

5-STEP PLAN FOR EMPLOYERS AFTER PRESIDENT BIDEN ANNOUNCES WORKPLACE VACCINE MANDATES

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In arguably the most far-reaching move of the COVID-19 pandemic, the Biden administration announced yesterday that federal workplace safety officials will soon issue a rule that will require all employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work. Businesses will also be required to give workers paid time off to get vaccinated and to recover from any vaccine side effects as part of the forthcoming emergency rule expected from the Occupational Safety and Health Administration (OSHA). **(Editor's Note: On a September 10 webinar, Labor Department officials stated that while employers must provide paid time off for employees to receive and/or recover from the vaccine, employers could require employees to use their existing paid time off for this purpose.)** The announcement was part of the Biden administration's "[Path Out of the Pandemic](#)," which outlines a six-pronged, comprehensive national strategy to combat COVID-19, which also includes vaccine mandates for federal contractors ([discussed here](#)) and many additional healthcare workers, and providing further access to federal financial assistance. Here is a summary of the expected rule along with a five-step action plan you can implement immediately.

Vaccine Mandate for Employers with 100+ Employees

The cornerstone of the plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees – which is estimated to

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impact 80 million workers, or two-thirds of the country's workforce. This rule will take the form of an Emergency Temporary Standard (ETS), which allows the agency to enact regulations it can enforce immediately if a "grave danger" to worker safety is present. Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation. Although it is currently unclear, this likely means a fine of up to \$14,000 for each facility inspected by OSHA where a covered employer has not implemented a mandatory vaccine policy or otherwise complied with the ETS.

Which Employers Will Be Covered?

As OSHA will be the agency responsible for issuing and enforcing the ETS, all employers covered by the OSH Act must comply with the forthcoming ETS. Many office-based employers do not even realize they fall under this statute and are not accustomed to interacting with OSHA, including financial institutions, insurance companies, law firms, and other professional and technical work environments.

When Will the ETS Likely be Issued?

While the Biden administration did not set out a timeline or deadline for OSHA to issue the ETS, it is clear that the administration is taking an aggressive approach. It is likely that OSHA will issue the ETS relatively quickly – perhaps in the next several weeks, especially if it has been in the works behind the scenes for some time now. After it is issued, OSHA will likely strive for a timeline of 75 days before it starts enforcing the ETS to remain consistent with the Biden administration's proposed deadline for federal workers to obtain the vaccine. **(Editor's Note: On a September 10 webinar, Labor Department officials stated that the ETS will be issued in the "coming weeks," but did not provide a specific date.)**

Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction. But in states where the federal government does not have jurisdiction over workplace safety (OSHA-state-plan states such as California, Tennessee, North Carolina, and Kentucky) these agencies will have to adopt the ETS or "just-as-effective measures" within 15 to 30 days.

How Long Will the ETS Last?

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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.

The 7 Biggest Unanswered Questions

The details of what the ETS will include are scarce at this point, leaving many questions unanswered. The seven biggest unanswered questions for employers at this point:

- **Will remote employees be covered?** Unless the ETS specifically addresses remote employees, remote employees likely will not be covered by the emergency rule. OSHA largely avoids addressing safety issues concerning employees working from home. **(Editor's Note: On a September 10 webinar, Labor Department officials confirmed that remote workers not working in contact with others would not be covered by the emergency rule provided they don't come to the workspace.)**
- **How will the 100-employee threshold be counted?** It is unclear whether the 100-employee threshold will be considered on a per location or company-wide basis. Given other standards that mandate certain requirements based on employer size, the threshold likely will be on the total number of workers employed by the company. It is also unclear whether a joint employer analysis will apply to the calculation of employees. **(Editor's Note: On a September 10 webinar, Labor Department officials confirmed that the 100-employee threshold will be counted on a company-wide basis.)**
- **Will employers be required to collect proof of vaccination?** Whether the ETS requires employers to collect proof of vaccination may have a huge impact on employers. OSHA's record retention regulations require that employers preserve and maintain employee medical records for the duration of employment plus 30 years. Therefore, if the ETS requires employers to collect proof of vaccination, you may be required to maintain that record for the duration of the employee's employment plus 30 years. **(Editor's Note: On a September 10 webinar, Labor Department officials confirmed that information regarding collection and verification of vaccination status will be outlined in the ETS.)**



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- **What type of testing will be required?** It is unclear whether the ETS will mandate a particular type of COVID-19 test (antigen, PCR, etc.). While the PCR test is more accurate, it takes longer to receive the results and is more expensive.
- **Who Pays for Testing?** While the Plan proposed to improve access to COVID-19 tests – even suggesting that retailers will offer to sell those rapid tests at cost for the next three months – the question of who pays for testing remains unanswered. Generally, however, any testing protocols must comply with applicable wage and hour laws, which provide that time spent on receiving employer-required tests should almost always be treated as compensable. Indeed, the Department of Labor’s COVID-19 and the Fair Labor Standards Act Questions and Answers, published before the Plan’s announcement, provides that employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises during regular working hours under the Fair Labor Standards Act (FLSA). 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. 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. **(Editor’s Note: On a September 10 webinar, Labor Department officials confirmed that the ETS will contain information about who bears the responsibility for COVID-19 testing costs.)**
- **Will unionized employers be required to bargain over the decision of how to comply with the ETS?** It remains to be seen whether and to what extent unionized employers would be compelled to bargain over the decision to effectuate compliance with the new mandate (or at least the discretionary aspects with respect to vaccines vs. weekly testing) under NLRB doctrine. At a minimum, you should prepare for a corollary obligation to bargain over the effects of that decision on demand. In the meantime, non-union employers should consider the practical implications of compliance from a labor relations perspective, as unions may attempt to leverage aspects of the new requirements for organizing purposes. **(Editor’s Note: On a September 10 webinar, Labor Department**

officials confirmed that the ETS will not change any collective bargaining agreement obligations, similar to all other OSHA standards.)

- **Will the ETS face legal challenges?** As with any broad sweeping policy, any ETS that is adopted is likely to face legal challenges. Governors of many states have already indicated that they intend to challenge any ETS. It is possible that a court could even block enforcement of the emergency rule until the legal challenges are resolved. OSHA will have to prove that there is a “grave danger” to the workers of large employees in order for the ETS to withstand a legal challenge, which may be a difficult task.

What Should You Do? A 5-Step Action Plan for Employers

Here is a five-step action plan you can implement immediately to put yourself in the best position to comply with the expected ETS.

1. Adopt Procedures for Determining Employees' Vaccination Status

You should prepare to implement a system for asking employees whether they have been vaccinated and maintain confidential records of employee vaccination status. The Equal Employment Opportunity Commission has indicated that it is generally lawful for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws. In most cases, the answer to that question alone may be all you really need.

The ETS likely will require that you not only ask for vaccination status but collect proof of vaccination. If this is the case, you should ask employees to show you documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. In lieu of collecting vaccination records, you can create a confidential list of vaccinated workers in order to minimize legal risks and requirements associated with retaining medical documentation, including checking state laws regarding confidentiality and privacy of

medical records. If you decide to collect vaccination records, it is recommended that you treat those records as you would other medical records.

2. Determine if You Will Mandate the Vaccine or Allow Unvaccinated Employees to be Tested Weekly

You will also need to determine whether you will adopt a mandatory vaccination policy or allow unvaccinated employees to be tested weekly. For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.

3. Develop a Plan for Handling Accommodation Requests

For those employers that adopt a vaccine mandate, develop a robust and clear reasonable accommodation policy to address **religious** and disability issues. Take special care to communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request. You should also be prepared for employees to request an accommodation from the weekly testing requirement – an accommodation process that must be addressed separately from requests for exemptions from any vaccination mandate.

For a detailed discussion of this topic, please refer to [**An Employer's 3-Step Guide to Responding to COVID-19 Vaccine Religious Objections.**](#)

4. Have a Plan for Tracking Test Results

For employers who allow individuals who are not fully vaccinated to undergo weekly COVID-19 testing in lieu of receiving the vaccine, you should have a plan in place for collecting and tracking test results. If regular employment-related testing is not covered by the employee's health insurance and free testing is not feasible, you will need to review the applicable federal, state, and local employment laws to determine if you must pay for testing. Further, under the federal FLSA, employers must pay nonexempt employees for the time spent undergoing testing during the workday.

5. Prepare for OSHA Complaints and Inspections

As a reminder, the vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation. Social distancing, masking, sanitizing, and other safety steps you may already be required to take under existing OSHA and CDC guidance, or state or local public health orders, remain in effect.

Therefore, in addition to the requirements of the new ETS, OSHA likely will ask for your COVID-19 response plan and training records if it receives a complaint or conducts an inspection concerning the vaccine mandate ETS. If not already in place, develop a COVID-19 policy and communicate its requirements to your employees. Train managers and supervisors on what to do and say if OSHA arrives for an inspection. This effort could save your company from paying significant fines.

Conclusion

You should begin preparing now for the forthcoming Emergency Temporary Standard by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. You should also prepare for the possibility that employees may refuse to comply with the requirements of the ETS and begin planning an appropriate response – which would include terminating their employment.

We will monitor these developments and provide updates as OSHA drafts and implements the Emergency Temporary Standard. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).