OSHA Publishes COVID-19 Vaccine Mandate for Companies with 100 or More Employees

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On Nov. 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its highly anticipated emergency temporary standard (ETS) mandating employers of 100 or more employees to implement a COVID-19 vaccination or testing requirement. This standard implements the policy goals announced by the Biden administration in September. There is a great volume of information in the nearly 500-page standard, but the following information provides key answers for employers processing this new requirement:

1. What does OSHA’s rule require?

All private companies that employ 100 or more employees must require (on or before Jan. 4, 2022) all employees to (1) be fully vaccinated or (2) submit to weekly
COVID-19 testing **and** wear a facial covering while in the workplace. The ETS also requires employers to provide paid time off (up to four hours) for employees to get a COVID-19 vaccine, and employers must provide sick leave for employees to recover from any side effects from vaccination. Additionally, the ETS standard sets new requirements for notification, removal, training, and reporting. OSHA’s facial-covering mandate for unvaccinated employees and paid leave requirements will go into effect on **Dec. 5, 2021**.

2. **What employees are subject to the requirement?**

The standard focuses on workplace safety and does not apply to those who work entirely remotely or independent contractors of a company. However, employees who work a hybrid schedule with part of their working time spent in a company’s workplace must comply with the vaccination and/or testing requirement.

3. **What is required for an employee to be fully vaccinated?**

Two doses of the Moderna or Pfizer-BioNTech vaccine or one dose of the Johnson & Johnson vaccine is required for an employee to be fully vaccinated, per the ETS. Further, employees who are partially vaccinated must comply with facial covering and weekly testing until the vaccination is fully effective. Those receiving the J&J vaccine will require two weeks of testing after the single shot, employees who received the Pfizer-BioNTech vaccine will require five weeks of testing (three weeks between shots and two weeks following the second shot), and Moderna recipients require six weeks of testing (four weeks between shots and two weeks following the second shot).

4. **What exemptions apply to the vaccination requirement?**

Employers must generally provide exemptions to a COVID-19 vaccine mandate for those employees with a disability or sincerely held religious belief preventing vaccination - subject to certain exceptions depending on the specific facts relating to the workplace and employee’s duties. However, the ETS’s testing and facial covering option for unvaccinated employees allows employers to comply with OSHA’s requirements without fear of violating Title VII of the Civil Rights Act or the Americans with Disabilities Act.

5. **How does OSHA’s rule affect employers that already mandate employee COVID-19 vaccination?**

The new rule provides a floor and not a ceiling for employers that wish to mandate employee vaccination. For those employers with vaccine mandates in place that do not provide a testing alternative, the OSHA rule does not require a change. However, accommodations to a mandatory testing policy may be necessary in cases of disability or sincerely held religious belief. For assessment of particular cases, please contact your Dinsmore labor and employment attorney.

6. **How must employers track employee vaccination?**
Employers are required to keep records of employee vaccination status in a separate file (apart from employee personnel files) that are only accessible by those management and/or human resources professionals with a legitimate business reason to access the information. Sufficient proof of an employee’s vaccination status include (1) a record of immunization from the employee’s health care provider; (2) a copy of the employee’s COVID-19 Vaccination Record Card; or (3) “in instances when an employee is unable to produce proof of vaccination,” a signed and dated employee attestation is acceptable proof of vaccination.

7. Who must pay for testing if the employer offers a testing alternative to employee vaccination?

The OSHA ETS is clear that it does not require employers to pay for or provide employee COVID-19 tests. However, employers may be required to pay for such tests pursuant to a collective bargaining agreement or local laws.

8. What notice requirements apply to covered employers?

Employers must provide employees a copy of any policies initiated to comply with the ETS and train employees on the same. For example, an employer may provide the policy to employees via email or a printed handout. To ensure employees understand their obligations, employers should identify a point of contact in management or human resources to address any employee questions. Also, employers must provide the following to employees: (1) the CDC’s document “Key Things to Know About COVID-19 Vaccines” (available here); (2) notice that employers are prohibited from discriminating against an employee for reporting work-related injury or illness or otherwise exercising their rights under the OSH Act; (3) notice that the OSH Act provides for criminal penalties for knowingly supplying false statements or documentation.

9. What penalties do employers face for non-compliance?

OSHA has the authority to assess penalties for violations of its standards, and the penalties available for serious violations can amount to $13,653 per occurrence.

10. Can OSHA require this from employers?

OSHA has the authority and responsibility to enact standards designed to protect workers in the workplace. COVID-19 undoubtedly presents a risk to workers inside the workplace, and the requirements of the ETS are designed to address that risk by threatening penalties for employers. However, it is no surprise that several lawsuits have already been filed challenging these requirements since the ETS was published earlier on Nov. 4. The Dinsmore COVID-19 Task Force will be closely monitoring as this litigation proceeds. For now, best practice for employers is to prepare as though OSHA’s ETS will go into effect as planned.

Independent of the OSHA ETS, the Centers for Medicare and Medicaid Services also released details today for its requirement that health care workers at facilities participating in Medicare and Medicaid are fully vaccinated.
This top line overview is designed to answer a few of the common questions employers may have relating to the OSHA standard, but employers have a short timeframe to ensure compliance with the standard before Jan. 4, 2021.

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