

What Employers with 100 or More Employees Need to Know About the New COVID-19 Vaccine/Testing Rule

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On Thursday, September 9, 2021, President Biden announced an impending rule^[1] that will require all private sector businesses with 100 or more employees to: (1) ensure that their employees are either fully vaccinated or undergo at-least-weekly COVID-19 testing; and (2) provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination. It is estimated that 80 million workers will be affected by this rule.

This announcement has raised many questions, such as:

Q: Is this requirement effective now and, if not, when will it be?

A: No, it is not effective now. It will be effective once the Occupational Safety and Health Administration (OSHA) publishes what is called an Emergency Temporary Standard (ETS). Although it is uncertain when that might occur, many commentators expect OSHA to issue the ETS in 15-45 days. Once an ETS is issued, it can remain in effect for six (6) months, at which time it must be replaced by a permanent rule.

Many groups have promised to challenge the ETS and there is the possibility that the ETS will be stayed and/or blocked as a result. The ETS process, which is meant for urgent situations, has been invoked only 10 times in OSHA's 50-year history and five (5) of those have been partially or completely invalidated/blocked.

Q: What are the details of the rule?

A: Right now, there aren't any. It is hoped that the ETS will clarify more specifics surrounding the rule.

One large trade group, the Consumer Brands Association, which represents the food, beverage and consumer products industry) penned a letter to Biden asking for immediate clarification of the rule. The specific questions raised are similar to those being asked by many employers and include:

- What is considered documentation for proof of vaccination and how will booster shots factor into compliance?
- Will the requirements only apply to vaccines that are fully approved by the FDA?
- Does the government plan to centralize vaccination tracking?
- What are the consequences of falsifying one's vaccination status or test results?
- What is considered suitable documentation for a negative test result?
- Should employees choose not to vaccinate, is the company or employee responsible for securing and paying for testing?
- When will the requirements be formally issued?
- Do the new federal requirements include exemptions for religious beliefs and disabilities?

The employment and labor law attorneys at Tucker Arensberg are closely monitoring developments and will follow-up with updates.

Q: What, if anything, should an employer with 100 or more employees be doing while it awaits the ETS?

Employers should:

- Consider whether they want to allow weekly testing as an alternative to full vaccination.
- Be ready to draft and implement policies, procedures and communications to employees regarding the rule once it is issued and looks like it will take effect.
- Prepare the HR/payroll function for tasks related to the administration of the paid leave that will be a part of the ETS.
- Prepare the HR/supervisory function for the inevitable accommodation requests from those who raise religion or disability-related reasons for not getting the vaccine.
- Keep an eye out for the ETS and other legal developments.

If you have any questions, please feel free to reach out to Albert Lee at alee@tuckerlaw.com or your contact at Tucker Arensberg, P.C.

[1] This rule is just one part of the White House's six-prong COVID-19 Action Plan. Other parts of the plan require vaccinations for (1) all Federal workers; (2) millions of contractors that do business with the federal government; and (3) 17 million health care workers at Medicare and Medicaid participating hospitals and other health care settings. A description of the COVID-19 Action Plan can be found by following this link: [President Biden's COVID-19 Plan | The White House](#)