

Preparing for federal contractor COVID-19 vaccine mandates and OSHA's emergency temporary standard

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President Biden's recent executive orders mandating vaccination for federal workers and federal contractors and his declaration that the Occupational Safety and Health Administration (OSHA) will be issuing vaccine or weekly testing mandates for certain private sector employers have fueled the flames of an already hot nationwide debate over mandatory COVID-19 vaccines and testing.

As the debate plays out in workplaces, legislatures, and courts, many employers find themselves in the unenviable position of being caught in the crossfire. Some employers view the prospect of an OSHA Emergency Temporary Standard (ETS) requiring mandatory vaccines (or weekly testing) as a positive development providing a rationale (or cover) for those mandates sure to upset a segment of their workforces in a tight labor market.

Federal employees must be fully vaccinated by Nov.22, 2021, and employees of federal contractors must be fully vaccinated by Dec. 8, 2021.

Other employers fear a negative impact on hiring and retention as vaccine-resistant workers transition to employers that fall under the 100-employee vaccine and testing threshold of the soon-to-be-issued ETS. Federal contractors (defined broadly) have no alternative testing option and will need to immediately focus on preparing employees for mandatory vaccination requirements.

Federal employees must be fully vaccinated by Nov.22, 2021, and employees of federal contractors must be fully vaccinated by Dec. 8, 2021. The costs of compliance and associated administrative burdens placed on employers by the new mandates will be significant.

Multiple legal challenges to the mandates will be filed. In fact, Arizona has already filed a preemptive challenge to the ETS, and 24 state attorneys general and various trade and industry groups are certain to challenge the federal contractor and/or ETS mandates.

The federal contractor executive order and anticipated ETS come at a time when several states are enforcing vaccine mandates while

other states are proposing initiatives prohibiting vaccine mandates — adding another layer of complexity to the compliance picture.

Most employers do not relish the prospect of being caught in limbo while the ETS is being challenged — or having to choose between complying with the ETS and conflicting state laws. Instead of focusing on the uncertainties surrounding legal viability of the federal contractor mandate and the ETS, which are largely beyond employer control, employers should focus on things within their control: enhancing workplace safety, promoting harmonious employee relations, and minimizing legal risk.

'Federal contractors' include all employees of federal contractors and subcontractors

On Sept. 24, 2021, the Safer Workforce Task Force issued guidance for federal contractor compliance with President Biden's executive order, (EO 14042) *Ensuring Adequate Safety Protocols for Federal Contractors*.

The executive order will be construed broadly to cover workplaces where employees are working on or in connection with federal government contracts or contract-like instruments and also employees of subcontractors (at any tier). Moreover, EO 14042 applies to all full-time or part-time employees of the contractor or subcontractor regardless of whether those employees are performing work pursuant to the federal contract.

As a practical matter, a standard clause will be included in federal contracts which will then be included as flow-down provisions throughout all tiers of the subcontractor chain. For federal contracts awarded prior to Oct. 15, 2021, the mandates must be incorporated at the time an option is exercised or an extension made.

The mandates must be included in all contracts awarded on or after Nov.14, 2021 and agencies are encouraged to include the mandates in contracts solicited prior to October 15, 2021, and awarded between Oct.15, 2021, and Nov. 14, 2021.

What are the new federal contractor mandates?

Covered contractor employees must be fully vaccinated by Dec. 8, 2021. The only exceptions to this requirement are for accommodating a disability or sincerely held religious belief, practice or observance or if an agency determines that it has

“an urgent, mission-critical” need for a contractor to begin work prior to all employees becoming fully vaccinated.

The recent guidance leaves open the possibility of future booster vaccination mandates but indicates that there is “currently” no post-vaccination time limit on fully vaccinated status.

In order to comply, a federal contractor must review “official documentation” demonstrating proof of an employee’s vaccination, but that documentation could be in the form of an electronic record (including a digital photograph).

Employers will be required to provide paid time off for vaccinations and any vaccination-related side effects ... subject to penalties of up to \$14,000 per violation.

Employee attestations are not acceptable proof of vaccination. Natural immunity and recent antibody tests are not acceptable substitutes for vaccination.

Other federal contractor requirements contained in EO 14042 include:

- (1) designating a COVID-19 coordinator responsible for compliance;
- (2) communicating the requirements to employees and visitors; and
- (3) following specific masking and social distancing requirements.

The requirements of EO 14042 supersede any conflicting state or local law or ordinance and must be followed regardless of any forthcoming OSHA ETS requirements.

OSHA’s emergency temporary standard

While the actual ETS is still in the works, President Biden revealed that the ETS, enforced by OSHA, will contain a vaccination or weekly testing requirement for all private sector employers with 100 or more employees. Employers will be required to provide paid time off for vaccinations and any vaccination-related side effects. Employers will be subject to penalties of up to \$14,000 per violation.

Aside from the threshold question of whether such an emergency standard is legally viable, questions concerning the substance of the ETS include:

- (1) Who is “an employee” and how are the 100 employees counted?
- (2) How much time do employers have to comply?
- (3) What vaccination and testing proof are employees required to obtain?
- (4) Who pays for the tests (assuming enough tests are available) and time spent testing?
- (5) What requirements will apply to remote workers?

- (6) What are the consequences for employer non-compliance?
- (7) What about collective bargaining obligations and will current agreements be grandfathered?
- (8) What provisions will apply to employers with fewer than 100 employees?

What to do now?

Employers understandably are looking for direction. While the full impact of this rule will not be known until OSHA releases the ETS, significant COVID-related guidance has already been provided to employers. Employers can be fairly certain that much of the previously issued guidance by OSHA, the Centers for Disease Control and Prevention (CDC) and the Safe Federal Workforce Task Force will be included in the ETS.

Based on guidance issued to date, the new ETS will likely mandate:

- (1) A written COVID Prevention and Response Plan and a designated coordinator with authority for conducting workplace-specific hazard assessments, development of policies and procedures for minimizing the risk of COVID in the workplace, ensuring employee engagement and enforcing compliance;
- (2) Masking, social distancing, quarantining, and testing for vaccinated, unvaccinated and at-risk workers in accordance with current CDC guidance;
- (3) Vaccination or, in the alternative, weekly testing for all employees of employers with 100 or more employees;
- (4) Pay for time spent by employees obtaining the vaccine and any time lost due to vaccine-related side effects;
- (5) Physical distancing and administrative controls to minimize crowding (flexible hours, remote work, staggered shifts);
- (6) Implementing physical barriers;
- (7) Furnishing and requiring use of appropriate personal protective equipment;
- (8) Encouraging good hygiene and providing related supplies;
- (9) Cleaning and disinfecting work areas;
- (10) Improving ventilation;
- (11) Encouraging sick employees to stay at home and providing paid time off; and
- (12) Prohibiting retaliation against employees voicing COVID-related concerns.

Additional considerations

Employers will see an increase in employee requests to be exempted from vaccine or testing requirements for disability-related reasons or due to sincerely held religious beliefs. Employers should develop and implement a process for addressing these accommodation requests (in the same manner they handle mask accommodation requests) and train supervisors so that they do not ignore or minimize those requests.

Employers should determine the consequences of vaccine or testing refusals and communicate those consequences. Given the significant anticipated vaccination and testing verification requirements, employers should consider how the organization currently obtains and retains this information.

Will the employer be able to continue to perform these administrative tasks in-house if employees are subject to weekly testing? Will the information be maintained electronically? How can the employer restrict access to this confidential medical information? Be proactive by addressing these issues now.

Many large employers are being encouraged to require vendors or contractors to implement a mandatory vaccination policy, especially

if the vendor or contractor is performing work at a large employer's facility — even if the vendor or subcontractor falls under the 100-employee threshold. Therefore, even smaller employers need to consider imposing vaccine mandates or risk losing substantial business and those employers may be subject to other requirements contained in the ETS.

Although there is still considerable confusion regarding the vaccine mandate, federal contractors and subcontractors now know that they have until Dec. 8, 2021, to comply. Other employers should use this time to prepare their workplaces for the anticipated requirements of the ETS.

About the authors



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