

OSHA ISSUES VACCINE MANDATE FOR LARGE EMPLOYERS

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On November 4, 2021, the White House announced a federal rule that will require private companies to mandate COVID-19 vaccinations or regular testing by employees. The rule, an emergency temporary standard (ETS) originally drafted by the Occupational Safety and Health Administration (OSHA), will apply to any company that has more than 100 employees.

[The full text of the ETS, which is expected to be officially published on Friday, November 5, 2021, is available here.](#) Under the new rule, covered employers are given one of two options:

1. Develop, implement, and enforce a policy requiring that employees receive the COVID-19 vaccination; or
2. Develop, implement, and enforce a policy giving employees the option to either get fully vaccinated or to undergo weekly testing for COVID-19.

Employers are required to compensate their employees for the time taken to receive a vaccine dose and must provide sick time for employees recovering from vaccine-related symptoms.

For unvaccinated employees, employers are not required to pay for or provide COVID-19 testing. Additionally, unvaccinated employees will be required to wear a face mask in the workplace.

While this rule is likely to face opposition, decisions from federal courts around the country thus far trend toward the rule being upheld. Federal courts have upheld a private employer's right to impose its own vaccine mandate. The question will become whether courts will extend those same protections to a mandate imposed by the government. Thus far, other government-issued vaccine mandates have withstood legal challenges. Courts in New York, Illinois, and California have upheld government-issued vaccine mandates.

Employers are likely to have many questions regarding the new mandate and its applicability to their workplace. Below are answers to some common questions regarding vaccine mandates.

How do employers with remote employees implement the vaccine mandate?

OSHA has carved out several exemptions to the rule for employees whose work or workplace is not subject to the same exposure risks, namely employees who work remotely or perform their work exclusively outdoors. In recent years, it is far more common for employers to have all or part of its workforce working on a remote basis. OSHA exempts workers who do not come into contact with others from its vaccine or testing requirement.

Note that such an exemption would only apply to employees who work remote full-time and are never in a physical workspace with other employees. A part-time remote employee who spends several days per week or per month in a physical setting would not be covered by this exemption.

How does an employer verify vaccine status and what must be done with that documentation?

Employers can ask their employees to provide documentation to confirm their vaccination status (or, in the alternative, the results of their mandatory COVID-19 testing). However, employers need to be mindful of confidentiality concerns with employee medical information. The Americans with Disability Act protects the confidentiality of employee information obtained as the result of a medical inquiry. Accordingly, employee medical information should be stored separately from an employee's general personnel file. Efforts should be made to minimize the number of people who are informed about an employee's

vaccination or testing status.

Do employers with fewer than 100 employees need to institute this mandate?

No. The OSHA regulation will only apply to private employers that have more than 100 employees. Private employers with 100 or fewer employees are not subject to the requirement.

What are the repercussions for not instituting this vaccine mandate?

Enforcement of this rule will largely fall on the employers themselves, as OSHA employs only a few thousand state and federal inspectors nationwide. However, OSHA inspectors will be tasked with responding to employee complaints about failures to abide by this rule and will add COVID-related items to their regular inspection checklists. The rule imposes a fine of \$13,653 per violation. For willful or repeated violations, the fines can grow to ten times that amount.

Will Arizona governmental employers be required to comply with the OSHA mandate?

Arizona is a state with an OSHA-approved state plan. Public workers in such states are protected by the ETS, and therefore, the new ETS applies to state and local government employers in Arizona.

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[Gordon Lewis](#) has more than 25 years of experience representing public and private employers in all manner of employment issues, policies, and practices. He defends employers against claims involving wrongful discharge, racial discrimination, sexual discrimination and harassment (including harassment based on sexual orientation), age discrimination, disability discrimination, civil rights violations, Family and Medical Leave Act, Unfair Labor Practice charges, and wage and hour claims.

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