC guidance and must still consider employees’ requests for religious and medical accommodations. As discussed by Kelley Drye [here](#), the accommodation process must be more than mere lip service. The OSHA rule itself notes that vaccination may not be required where it is impracticable due to a medical condition or in conflict with a sincerely held religious belief. In New York and other states that have already enacted their own vaccine mandates, these medical exemptions have been rarely granted. But the unavailability of medical exemptions has led to more employees seeking a religious exemption. The EEOC has recently issued helpful guidance on religious accommodation, but it is important to note that there is no hard and fast rule to apply for accommodations; it is a very fact-specific inquiry that depends on the circumstances.

Much has been written about the challenge of religious accommodations. When an employee makes a request for religious accommodation, the employer will often face difficulty in showing that a belief

is not sincerely held. Because of this, the EEOC suggests not challenging a religious belief unless there are compelling reasons to do so (such as a desire to have vaccinated employees in the office). With that being said, there are some factors that businesses can consider in making their determination of whether to grant an accommodation.

These include:

- whether the employee acts inconsistently with their professed belief,
- whether the accommodation sought is often sought for secular reasons,
- whether the timing of the request is suspicious (e.g., it follows an earlier-denied medical request for exemption), and
- whether there are other reasons to believe that the accommodation is not sought for religious reasons.

Still, this inquiry is extremely fact specific, so it would depend on the requesting employee's situation.

As with other accommodation requests under Title VII, if the employer finds that there is a basis for an accommodation, they should consider all reasonable accommodations, both to protect the employee and to prevent potential litigation. For example, teleworking or forced social distancing have been suggested as reasonable accommodations for employees who cannot be vaccinated. And just like other accommodations, an employer does not have to grant any accommodation that will cause an undue hardship, which is also a fact-specific inquiry that depends on nature of their business. If social distancing or telework are not feasible and the unvaccinated employee will be in close proximity to others, providing and requiring additional PPE may also be an option to mitigate risk.

Before terminating or denying an accommodation, an employer would be well advised to consult with employment counsel, in order to avoid litigation down the road.

A NATIONAL STANDARD, SUBJECT TO LEGAL CHALLENGES

A White House fact sheet made clear that the federal government believes that this rule supersedes any more lenient state or local rules or laws. In other words, it will nullify any state or local law which prohibits vaccine or mask mandates (like in Texas). Therefore, this now-national standard should actually make compliance simpler for companies with facilities in multiple states. However, the fact specific inquiry around the accommodation process still looms large over an employer's decisions under the rule.

Because the discussion around COVID-19 vaccination has unfortunately turned political, these rules are subject to change. Even before the details of the rules were released, several attorneys general have announced their intention to sue the Biden Administration. One argument they advance is that COVID-19 is outside of OSHA's jurisdiction, as it is not a work-related hazard. Congressional Republicans have vociferously opposed the mandate-or-testing requirements since they were initially floated by the president back in September. GOP members of the House Committee on Education and Labor sent the president a letter on September 29th that unsuccessfully urged him to pull the mandate, which they called "extreme, intrusive, disruptive, and likely unlawful."

We will continue to monitor the situation surrounding the OSHA rule and its effect on your business.

The rule has been logged with the Federal Register as of this morning, and it can be found [here](#). In the meantime, if you have any questions about mandatory vaccination programs or accommodations, please reach out to Kelley Drye & Warren LLP.

UPDATE (November 11, 2021)

We updated this blog to answer one additional question that continues to cause confusion for many—must employers offer a testing option or can they mandate vaccination for ALL employees?

The answer is that employers can mandate a vaccine for ALL employees, subject to possible medical and religious exemptions.

While a lot has been made about the vaccine-or-test requirements contained in the ETS, employers can adopt one of three vaccine-policy options. It is important to note that while the ETS is geared towards employers with 100 or more employees, employers of ANY size can also adopt these options. Further, any employer can opt to do more than OSHA requires. Therefore, any employer may opt to require masking of all employees, vaccinated or not. This is all lawful. The three vaccine-policy options are below.

- **Mandatory Vaccination Policy** – Under the ETS, employers may require all covered employees to be fully vaccinated against COVID-19 in order to work on the premises. Employers do not have to offer the testing option.
 - Covered employers must consider employee applications for religious and medical exemptions.
 - Employers may set the deadline for covered employees to be vaccinated, but that deadline should not come **after January 4, 2022**.
 - After the set deadline, an employer may reassign or terminate unvaccinated employees unless the employee has applied for and been granted an exemption from the vaccination requirement due to a medical accommodation or sincerely held religious accommodation (as discussed above).
- **Vaccination-or-Testing Policy** – Employers also have the option to set a policy where employees are either required to be fully vaccinated against COVID-19 or submit to weekly testing. This also should go into effect no later than January 4, 2022.
 - As of December 6, 2021, covered employers must require that any unvaccinated employees wear a mask when in the workplace.
 - As of January 4, 2022 employers who opt for a “vaccination-or-testing” policy must ensure that unvaccinated employees are getting tested for COVID-19, at their personal expense, weekly.
 - Also by January 4, 2022, covered employers must have some mechanism to confirm that unvaccinated employees are being tested at least weekly and keep records of those test results.
 - After the testing protocol takes effect, subject to some exceptions, an employer may remove any employee who is not vaccinated and who cannot produce a negative test result.

- **Hybrid Policy** – Under the ETS, employers may also mandate vaccination for some employees while implementing for a “vaccination-or-testing” policy for others. OSHA gives the example of a retail employer who requires its floor staff to be vaccinated but implements a “vaccination-or-test” policy for staff at its headquarters. This type of hybrid policy is permissible, but only if all covered employees are subject to some form of vaccination or testing protocol.

Also, any employer can opt to enact these policies before December 6 or January 4. Those are just the final deadlines for compliance.

As you consider which of these policy types to adopt, you want to look into the specific needs of your business and your employees. OSHA has indicated that it “strongly prefers” that all employees adopt mandatory vaccination policies as the best way to slow the spread of COVID-19. In addition, regardless of the vaccination policy that your business adopts, the other requirements of the ETS discussed above (such as giving employees paid time to get the COVID-19 vaccine and recover from any side effects) will continue to apply. If you have any questions about these vaccination programs or any of their specific logistical requirements, please reach out to Kelley Drye & Warren LLP.