

What to Expect from OSHA on COVID-19 Vaccine and Testing Rules

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Businesses with at least 100 employees will soon be required to mandate that employees get vaccinated against the coronavirus or submit to weekly testing. Employers are still waiting for the Occupational Safety and Health Administration (OSHA) to issue an emergency temporary standard (ETS), and some key questions have yet to be answered, but employers can take certain steps now to prepare.

Here's what employers need to know.

ETS Timing

President Joe Biden announced the six-part "Path Out of the Pandemic (<https://www.whitehouse.gov/covidplan/>)" on Sept. 9. "We're going to reduce the spread of COVID-19 by increasing the share of the workforce that is vaccinated in businesses all across America," he said.

Among other steps, the administration will require most federal employees and federal contractors to get the COVID-19 vaccine. Biden's order eliminated the option for such workers to opt for regular testing instead of vaccination. OSHA's pending ETS, however, will let private-sector employers alternatively allow "any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work," according to the White House.

When will the rule take effect? "Although the timing of when the ETS requirement will go into effect is not clear, it will likely not be a long wait," said Keith Wilkes, an attorney with Hall Estill in Tulsa, Okla. The rule is expected to impact more than 80 million private-sector workers.

Ashley Brightwell, an attorney with Alston & Bird in Atlanta, said OSHA may not issue the ETS for another 30 to 60 days.

The ETS can remain in place for six months. "After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period," according to law firm Fisher Phillips.

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COVID-19 Vaccination Resources

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

Feedback

In light of the news, Brightwell suggested that employers start encouraging all employees to get vaccinated to make compliance easier once the rule goes into effect.

Ian Carleton Schaefer, an attorney with Loeb and Loeb in New York City, said covered employers need to quickly ramp up their infrastructure in terms of policies, administration and tracking.

Employers also need to decide whether they will mandate vaccination or allow weekly testing as an alternative. "For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy," according to Fisher Phillips.

Notably, employers will be required to provide paid time off for workers to get vaccinated and recover from any side effects. Businesses will also have to consider the costs associated with confirming negative test results for unvaccinated employees.

"Regarding the tests themselves, while insurance may cover the cost of tests, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing," Fisher Phillips said.

Under the federal Fair Labor Standards Act, employers must pay nonexempt employees for the time spent undergoing testing during the workday. "This likely includes required testing occurring on employees' days off if such testing is necessary to perform their jobs safely and effectively during the pandemic," according to the firm.

Be Ready for Accommodation Requests

OSHA's rule will almost certainly affirm that employers must accommodate employees who refuse to be vaccinated based on a medical exemption or sincerely held religious belief, said Paula Ketcham, an attorney with Schiff Hardi in Chicago.

Erika Todd, an attorney with Sullivan & Worcester, noted that when an employee requests a medical exemption, an employer is entitled to require a reasonable amount of verification to confirm that the employee does have a bona fide medical reason not to be vaccinated. "At the same time, employers must maintain the confidentiality of any medical information they obtain when discussing an exemption," Todd added.

She said religious objections are protected even when they are not supported by a formal religious group, and employers should seek further verification only in rare circumstances if there is a specific reason to doubt that the employee's objection is religion-based. "Notably, political and philosophical objections are not protected by federal anti-discrimination law," she said.

Mixed Reactions to Rule

In addition to potential legal risks, the main concerns employers have had in 2021 regarding vaccine mandates include resistance from employees, the potential impact on company culture and employee morale, and the possibility of losing employees in a tight labor market, according to research from law firm Littler Mendelson.

"The administration's approach will help equalize the playing field and take some pressure off employers who have been concerned about moving too fast or too early in this important area," said Devjani Mishra, an attorney with Littler in New York City.

Schaefer also said the government mandate alleviates some issues surrounding vaccination policies for covered employers that are competing for talent.

Some people have raised concerns (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-law-professor-sues-over-covid-19-policy.aspx) about requiring vaccination for those with natural immunity due to a past COVID-19 infection. The U.S. Centers for Disease Control and Prevention (CDC), however, is still urging people who already had the coronavirus to get vaccinated and pointed to the results of a recent study (<https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html>) highlighting the risk of reinfection. "The study of hundreds of Kentucky residents with previous infections through June 2021 found that those who were unvaccinated had 2.34 times the odds of reinfection compared with those who were fully vaccinated," the CDC said. "The findings suggest that among people who have had COVID-19 previously, getting fully vaccinated provides additional protection against reinfection."

Legal challenges to OSHA's ETS are expected. "Many legal experts have argued that the executive order exceeds President Biden's powers under Article II of the Constitution," noted Stephanie Gaston, an attorney with Bradley Arant Boult Cummings in Houston.

OSHA has the authority to issue emergency temporary standards only if it can show both of the following factors:

- Employees are exposed to grave danger from the hazard.
- The ETS is necessary to protect employees from that danger.

According to the Congressional Research Service (<https://sgp.fas.org/crs/misc/R46288.pdf>), "[I]n the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case."

Questions Remain

"The details of what the ETS will include are scarce at this point, leaving many questions unanswered," Fisher Phillips said. How will the 100-employee threshold be counted? Will employers be required to collect proof of vaccination? What type of testing will be required? Will remote employees be covered?

Brightwell thinks it unlikely that the ETS will apply to remote workers under the "grave danger" requirement. If employees are not exposed to anyone in the workplace, the risk of contracting COVID-19 is not work-related.

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