

Insights: Alerts

U.S. Department of Labor Issues New Rules Requiring Vaccination or Weekly Testing for Employees of Large Employers

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Resource Center page](#) and/or your email for updates.

On November 4, 2021, the U.S. Department of Labor issued the long awaited emergency temporary standard (“ETS”) on COVID-19 vaccines. This legal alert highlights and summarizes some of the key provisions.

The ETS requires all private employers with 100 or more employees corporate-wide to establish, implement, and enforce a mandatory COVID-19 vaccination policy. Under the ETS, covered employers can also allow employees to elect to undergo weekly COVID-19 testing and wear a face-covering at the workplace, in lieu of vaccination. Either approach must be put into a written policy and each employee must be informed of how the employer is implementing the ETS. Employers that choose not to offer a testing option to all employees must still provide an exemption from the vaccine requirement and a testing option for employees (1) for whom a vaccine is medically contraindicated, (2) for whom medical necessity requires a delay in vaccination, or (3) who are legally entitled to a reasonable accommodation because they have a disability or sincerely-held religious belief, practice, or observance that conflicts with a vaccine requirement. Additionally, employers may have to accommodate unvaccinated employees who cannot wear a face covering because of a disability and employees who cannot wear a face covering or be tested for COVID-19 because of a sincerely-held religious belief, practice, or observance.

Although the ETS is effective immediately upon publication, employers will have until December 5, 2021 to comply with most provisions of the ETS. Thus, by December 5, covered employers must issue a written policy requiring vaccinations and determine and maintain a record of the vaccination status of all employees by that date, including obtaining documented proof of vaccination. Employers must also keep a roster of each employee's vaccination status. Such records and roster must be treated as confidential medical records. Employers must also provide specific information to employees about vaccine efficacy, safety, and the benefits of being vaccinated; OSHA retaliation prohibitions; and criminal penalties for providing false statements and documentation. Additionally, by December 5, employers are required to provide up to four (4) hours of paid time off (including travel time) for employees to get vaccinated during work hours and reasonable time off and paid sick leave to recover from any negative side effects experienced after each dose of a COVID-19 vaccine. Per

official FAQs about the ETS, OSHA presumes that an employer would be in compliance with the latter requirement if it makes available up to two (2) days of paid sick leave per dose to recover from side effects.

The ETS defines fully-vaccinated employees as those employees who are two weeks past their second shot of a two-dose regimen or their single shot of a single-dose regimen. Any employee who does not provide by December 5 acceptable documentation of vaccination, as set forth in the ETS, must be treated by the employer as not fully vaccinated and must thereafter wear face coverings that comply with OSHA standards at most times within the workplace. In addition, if an employer is allowing testing in lieu of vaccination, beginning January 4, 2022, employers must require weekly proof of a negative COVID-19 test for all employees who (1) are not fully vaccinated and (2) report to a workplace where other coworkers or customers are present. It appears that employees who have received all applicable doses of a COVID-19 vaccine by January 4 do not have to be tested, even if two weeks has not yet passed between the last dose and January 4. Beginning January 4, if an employee who is not fully vaccinated does not timely produce a negative test, the employee must be removed from the workplace. Additionally, any employee, regardless of vaccination status, who tests positive for or is diagnosed with COVID-19 must be required to immediately notify the employer and must be immediately removed from the workplace for a period of time. Employers are not required to pay for face coverings or the testing of individuals that do not wish to be vaccinated unless required to do so by other law, regulation, contract, or an applicable collective bargaining agreement. Employers must maintain a record of each test result, which must be kept confidential. The time an employee spends obtaining a COVID-19 test could be considered compensable hours worked in certain circumstances, such as if an employee is instructed to obtain the test from a specific provider at a set time.

Employees who do not report to a workplace where other individuals are present or who work exclusively outside are not covered by the ETS. Additionally, the ETS does not apply to employees while working from home. The ETS generally does apply to unionized workplaces.

To ease the burden on federal contractors, the DOL has also said that it will extend the deadline for federal contractors to comply with the similar but stricter previously-issued vaccine mandate, which was the subject of a prior [Legal Alert](#). Besides extending the deadline for compliance with the vaccine mandate, these new rules do not affect the federal contractors vaccine mandate.

It is anticipated that there will be pushback from state and local governments, and Congressional Republicans have already expressed their opposition. The ETS specifically states that it preempts any contradictory state or local laws. The ETS will be in effect for six (6) months and it could be extended thereafter.

Related People



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