

Navigating Vaccine Mandates in the Workplace

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Today's Presenters



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President Biden's COVID-19 Action Plan

- The Biden Action Plan includes vaccination requirements for employees of healthcare facilities, federal employees, and contractors, and certain schools, programs, and private employers.
- Executive Order 14042 (September 9, 2021).
- OSHA Emergency Temporary Standard (ETS) (effective November 5, 2021).
- Centers for Medicare & Medicaid Services Rule (CMS) (effective November 5, 2021).

Impact on Federal Contractors

- All Covered Contractor Employees must be fully vaccinated by December 8, 2021.
- Covered Contracts
 - Contracts related to federal property or involving services or construction.
 - “Services” is interpreted broadly but there are a few exceptions it does not apply to, most notably subcontracts solely for the provision of products.
- Proof of Vaccination
 - Fully vaccinated two weeks after receiving the final dose in a one- or two-dose series approved by the FDA.
 - Covered contractors must require and verify proof of vaccination.
- Weekly testing is NOT authorized as an alternative to vaccination.
- Covered contractors must designate a person(s) to coordinate COVID-19 workplace safety efforts.

OSHA's Emergency Temporary Standard

- Private employers with 100 or more employees must ensure employees are “fully vaccinated” or provide proof of a negative COVID-19 test at least once per week.
- “Fully vaccinated” means two doses of Pfizer or Moderna, or one dose of Johnson & Johnson.
- Employers are not required to cover costs of COVID tests for unvaccinated employees who choose the testing option.
- Employers are required to provide employees with paid-time off to get vaccinated or to recover from any negative side effects.
- Employer’s responsibility to determine the vaccination status of each employee.
- Employees who are not vaccinated must wear masks while at work sites.
- Employers must implement most of the requirements by December 6, 2021. The Weekly testing requirements will become effective January 4, 2022.
- Employers must comply with information and posting requirements.

Centers for Medicare & Medicaid Services Rule for Health Care Workers

- Requires healthcare workers at facilities participating in Medicare and Medicaid to be fully vaccinated.
- Applies to all current staff as well as any new staff who provide care, treatment, or other services for the facility and/or its patients.
- Covered facilities must establish a policy or process to ensure that all eligible staff are vaccinated.
- The CMS rule does not include a weekly testing option like OSHA's ETS.

Challenges to OSHA's ETS

- States, businesses, and other organizations across the country have challenged the ETS, with the Texas Attorney General calling the ETS a “breathhtaking abuse of federal power,” and the Alabama Governor stating that she is “adamantly against this weaponization of the federal government, which is why we simply must fight this any way we know how.”
- The ETS has already been challenged by twenty-three petitions for review that have been filed in the D.C., Fifth, Sixth, Seventh, Eighth, and Eleventh U.S. Circuit Courts of Appeal.
- One day after the rule was officially published, the Fifth Circuit quickly halted the ETS by issuing a stay, citing “grave and statutory constitutional issues.”

What's Next?

- Ultimately a circuit court that will decide the fate of OSHA's ETS will be chosen by a lottery system.
 - Because two or more courts of appeals received a petition for review within ten days of promulgation, all cases must be consolidated to one of the federal appellate courts that received a petition.
- More petitions are expected, both by those who seek to challenge the rule and by those who support the OSHA mandate and want to expand the potential pool of circuits in the lottery.

State Laws v. Biden's COVID-19 Action Plan- Preemption

- President Biden's Executive Order may preempt any contradictory state mandate for government contractors.
- For private employers, the ETS also may preempt any state or local requirements that ban or limit an employer's authority to require vaccination, face coverings, or testing.
- The ETS does not purport to preempt more protective generally applicable state and local requirements that apply to the public at large.
- Employers will need to review the language of any state-issued orders to determine whether compliance with both the order and the ETS is possible.

Document Your Policy, Practice, and Decision

- Employers should formalize their vaccination policies and procedures, regardless of whether it is a mandatory vaccination policy, or offers a testing component, as well.
 - A policy should advise employees that the company will consider reasonable accommodations for disabilities and religious objections.
- Any requests for an accommodation for disability and supporting documentation should be maintained in confidential files separate from personnel files.

Document Your Policy, Practice, and Decision

- Have forms ready for employees who request an accommodation.
- Have a trained team or person who handles the accommodation requests and conducts the interactive process.
- After concluding the interactive process, the decision should be communicated to the employee in writing, and if the exemption is denied, the reasoning should also be included.

Handling Requests for Disability Exemptions

- Disabilities that could cause employees to seek an exemption may include:
 - Allergic reactions to vaccinations with certain ingredients;
 - Certain pregnancy-related conditions;
 - Certain chronic illnesses or other disabilities as determined by an employee's health care provider.
- If it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates consideration for an accommodation (this is only part one of inquiry).
 - Requests for medical information must be narrowly tailored.

Handling Requests for Disability Exemptions

- Each request should be evaluated individually and separately.
 - Must participate in the interactive process.
- Employers are not required to accommodate disability/medical exemption requests if it creates an “undue hardship,” but must show special circumstances demonstrating undue hardship.
 - Showing a “*de minimus*” negative effect is insufficient.
 - Employers can deny a disability/medical exemption request if the employee poses a direct threat to the health or safety of others in the workplace.

Handling Requests for Religious Exemptions

- The employer may determine whether the request is based on a “sincerely held religious belief.”
 - The EEOC has said that “religion” also includes “religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.”
- Social, political, economic philosophies, or personal preferences are not “religious” beliefs.

Handling Requests for Religious Exemptions

- Employers are entitled to make a limited inquiry into the facts and circumstances that the belief at issue is religious
 - While a sincerely held belief may give rise to the need to consider an accommodation, it is only part one of the analysis.
- Employers are not required to accommodate an employee's sincerely held religious belief if it creates an "undue hardship."
 - "*De minimus*" standard applies here.

Health Plan Coverage of COVID Vaccinations, Testing and Treatment

- CARES Act requirements.
- Effective January 5, 2021, no cost sharing permitted for vaccines.
- Vaccines must be covered as soon as approved within Emergency Use Authorization (EUA) or Biologics License Application (BLA).
- Eventual booster doses and age demographic expansion have same treatment in group health plans.

Vaccine Incentives as Wellness Programs

- HIPAA generally prohibits discrimination on a “health factor.”
- For group health plans, there is an exception for incentives offered in return for adherence to certain programs of health promotion and disease prevention
- Commonly referred to as wellness programs.
- Since 2013, the maximum permissible reward (or penalty) under a health-contingent wellness program that is part of a group health plan is 30 percent of the cost of coverage.

One Type of Vaccine Incentive = Health Plan Vaccine Premium Differential

- Practical observations and typical open enrollment timelines.
- Jointly issued by DOL, HHS, Treasury on 10/4/21 – FAQs blessed this approach.
- Addressed parallels to existing tobacco use surcharge approach.
- Any premium discount/surcharge must satisfy the wellness program requirements for an activity related to a health factor.
- The amount of the premium for employee-only coverage of someone who is not vaccinated is what must be used to determine affordability under the ACA.

Traps for the Unwary on COVID Vaccine Premium Differentials

- Cheaper premium must be given to individuals for whom it is unreasonably difficult due to a medical condition or medically inadvisable to obtain the COVID-19 vaccination in order to qualify for the full reward.
- Plan must notice of the availability of the reasonable alternative standard under the wellness program.
 - Examples could include strict masking/distancing protocols and verified viewings of educational videos about COVID safety.
- Reward (discount) must not exceed 30 percent of the total cost of employee-only coverage.
- Plan must give individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year.

Going Too Far – What is Known to be Impermissible Today

- Conditioning enrollment or limiting COVID treatment payment to just vaccinated individuals.
- Benefits under the plan must be uniformly available to all similarly situated individuals and any restriction on benefits must apply uniformly to all similarly situated individuals and must not be directed at individuals based on a health factor.
- Don't confuse premium differential availability (allowed) with denying eligibility for benefits or coverage based on a health factor (not allowed).

HIPAA Privacy and Security Observations in COVID Incentive Space

- Recordkeeping considerations – consider clear training on distinguishing between employment record files versus health plan claims files.
- Plan notices and procedures – consider updates.
- HIPAA authorization language advised on certain exemption paperwork.

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