

Mandatory Employee Vaccines For Large Employers - The Top 10 (ish) Things Employers Must Know

11.05.2021

Yesterday, the Occupational Safety and Health Administration (“OSHA”) released its highly anticipated Emergency Temporary Standard (“ETS”) regarding mandatory vaccines for employees of “large employers,” or those with 100 or more employees. This ETS was released in response to President Biden’s September 9, 2021 announcement which, among other things, put the wheels in motion for a vaccine mandate for several groups, one being this “large employer” group. Until yesterday, much of the details on the looming mandate were unclear; however, the ETS has now provided answers to many of our questions. This Breaking News alert is intended to provide employers with the most critical points to understand when navigating the large employer vaccine mandate.

1. How do we count employees to determine if we meet the 100 employee threshold?

The count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted. Full-time, part-time, temporary, and seasonal workers employed directly by the employer (not obtained from a temporary staffing agency) should be counted. Independent contractors and employees from staffing agencies not employed by the employer should not be counted.

ATTORNEYS

Jacqueline N. Ryan

PRACTICE AREAS

Employee Benefits and ERISA
Employment and Labor

Mandatory Employee Vaccines For Large Employers - The Top 10(ish) Things Employers Must Know

With respect to separate but related entities (i.e., parent/subsidiary, sister companies), two or more related entities may be regarded as a single employer if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted.

If an employer does not meet the 100-employee count today, but at some point does while the ETS is still in effect, then, from that point going forward (until the ETS is no longer in effect), the employer would then be covered. Similarly, if an employer meets the 100-employee count today, but drops below this level in the future, the employer is still covered as long as the ETS is in effect.

2. When do we need to comply with the ETS by? How long will the ETS be in effect?

There are two important “phases” of compliance. First, employers must have a mandatory vaccine policy developed by December 4, 2021; second, employers must mandate vaccinations or start weekly testing of their workers by January 4, 2022. If employers already have a mandatory vaccine policy, it must be amended to include all required elements in the ETS.

OSHA anticipates that the ETS will be in effect for six months from the date of publication in the Federal Register. However, OSHA will continue to monitor trends in COVID-19 infections and deaths as more of the workforce and the general population become vaccinated and the pandemic continues to evolve.

3. What does it mean to be “fully vaccinated”?

Employees are fully vaccinated 14 days after their second dose of a two dose series (i.e., Pfizer or Moderna) or 14 days after a single dose vaccine (i.e. Johnson and Johnson). Therefore, if an employee has only received one dose of a two dose vaccine, or is within that 14 day window, the employee must submit to weekly tests (if their employer has given them the option of testing, as discussed more in Question 4).

4. Are there alternatives to mandatory vaccines?

Employers, at their election, may allow for weekly testing of employees who are unvaccinated. If an employer does not want to allow for weekly testing, and instead wants to solely impose mandatory vaccinations, that is permissible. Employers do not need to pay for tests, but may do so if they want.

5. What about disability or religious belief exemptions? How do those fit in to the ETS?

Mandatory Employee Vaccines For Large Employers - The Top 10(ish) Things Employers Must Know

It is possible that an employee may be exempt from the mandatory vaccine requirement if they have a disability or sincerely held religious belief that causes them to be unable to obtain a vaccine. In this case, the employee would be required to submit to weekly testing (if offered by the employer) just like other unvaccinated employees who are not vaccinated due to a personal choice unrelated to disability or religion. If the employer chooses not to offer weekly testing and decided to make their policy “vaccine only,” those employees with disabilities or sincerely held religious beliefs would be the only employees allowed to seek testing as a reasonable accommodation to the vaccine requirement (there would be no legal basis for a reasonable accommodation for non-protected class reasons).

6. If we allow for weekly testing, what types of tests are allowed?

Under the ETS, a “COVID-19 test” must be a test for SARS-CoV-2 that is: (1) cleared, approved, or authorized, including an Emergency Use Authorization, by the U.S. Food and Drug Administration to detect current infection with the SARS-CoV-2 virus (i.e., a viral test); (2) administered in accordance with the authorized instructions; and (3) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory, proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer. Antibody tests do not qualify as tests under the ETS.

7. What exactly does “weekly testing” mean, and does it apply to all unvaccinated employees?

All unvaccinated employees (whether due to a religious belief or disability or because of their own personal choice) who are in person at the workplace at least once every seven days must be tested at least once every seven days prior to coming to work. If an unvaccinated employee only comes into the workplace on an infrequent or irregular basis (i.e., less than once every seven days), then that employee only needs to be tested at least seven days prior to the day on which they will be in the workplace. Unvaccinated employees who are fully remote do not need to be tested.

If an unvaccinated employee has received a positive COVID-19 test, or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis (due to the fact that false positives may be more likely to occur in this window). Once the 90-day period is over, the employee resumes testing.

Mandatory Employee Vaccines For Large Employers - The Top 10(ish) Things Employers Must Know

8. What happens if an unvaccinated employee tests positive on one of their weekly tests?

The employee must notify the employer as soon as possible if they receive a positive test result, and the employer must immediately remove the employee from the workplace. The employee must remain away from the workplace until the employee: (1) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; (2) meets the return to work criteria in CDC's "Isolation Guidance"; or (3) receives a recommendation to return to work from a licensed healthcare provider. Employers do not need to provide an employee with paid time off during this removal. Under the ETS, there is no requirement to remove any employees who have been in close contact with a COVID-positive individual; an employee must be removed only if they are positive themselves.

Note that, while this question pertains to unvaccinated employees, if a vaccinated employee tests positive at any time while the ETS is in effect (i.e., if they took a test on their own for other reasons outside the ETS), the employer must follow the same removal guidelines as outlined in this Question 8.

9. Do unvaccinated employees have to abide by any other standards other than the weekly testing (if offered by the employer)?

The employer must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes, except: (1) when an employee is alone in a room with floor to ceiling walls and a closed door; (2) for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements; (3) when an employee is wearing a respirator or facemask (i.e., the employee's job already requires them to wear a respirator, regardless of the ETS); or (4) where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance with this paragraph (i.e., when it is important to see the employee's mouth for reasons related to their job duties, when the work requires the use of the employee's uncovered mouth, or when the use of a face covering presents a risk of serious injury or death to the employee).

10. Do we have to maintain records of vaccinations and tests?

The ETS requires that employers maintain a record containing the vaccination status of all employees, specifically, whether each employee is fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. For vaccinated employees, the records must also contain "proof" of vaccination. Acceptable proof is

Mandatory Employee Vaccines For Large Employers - The Top 10(ish) Things Employers Must Know

one of the following: (1) the record of immunization from a health care provider or pharmacy; (2) a copy of the U.S. COVID-19 Vaccination Record Card; (3) a copy of medical records documenting the vaccination; (4) a copy of immunization records from a public health, state, or tribal immunization information system; or (5) a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

An employee who does not possess their COVID-19 vaccination record (e.g., because it was lost or stolen) should contact their vaccination provider (e.g., local pharmacy, physician's office) to obtain a new copy or utilize their state health department's immunization information system. In instances where an employee is unable to produce acceptable proof of vaccination listed above, a signed and dated statement by the employee will be acceptable. The employee's statement must: (1) attest to their vaccination status (fully vaccinated or partially vaccinated); (2) attest that they have lost or are otherwise unable to produce proof required by this section; and (3) include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

In addition to vaccinations, employers must also maintain a record of every test result for each employee.

11. Do we have to offer paid time off for vaccinations?

Employers must offer paid time off for both the time it takes for an employee to get each dose of the vaccination (up to 4 hours for each dose) and the time it takes an employee to recover from any side effects of the vaccine. Employers may not require employees to use their already available paid time off, vacation leave, or sick leave for time off to receive the vaccine; instead, employers must provide the employee with additional paid time off, at the employee's regular rate of pay (i.e., additional leave on top of what they already may have). If an employee is needing time off to recover from any vaccine side effects, the employer must provide them with a "reasonable" amount of paid time off. As opposed to time off for getting the vaccine, employers may require employees to use their already accrued leave for the recovery time after the shot (additional time does not need to be granted).

12. Do we have to make the vaccine and/or testing records available?

At an employee's election, the employee (or their authorized representative) may request to view and/or copy their own vaccine and/or testing records maintained by the employer. Employers must make the information available to the employee (or their authorized representative) by the following business day. Additionally, in the event OSHA ever requests an

Mandatory Employee Vaccines For Large Employers - The Top 10(ish) Things Employers Must Know

employer's vaccine and/or testing records or the number of fully vaccinated employees in the company as compared to the total number of employees, the employer must make this information available to OSHA within four hours of OSHA's request.

There is more to come.

Given that this ETS was just made available yesterday, we recognize that employers will have many questions about how to comply and what is required of them. We encourage employers to send us any questions that arise and we will work diligently to find an answer. We also suggest employers to visit OSHA's website, as there is a list of excellent FAQs that may provide employers with some clarity on their questions. OSHA's FAQs can be found [here](#).

As always, the Koley Jessen Employment, Labor, and Benefits Department continues to monitor the developments on the COVID-19 front and will provide additional guidance as needed. Employers with questions are welcome to contact a member of our Department with any questions they may have about this ETS or other COVID-19-related workplace matters.

We are having a webinar focused on large employers on November 9th and you can find that information [here](#).

If you are covered under the CMS Rules please join us on November 11th for a webinar. That information can be found [here](#).