

How Much Will the Vaccine Mandate Move the Needle?

By Allen Smith, J.D.

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The federal mandate for certain employers to require workers to be vaccinated against COVID-19 or undergo weekly testing may not increase the number of vaccinated people as much as was hoped.

The anticipated emergency temporary standard (ETS) mandating that employers with at least 100 employees require workers to be vaccinated or be tested frequently is already facing challenges: religious and medical exemptions, legal objections (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-states-will-challenge-vaccine-mandate.aspx) and enforcement hurdles.

The anticipated ETS (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/federal-vaccine-mandate.aspx) "will result in significant headaches for employers who will have to manage multiple requests for exemptions and to determine whether the requests are legitimate," said Martha Boyd, an attorney with Baker Donelson in Nashville, Tenn.

The benefit of the expected ETS is it provides another arrow in the anti-COVID-19 quiver, she said. But with the possibility of exemptions, "I'm not sure a mandate really moves the needle much," she said. "Most Americans who want to get vaccinated are." However, nearly half of those who are unvaccinated say they're willing to get a coronavirus shot, according to the U.S. Department of Health and Human Services, *The Washington Post* reports (<https://www.washingtonpost.com/health/2021/09/23/covid-unvaccinated-but-willing/>). They cited, among other reasons for not yet getting the vaccine, difficulties getting to a clinic or doctor's office.

Boyd said she didn't think the mandate would change the concerns that some employees have about the safety of the vaccine—concerns that exist despite the Food and Drug Administration's full approval of the Pfizer vaccine (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/pfizer-covid-19-vaccine-receives-full-fda-approval.aspx) and a miniscule number of serious side effects.

"Employers already stressed by too few employees to fill the jobs they have are fearful that large numbers of their workers will quit if they enforce a vaccine mandate, particularly in areas of the country that are less vaccinated, such as the Southern U.S.," Boyd said.

Testing is being offered as an alternative for exactly that reason—to prevent much-feared walkouts if vaccines were mandated with no other options, she said.

If employees claim they can't get access to tests due to supply issues, employers should give them information well in advance of the ETS on where testing or test kits are available, said Keith Wilkes, an attorney with Hall Estill in Tulsa, Okla.

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COVID-19 Vaccination Resources (www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Legal Challenges

The Occupational Safety and Health Administration (OSHA) is authorized to issue an ETS only when reasonably necessary to protect workers from grave danger, said Allison Oasis Kahn, an attorney with Carlton Fields in West Palm Beach, Fla., and a senior consultant with Core Triangle Consulting, which is based in Washington, D.C.

"There is a possibility that employers may challenge the timing of the ETS, which is 18 months into the pandemic and six months after widespread availability of the vaccines," Kahn said.

"They will also question why, if there is grave danger, the ETS does not apply to all employers, not just those with 100 or more employees."

Arizona Attorney General Mark Brnovich already has challenged the Biden administration's COVID-19 vaccine mandate as unconstitutional.

"Emergency temporary standards are rare," Kahn said. "In the past, courts have been reluctant to uphold challenged emergency standards because they bypass the usual rulemaking process and public comment period."

"The overriding issue is that this ETS would affect the conduct of tens of thousands of workplaces and OSHA's enforcement capabilities could never be more than episodic," said Baruch Fellner, an active retired partner with Gibson Dunn & Crutcher in Washington, D.C.

"In the past, emergency standards have been issued to address things like air contaminants, carcinogens, asbestos and benzene, and in many cases those standards have been put to judicial review and either stayed or vacated," said Stephanie Gaston, an attorney with Bradley in Houston.

Carrie Hoffman, an attorney with Foley & Lardner in Dallas, said employers might sue the government, but the government will take the position that a pandemic that has caused more than 660,000 deaths in the U.S. in less than two years qualifies as a grave risk to workers. She recommended that employers with at least 100 employees "begin communicating to employees that they need to be vaccinated or start providing a negative test result."

Enforcement Hurdles

Nonetheless, "OSHA is vastly understaffed to enforce the mandates requested by the Biden administration," said Christina Janice, an attorney with Barnes & Thornburg in Chicago, Columbus, Ohio and New York City. "Enforcement activities may be delayed by a lack of field staffing, ongoing legal objections or the ongoing development of clear enforcement standards."

Ian Carleton Schaefer, an attorney with Loeb & Loeb in New York City, added, "Given that OSHA will likely have to prioritize resources, I can imagine the requirement that employers self-certify compliance on some centralized registry if one could be developed."

While the agency might publicize high-profile cases of noncompliant employers being penalized in order to encourage other employers to comply, Fellner said, "public shaming works to an extent only where conduct alternative to the regulation is obviously wrong-headed." He predicted that "a large number of dissenters will garner not shame but honor from refusing to comply with such a problematic regulation."

Christine Walters, J.D., SHRM-SCP, an independent consultant with FiveL Co. in Westminster, Md., noted that even if there wasn't the upcoming ETS, an employer could mandate vaccines, except in Montana (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-limits-inquiries-into-immunization-status.aspx), which prohibits employers from requiring vaccines.

OSHA Fines

Despite the challenges, employers should prepare to comply with the ETS, as they could face OSHA fines if they don't, said Alana Genderson, an attorney with Morgan Lewis in Washington, D.C. If OSHA discovers a violation, it could issue a citation and penalty of \$13,653 per violation, which could increase to \$136,532 per violation for repeat offenders.

In terms of the realistic expectation of any individual employer suffering legal consequences in the form of OSHA fines, "I'd say that's a gamble many employers do not want to take," Boyd said. "But as a practical matter, employers in industries already identified as part of OSHA's national emphasis program—such as health care, meat or poultry processing, and retail stores—should be particularly adherent to the ETS. Law offices, technology companies and other office-based businesses will likely be far down the list of the kinds of business OSHA would inspect, given the agency's limited resources."

Nonetheless, Wilkes said, "Most will choose to follow the law."

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