



Employer Considerations: Biden Administration Mandates Vaccination or Testing for Most Employees

On September 9, 2021, the Biden administration announced that the federal government will require employers with 100 or more employees to ensure that those employees are either fully vaccinated against COVID-19 or test negative for COVID-19 on a weekly basis. The federal government will also require most federal workers, federal contractors and healthcare workers to be vaccinated, without the option to test. Also, the announcement requires employers to provide paid time off (PTO) for employees to get or recover from the vaccine. The announcement was very broad and contained few details. Charged with publishing rules (and more details), the DOL's Occupational Safety and Health (OSHA) is expected to issue an Emergency Temporary Standard (ETS) that will apply until formal rules are issued.

Because this mandate primarily involves employment law, employers should consult with legal counsel regarding employer compliance with the new requirements.

Until the ETS is published, there are many unanswered questions. As we await answers, and to help preview the related issues for employer consideration, we've outlined the questions that we hope OSHA will address in the ETS.

- Which employers are subject to the vaccine mandate and testing alternatives?
- Which individuals are included in the 100-employee count? Will it include part-time, temporary or seasonal employees? Is it based on a particular worksite or across worksites? Does it include companies with common ownership? Is it current or prior calendar year count?
- Must employers ensure remote workers are vaccinated, or is it only employees returning to an office, work or job site?
- What is the definition of "fully vaccinated"? Does it incorporate the CDC's definition, or a new definition? What about booster shots? And when will employees need to be fully vaccinated?
- How will employers verify an employee's vaccination status? Can an employer rely on employee attestation, or do they need to request vaccination card as proof? How should employers confidentially store information relating to employee vaccination and testing?
- Must the employer provide the alternative testing option for all employees or just those unable to get the vaccine due to a medical condition, disability or religious objection?
- How does an employer verify an employee's medical condition, disability or religious objection?
- Who pays for the alternative testing, and how often should testing be performed?
- What types of alternative testing will be required? How must employers treat a positive test?
- Is employer administration of an alternative test considered medical care and does it establish a group health plan for purposes of ERISA, COBRA and other benefits compliance rules?
- What are the requirements relating to paid time off (PTO) for vaccination or testing? How much PTO must be provided? What is the rate of pay that would apply during PTO? Is the leave in addition to and/or concurrent with other leave? Are there any notice requirements?
- How long will the vaccine and testing requirements last?
- What are the penalties for not complying with the requirements? Is the penalty determined on a per employee basis? Is there a cap on the penalty? Does the penalty vary for willful violations, and if so, how is "willfulness" determined?
- Will there be legal challenges to the new vaccine and alternative testing mandates?

We will continue to monitor developments and update this document as we learn more. As another resource, and for further discussion, please check out [Episode 109](#) of our podcast entitled "Biden's Vaccine Mandates & Testing Alternatives."

White House Announcement: <https://www.whitehouse.gov/covidplan/>

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