

Bolton

Alert

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Legal Update: What the COVID-19 Vaccine Mandate Means for Employers

President Joe Biden's administration is [continuing its efforts](#) to curb the COVID-19 pandemic and the spread of the deadly coronavirus Delta variant. Recently, the White House ordered all federal workers and contractors to get vaccinated against COVID-19. Now, the government is imposing a similar requirement on private employers. The move is estimated to affect over 80 million private-sector workers.

The Occupational Safety and Health Administration (OSHA) has been tasked with drafting an emergency temporary standard (ETS) and will announce more specifics in the coming weeks. Soon, employers with 100 or more employees will need to adapt their vaccine policies to comply with these new rules. This article discusses this latest vaccination mandate, including its scope and how it may affect employers.

Note: This is a developing issue. Information will be updated here and in subsequent resources as more details are released.

Rule Overview

Soon, employers with 100 or more employees (measured companywide, not by location) will need to enforce one of the following:

- Require employees to get vaccinated against COVID-19
- Require unvaccinated employees to produce evidence of a negative COVID-19 test each week

This flexibility allows employers to choose how strictly they want to enforce a vaccine mandate. In other words, some employers may decide to make vaccination a condition of employment; others may only require negative COVID-19 tests.

What's Known About the Upcoming Rule

OSHA is tasked with drafting the new rule. As such, there will be few details available before OSHA publishes a definitive ETS. Meanwhile, the only pertinent information has come from short government briefings. Here's what's known about the upcoming rule, keeping in mind these particulars may change in time:

- The rule will only apply to employers with 100 or more employees, measured companywide.
- Employers will be able to decide if they want to adopt a strict, mandatory vaccination policy or allow testing as an alternative.
- Employers must provide paid leave to receive and recover from vaccinations.
- Remote employees not working in contact with others will be exempt from the ETS (unless they come into the workplace).

Again, all aspects of this upcoming rule are subject to modification as OSHA continues to work on the details. The above information is provided to help employers understand how the government is proceeding in this area.

Please Note: The information contained in this letter is not legal advice and should not be relied upon or construed as legal advice. This letter is for general informational purposes only and does not purport to be complete or cover every situation. Please consult your own legal advisors to determine how these laws affect you.

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What's Unknown About the Upcoming Rule

Much is still unknown about the upcoming vaccine requirement, and it will remain as such until OSHA publishes the ETS. Here are just some of the questions that remain to be answered:

- When will enforcement of the ETS begin?
- What qualifies as proof of vaccination or a negative COVID-19 test?
- Who must pay for weekly testing?
- What specific penalties will there be for non-compliance?
- Will the mandates apply to part-time workers?
- Will there be new guidance on how employers should handle accommodations for employees seeking an exemption?
- Are managers prepared to carry out requirements and discuss questions or concerns with employees?
- Must paid leave be provided for employees' COVID-19 testing, as it is for vaccinations?

As the list illustrates, there are many unknown factors at this time. Employers will need to stay tuned for updates from OSHA as they come; however, employers can take action in the meantime.

Expected Enforcement Timetable

The vaccination mandate will come in two primary waves:

1. An ETS with comprehensive details and actionable steps
2. A permanent OSHA standard with all aspects developed

First, OSHA will publish its ETS that will include important details and enforcement guidelines. This is expected to come in the weeks ahead; however, an actual release date is uncertain. Once issued, the ETS will take immediate effect in states where federal OSHA has jurisdiction. In states where the federal government does not have jurisdiction over workplace safety, state agencies will have to either adopt the ETS or develop their own ETS within 30 days that is "at least as effective."

An ETS can only remain in effect for six months. After that time, it must be replaced by a permanent standard, which must undergo a formal rule-making process involving a notice-and-comment period to allow stakeholders to submit feedback. This process follows the usual procedure for adopting a permanent standard except that a final ruling should be made within six months from that date OSHA publishes the ETS in the Federal Register.

In summation, employers can expect the ETS sometime within the year, but its specifics may ultimately change as the standard is finalized.

What Employers Can Do Now

While many details are still unknown, the primary vaccination or testing requirement is definite. As such, employers can at least prepare for this aspect of the mandate. Here are some actions employers can consider when preparing for the upcoming requirement:

- Determine whether COVID-19 vaccination will be required as a condition of employment or if weekly negative testing will be an alternative.
- Consider how to handle accommodation requests for those seeking vaccination exemptions.

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- Start planning a thorough, transparent, and engaging employee communication strategy to educate workers about vaccine policy changes.
- Think about the systems needed to adequately track employee vaccination statuses and confidentially secure the data. Bolton is currently evaluating solutions and resources in the industry.
- Plan for potential staffing shortages or scheduling changes to afford employees time to get vaccinated.
- Consider whether partitions or spaced-out workstations will be utilized.

This list is non-exhaustive, as certain considerations will be unique to individual employers.

Though the ETS will almost certainly face multiple legal challenges, employers should not count on the rule being entirely struck down and should begin preparing to comply as soon as possible.

Employer Action

The specifics of this latest vaccine mandate are still being drafted, so its rules may seem like a distant concern; however, these requirements will take effect quickly once they're announced. Employers will need to act swiftly when the time comes to ensure compliance. Taking proactive steps now can help save employers from a scramble at the end of the year.

Reach out to a Bolton Consultant to discuss how this new rule may affect your business. In the meantime, stay tuned for updates as this situation develops.