


What Employers Need to Know: COVID-19 Vaccine Mandates in the Workplace

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Presenters



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TOPICS INCLUDE:

- New regulations from OSHA (*still waiting for these regulations to be released*)
- Existing OSHA regulations that continue
- Expected OSHA rules for healthcare and non-healthcare employers with 100+ employees
- OSHA rules for employers with less than 100 private sector employees
- OSHA general duty clause that covers all private sector employers
- Mandatory vaccine policy and exemptions vs. non-mandatory policy, and the pros and cons in light of the expected OSHA rules
- Federal OSHA vs. state OSHA
- Employer rights to discipline for non-compliance by employees




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THE BIG PICTURE

1. Federal contractors of any size # of employees – Vaccines only
2. Healthcare of any size # of employees – Vaccines only
3. Large private employers of 100+ employees – Vaccines or weekly testing
4. Small private employers – Vaccines and/or weekly testing or neither, but follow current OSHA and CDC Guidelines issued in August 2021

!!! Remember that under the Federal OSHA general duty clause all employers have legal exposure if they are not adhering to current OSHA and CDC guidelines for protecting their unvaccinated employees!!!



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New Regulations from OSHA
(still waiting for these regulations to be released)




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New Regulations from OSHA

5-Step Plan for Employers After President Biden Announces Workplace Vaccine Mandates

In arguably the most far-reaching move of the COVID-19 pandemic, the Biden administration announced that federal workplace safety officials will soon issue a rule that will require all employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work.




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New Regulations from OSHA

Businesses will also be required to give workers paid time off to get vaccinated and to recover from any vaccine side effects as part of the forthcoming emergency rule expected from the Occupational Safety and Health Administration (OSHA).

(Note: On a September 10 webinar, Labor Department officials stated that while employers must provide paid time off for employees to receive and/or recover from the vaccine, employers could require employees to use their existing paid time off for this purpose.)




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New Regulations from OSHA

The announcement was part of the Biden administration’s “Path Out of the Pandemic,” which outlines a six-pronged, comprehensive national strategy to combat COVID-19, which also includes vaccine mandates for federal contractors and many additional healthcare workers, and providing further access to federal financial assistance.


Here is a summary of the expected rule along with a five-step action plan you can implement immediately.



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Vaccine Mandate for Employers with 100+ Employees


The cornerstone of the plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees – which is estimated to impact 80 million workers, or two-thirds of the country’s workforce. This rule will take the form of an Emergency Temporary Standard (ETS), which allows the agency to enact regulations it can enforce immediately if a “grave danger” to worker safety is present. Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation. Although it is currently unclear, this likely means a fine of up to \$14,000 for each facility inspected by OSHA where a covered employer has not implemented a mandatory vaccine policy or otherwise complied with the ETS.



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Which Employers will be Covered?

As OSHA will be the agency responsible for issuing and enforcing the ETS, all employers covered by the OSH Act must comply with the forthcoming ETS. Many office-based employers do not even realize they fall under this statute and are not accustomed to interacting with OSHA, including financial institutions, insurance companies, law firms, and other professional and technical work environments.




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When will the ETS Likely be Issued?

While the Biden administration did not set out a timeline or deadline for OSHA to issue the ETS, it is clear that the administration is taking an aggressive approach. It is likely that OSHA will issue the ETS relatively quickly – perhaps in the next several weeks, especially if it has been in the works behind the scenes for some time now. After it is issued, OSHA will likely strive for a timeline of 75 days before it starts enforcing the ETS to remain consistent with the Biden administration’s proposed deadline for federal workers to obtain the vaccine.


(Note: On a September 10 webinar, Labor Department officials stated that the ETS will be issued in the “coming weeks,” but did not provide a specific date.)



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When will the ETS Likely be Issued?


Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction. But in states where the federal government does not have jurisdiction over workplace safety (OSHA-state-plan states such as California, Tennessee, North Carolina, and Kentucky) these agencies will have to adopt the ETS or “just-as-effective measures” within 15 to 30 days.



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How Long will the ETS Last?

The ETS can remain in place for six months. After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period.




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New Regulations from OSHA

The 7 Biggest ETS Unanswered Questions

The details of what the ETS will include are scarce at this point, leaving many questions unanswered. The seven biggest unanswered questions for employers at this point are:




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1. Will remote employees be covered?

Unless the ETS specifically addresses remote employees, remote employees likely will not be covered by the emergency rule. OSHA largely avoids addressing safety issues concerning employees working from home.

(Note: On a September 10 webinar, Labor Department officials confirmed that remote workers not working in contact with others would not be covered by the emergency rule provided they don't come to the workspace.)




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2. How will the 100-employee threshold be counted?

It is unclear whether the 100-employee threshold will be considered on a per location or company-wide basis. Given other standards that mandate certain requirements based on employer size, the threshold likely will be on the total number of workers employed by the company. It is also unclear whether a joint employer analysis will apply to the calculation of employees.

(Note: On a September 10 webinar, Labor Department officials confirmed that the 100-employee threshold will be counted on a company-wide basis.)




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3. Will employers be required to collect proof of vaccination?

Whether the ETS requires employers to collect proof of vaccination may have a huge impact on employers. OSHA's record retention regulations require that employers preserve and maintain employee medical records for the duration of employment plus 30 years. Therefore, if the ETS requires employers to collect proof of vaccination, you may be required to maintain that record for the duration of the employee's employment plus 30 years.


(Note: On a September 10 webinar, Labor Department officials confirmed that information regarding collection and verification of vaccination status will be outlined in the ETS.)



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4. What type of testing will be required?


It is unclear whether the ETS will mandate a particular type of COVID-19 test (antigen, PCR, etc.). While the PCR test is more accurate, it takes longer to receive the results and is more expensive.



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5. Who Pays for Testing?

While the Plan proposed to improve access to COVID-19 tests – even suggesting that retailers will offer to sell those rapid tests at cost for the next three months – the question of who pays for testing remains unanswered. Generally, however, any testing protocols must comply with applicable wage and hour laws, which provide that time spent on receiving employer-required tests should almost always be treated as compensable. Indeed, the Department of Labor’s COVID-19 and the Fair Labor Standards Act Questions and Answers, published before the Plan’s announcement, provides that employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises during regular working hours under the Fair Labor Standards Act (FLSA). *(continued)*




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5. Who Pays for Testing?

This likely includes required testing occurring on employees’ days off if such testing is necessary to perform their jobs safely and effectively during the pandemic. Regarding the tests themselves, while insurance may cover the cost of tests, several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.

(Note: On a September 10 webinar, Labor Department officials confirmed that the ETS will contain information about who bears the responsibility for COVID-19 testing costs.)



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6. Will unionized employers be required to bargain over the decision of how to comply with the ETS?

It remains to be seen whether and to what extent unionized employers would be compelled to bargain over the decision to effectuate compliance with the new mandate (or at least the discretionary aspects with respect to vaccines vs. weekly testing) under NLRB doctrine. At a minimum, you should prepare for a corollary obligation to bargain over the effects of that decision on demand. In the meantime, non-union employers should consider the practical implications of compliance from a labor relations perspective, as unions may attempt to leverage aspects of the new requirements for organizing purposes. (continued)



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6. Will unionized employers be required to bargain over the decision of how to comply with the ETS?

(Note: On a September 10 webinar, Labor Department officials confirmed that the ETS will not change any collective bargaining agreement obligations, similar to all other OSHA standards.)



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7. Will the ETS face legal challenges?

As with any broad sweeping policy, any ETS that is adopted is likely to face legal challenges. Governors of many states have already indicated that they intend to challenge any ETS. It is possible that a court could even block enforcement of the emergency rule until the legal challenges are resolved. OSHA will have to prove that there is a "grave danger" to the workers of large employees in order for the ETS to withstand a legal challenge, which may be a difficult task.




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New Regulations from OSHA

What Should You Do?

- A 5-Step Action Plan for Employers


Here is a five-step action plan you can implement immediately to put yourself in the best position to comply with the expected ETS.



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1. Adopt Procedures for Determining Employees' Vaccination Status


You should prepare to implement a system for asking employees whether they have been vaccinated and maintain confidential records of employee vaccination status. The Equal Employment Opportunity Commission has indicated that it is generally lawful for employers to ask employees about COVID-19 vaccination status. That's because this simple question alone is not likely to elicit information from the employee about possible medical conditions, an inquiry that otherwise would invoke federal or state disability laws. In most cases, the answer to that question alone may be all you really need.



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1. Adopt Procedures for Determining Employees' Vaccination Status


The ETS likely will require that you not only ask for vaccination status but collect proof of vaccination. If this is the case, you should ask employees to show you documentation from the immunization source showing the date(s) the vaccine was administered. To avoid potential legal issues related to this process, you should affirmatively inform employees that they do not need to provide any additional medical or family history information. In lieu of collecting vaccination records, you can create a confidential list of vaccinated workers in order to minimize legal risks and requirements associated with retaining medical documentation, including checking state laws regarding confidentiality and privacy of medical records. If you decide to collect vaccination records, it is recommended that you treat those records as you would other medical records.



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2. Determine if You Will Mandate the Vaccine or Allow Unvaccinated Employees to be Tested Weekly


You will also need to determine whether you will adopt a mandatory vaccination policy or allow unvaccinated employees to be tested weekly. For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.



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3. Develop a Plan for Handling Accommodation Requests


For those employers that adopt a vaccine mandate, develop a robust and clear reasonable accommodation policy to address religious and disability issues. Take special care to communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request. You should also be prepared for employees to request an accommodation from the weekly testing requirement – an accommodation process that must be addressed separately from requests for exemptions from any vaccination mandate.



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4. Have a Plan for Tracking Test Results

For employers who allow individuals who are not fully vaccinated to undergo weekly COVID-19 testing in lieu of receiving the vaccine, you should have a plan in place for collecting and tracking test results. If regular employment-related testing is not covered by the employee's health insurance and free testing is not feasible, you will need to review the applicable federal, state, and local employment laws to determine if you must pay for testing. Further, under the federal FLSA, employers must pay nonexempt employees for the time spent undergoing testing during the workday.




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5. Prepare for OSHA Complaints and Inspections

As a reminder, the vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation. Social distancing, masking, sanitizing, and other safety steps you may already be required to take under existing OSHA and CDC guidance, or state or local public health orders, remain in effect.

Therefore, in addition to the requirements of the new ETS, OSHA likely will ask for your COVID-19 response plan and training records if it receives a complaint or conducts an inspection concerning the vaccine mandate ETS. If not already in place, develop a COVID-19 policy and communicate its requirements to your employees. Train managers and supervisors on what to do and say if OSHA arrives for an inspection. This effort could save your company from paying significant fines.




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New Regulations from OSHA

Conclusion

You should begin preparing now for the forthcoming Emergency Temporary Standard by establishing policies for determining employees' vaccination status and procedures for tracking weekly test results. You should also prepare for the possibility that employees may refuse to comply with the requirements of the ETS and begin planning and appropriate response – which would include terminating their employment.



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Current OSHA Regulations and Guidance Still in Effect




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Continuing OSHA Regulations and Guidance

The Occupational Safety and Health Administration (OSHA) recommends employers use "multiple layers of protection," including mask wearing, physical distancing and testing, to safeguard unvaccinated and otherwise at-risk workers and to mitigate the spread of COVID-19.

Multiple layers of protection include facilitating employee vaccination and possibly routine cleaning and disinfection, remote work, quarantine, increased ventilation, staggered break times, staggered departure times, restrictions on visitors and customers, and personal protective equipment (PPE), said Peter Spanos, an attorney with Taylor English Duma in Atlanta.




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Continuing OSHA Regulations and Guidance

Employees are entitled to a workplace free of known health and safety hazards under OSHA's general duty clause, said Mary Leigh Pirtle, an attorney with Bass, Berry & Sims in Nashville, Tenn.

"While this pandemic may feel like it has been going on forever, employers must not succumb to the temptation of letting their guards down and prematurely reducing COVID-19-related safety measures," said Justin Guilfoyle, an attorney with BakerHostetler in New York City.




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Continuing OSHA Regulations and Guidance
- Key Controls

Kelly O'Connor, an attorney with Vaughan Baio & Partners in Syracuse, N.Y., said key controls identified by OSHA that employers can enforce to help protect unvaccinated or otherwise at-risk workers include the following:


- Help employees get vaccinated.
- Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive, and all workers with COVID-19 symptoms to stay home from work.
- Provide workers with face coverings or surgical masks as appropriate, unless work requires specific PPE.
- Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers.
- Suggest or require that unvaccinated customers wear face coverings in public-facing workplaces such as retail establishments and that all customers wear face coverings in public, indoor settings in areas of substantial or high transmission.
- Record and report COVID-19 infections and deaths.
- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.
- Educate and train workers on the employer's COVID-19 policies.



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Continuing OSHA Regulations
- Emergency Temporary Standard and Guidance

In June, OSHA issued an emergency temporary standard—applicable to healthcare employers—that requires covered employers to create a written plan to identify and control COVID-19 workplace hazards. The standard requires nonexempt facilities to conduct a hazard assessment and requires healthcare employers to provide some employees with N95 respirators or other PPE. OSHA also simultaneously implemented guidance on mitigating and preventing the spread of COVID-19 in the workplace in other industries.




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Continuing OSHA Regulations
- Emergency Temporary Standard and Guidance

In addition, OSHA's recent August guidance encourages employers to consider requiring employees to get vaccinated to protect their health and safety and recommends that vaccinated workers in COVID-19 hot spots and high-risk settings wear masks.

"This is guidance, not a final regulation that has the force of law," said Bryan Keyt, an attorney with Bryan Cave Leighton Paisner in Chicago.


"However, as the virus continues to change and spread, in recent weeks we have seen a number of major employers in the technology, airline and food delivery space begin to require vaccination by their employees."



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Continuing OSHA Regulations and Guidance
- General Duty Clause


Keyt cautioned that if an employer chooses not to require vaccination and has not taken other appropriate action—such as implementation of barriers, respiratory protection and social distancing—that employer could be liable under the general duty clause. "How much heightened OSHA enforcement risk an employer may face will depend on a variety of factors, such as the work industry, nature of the job tasks, proximity of employees to one another in the workplace and potential exposure to members of the public," he said.



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Continuing OSHA Regulations and Guidance
- General Duty Clause

Although there is presently no clear authority establishing that failure to follow OSHA or U.S. Centers for Disease Control and Prevention (CDC) guidance violates the general duty clause, "the best current risk-avoidance strategy is to assume that the CDC guidelines and OSHA recommendations are required by the general duty clause," Spanos said. "It is very likely that OSHA will consider failure to follow its recommendations as a violation of the general duty clause."




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Continuing OSHA Regulations and Guidance
- General Duty Clause

Jonathan Schaefer, an attorney with Robinson+Cole in Hartford, Connecticut, said that in addition to the risk of violating the general duty clause, employers are facing citations for violation of specific OSHA regulations relative to COVID-19, such as violation of standards related to:

- Respiratory protection
- Bloodborne pathogens
- Sanitation
- PPE




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Continuing OSHA Regulations and Guidance
- OSHA Liability for Vaccination Side Effects?

"Although there is much controversy surrounding COVID-19 vaccines, the chances of employer OSHA liability for employee side effects from a vaccine are low at this time," said Katy Willis, an attorney with Burr & Forman in Mobile, Ala.

"This may have been a valid concern earlier in 2021 when OSHA's enforcement guidance compelled those employers requiring employees to be vaccinated as a condition of employment to record adverse reactions to the vaccine if the adverse reaction met the other recordability criteria," Schaefer said.

"With the revocation of the old enforcement guidance in May 2021, OSHA distanced itself from appearing to discourage employees from receiving the vaccine or to disincentivize employers' vaccination efforts. Rather, OSHA indicated it will not enforce the recordability requirements as related to the effects from COVID-19 vaccination—at least through May 2022."




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Continuing OSHA Regulations and Guidance - OSHA Liability for Vaccination Side Effects?

In addition, liability for side effects from vaccinations is likely to fall under workers' compensation rather than the Occupational Safety and Health Act, Spanos said. He also said the risk of permanent, serious side effects from one of the vaccines is statistically very low.


Moreover, "employers are not liable for vaccine side effects because the employer does not create, manufacture or administer the vaccine, particularly if employees choose how they will be vaccinated and by whom, or if the employer partners with a third-party healthcare provider to administer the vaccine," Spanos said.



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OSHA's Recent Guidance


Employers are having to keep on their toes when it comes to protecting employees from COVID-19. Shifts in the outbreak continue to drive rapidly changing workplace health and safety rules in the Pacific Northwest, and this is leading to dramatically different requirements being imposed by federal and state authorities. No sooner had many employers considered relaxing mask mandates and return to work policies according to federal OSHA guidelines, when the later summer rise in COVID-19 cases led OSHA to publish new guidance on August 13, 2021, reinstating some restrictions. At the same time, local and state health authorities in the Pacific Northwest have imposed new safety and health requirements, including mask mandates. To help employers with the dizzying array of changing requirements, we summarize some of those key requirements below.



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OSHA's Recent Guidance


The latest OSHA guidance entitled *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* states that unvaccinated or at-risk employees should wear face coverings indoors, maintain social distancing, participate in training, practice good hygiene, and get tested regularly in places of substantial or high community transmission. However, OSHA's guidance still indicates that unvaccinated or at-risk employees working outdoors may choose to work without wearing face coverings. OSHA's guidance for fully vaccinated employees mirrors that published by the Center for Disease Control and Prevention (CDC), with both federal agencies recommending that vaccinated employees:



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OSHA's Recent Guidance

- Wear a mask in public indoor settings in areas of substantial or high transmission;
- Consider wearing a mask regardless of level of transmission; and
- Get tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19, and wear a mask in public indoor settings for 14 days after exposure or until a negative test result.




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OSHA's Recent Guidance

OSHA's guidance further encourages employers to work with employees to implement multi-layered interventions to protect unvaccinated or at-risk workers and mitigate the spread of COVID-19. OSHA recommends that employers consider the following measures to mitigate and prevent COVID-19 from spreading in the workplace:


- Grant paid time off for employees to get vaccinated and recover from its side effects;
- Instruct workers to stay home if they are (1) infected, (2) unvaccinated and come into close contact with someone that tested positive, or (3) experience any COVID-19 symptoms;



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OSHA's Recent Guidance


- Suggest or require (1) unvaccinated customers, visitors, or guests to wear face coverings in public-facing workplaces, and (2) all customers, visitors, or guests to wear face coverings in public indoor settings in areas with substantial or high transmission;
- Continue social distancing and limiting the number of unvaccinated or at-risk employees in communal areas;
- Educate and train workers on the company's COVID-19 policies and procedures, and protect workers from retaliation through an anonymous complaint process;



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OSHA's Recent Guidance

- Maintain or improve ventilation systems;
- Perform routine cleaning and disinfection; and
- Record and report COVID-19 infections and deaths as required under the mandatory OSHA rules in 29 C.F.R. § 1904, as well as following any other OSHA regulations applicable to the employer.




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OSHA's Recent Guidance

OSHA's guidance further suggests that employers should assess whether their workplace is considered "higher-risk" and should implement additional protections, based on the following factors:


- Whether employees work in close proximity to one another, such as production/assembly lines, busy retail settings, or when clocking in/out, during breaks, or in locker/changing rooms;
- Have prolonged closeness to coworkers, such as for 6-12 hours per shift;



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OSHA's Recent Guidance

- Work in spaces where respiratory particles can be more easily transmitted, such as poorly ventilated spaces, or common surfaces or objects; or
- Other factors such as (1) shared transportation, (2) frequent contact with other individuals in the community, or (3) communal living quarters.




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OSHA's Recent Guidance

For higher-risk workplaces, OSHA's guidance suggests that employers take additional precautions, including:


- Staggering break times, time punching, and arrival/departure times;
- Expanding breakrooms and restrooms;
- Improving ventilation and barriers; and
- Adding visual cues for social distancing.



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OSHA's Recent Guidance

OSHA's guidance is directed to all industries that are not specifically addressed otherwise (such as the healthcare industry). Importantly, OSHA's guidance states that it "is not a standard or regulation, and it creates no new legal obligations" — except where mandatory OSHA standards exist. This should give some comfort to those employers who are not currently complying with OSHA's guidance, but it also does not provide immunity to employers. Indeed, employers remain obligated under the general duty clause of the federal Occupational Safety and Health Act of 1970 to provide employees with a "place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."



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Mandatory Vaccine Policy and Exemptions vs. Non-mandatory Policy and the Pros and Cons in light of the Expected OSHA Rules



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Sincerely Held Religious Belief


- Title VII requires employers to accommodate only those religious beliefs that are "sincerely held."
- Employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief.
- If the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.
- According to the EEOC, "factors that – either alone or in combination – might undermine an employee's assertion that he sincerely holds the religious belief at issue include:
 - whether the employee has behaved in a manner markedly inconsistent with the professed belief;
 - whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
 - whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
 - whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons."



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Religious Exemptions

- **"Religion" is not limited to the "big three" of Christianity, Judaism, and Islam.**
 - It also includes generally recognized belief systems that are less common in the United States, and "individualized" beliefs that are not part of any generally recognized system.
 - It also includes individual interpretations of generally recognized faiths.




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Religious Exemptions

- There also appears to be diversity of viewpoint about COVID vaccinations among Jews and Evangelical Christians.


The religious belief must be "sincerely held" to be entitled to accommodation, and employers are supposed to start out with the assumption that the employee's religious belief is sincere.



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Religious Exemptions


- Many people still do not want to be vaccinated, and several websites have popped up like crabgrass in your beautiful, green, carpet-like springtime lawn, providing free form letters to employees who don't want to be vaccinated and need a religious excuse.
- For example:
 - Let's say Frank doesn't want to be vaccinated because he sincerely believes (1) the vaccines were rushed into distribution, (2) vaccination is too "Big Brother" and (3) Frank never trusted that scoundrel Bill Gates anyway.
 - None of these are reasons that would qualify Frank for a religious exemption from the vaccine.
 - However, because the religious exemption standard is so loosey-goosey, Frank might be able to claim it, whether he's an actual believer or not. First, he gets the benefit of the doubt. Second, unlike a request for Sundays off, which might be revoked if he's caught going to the Tippy Bar & Grille instead of church, a phony request to be exempt from vaccination is less likely to be "caught."



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What Can Employers Do?


- **Know your employees or consult with people who do (such as their direct supervisors).**
 - Does their history indicate that they really do have sincere religious beliefs or moral/ethical beliefs that rise to the level of being "religious" in nature?
 - Does the supervisor know that Margaret goes to worship services, takes prayer breaks during the workday and gives every indication that she is a sincere believer?
 - Does the supervisor know that Jason has never been to a worship service in his adult life, makes fun of his co-workers who believe in "the Great Sky Fairy" and conducts himself in his personal life as if he is his only boss?



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What Can Employers Do?


- **Familiarize yourself with the canned forms available on the internet.**
 - <https://healthfreedomidaho.org/sample-letter-for-religious-vaccine-exemption/>
 - <https://fredbrownbill.wordpress.com/2021/07/31/important-download-covid-vaccine-religious-exemption-documents-here/>
 - <https://covid19up.org/request-exemption-vaccine-mandate/>



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Form Religious Exemption Letters


- Typically include language such as:
 - Biblical quotes regarding defiling the temple of God and unclean food
 - Links to vaccine contents
 - Points regarding vaccine creation and delivery methods



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What Can Employers Do?


1. Get a narrative.
2. Pick the "low-hanging fruit."
3. Talk to the "high-hanging fruit."
4. Document everything.



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1. Get the narrative


- **Ask the employees seeking religious objections to provide a written narrative explaining their objection to the vaccine** and the religious basis for their objection.
- Recognize that some employees will have difficulty with this step, not because their beliefs are not sincere, but because they have literacy or language issues that make it difficult for them to put anything down in writing.
- Letters from ministers, priests, rabbis or imams are great, but don't rule out an employee's sincere belief just because the employee is unable to provide one.



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2. Low-Hanging Fruit


- **If the narrative supports the request for religious accommodation**, then accept it as a valid request and go on to the next step of determining whether you can accommodate without undue hardship.
- **If the narrative clearly does not support the request for religious accommodation** (for example, if it shows that the employee's objection is entirely political or based on fears about side effects), then deny the request. *These may be legitimate reasons to oppose vaccination, but they are not religious in nature.*



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3. High-Hanging Fruit


- Employees who are "not clearly entitled and not clearly unentitled" to religious accommodation
- Follow-up with interviews, either in person, by videoconference or by phone.
- To determine whether the employee's objection is "religious" in nature, ask yourself the following:
 - During the interview, did the employee continually veer off into the politics of COVID or vaccines?
 - Does the employee's real concern appear to be the safety of the vaccines?
 - Does the employee's real concern appear to be that mandatory vaccination is an infringement on his or her personal freedom?
 - Does the employee seem to genuinely believe it would be a "sin" to get the vaccine?
 - Can the employee reasonably articulate why he or she believes that vaccination would be sinful?



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4. Document


- Documenting the reasons for denials are especially important, but approvals are important, too, in case you need comparative evidence.
- The documentation should include:
 - the employee's request,
 - any supporting information submitted by the employee,
 - the reason you determined that the request was or was not "religious" in nature,
 - the reason you determined that the employee's belief was or was not "sincere," and any other information that might come in handy in the event of a legal challenge.



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Disability Exemption


- The employee is disabled as defined by the Americans with Disabilities Act (“ADA”)
- Disabled employees could be exempt from the mandatory COVID-19 vaccine if the disability is contraindicated by the vaccine.
- The ADA and Rehab Act make it illegal for employers to discriminate against people based on a disability when it comes to hiring, terminating, or complying with certain conditions and terms of employment.
- Disabilities are defined by the ADA as a physical or mental impairment that creates substantial limitations to one or more major life activities, having a record of this type of impairment, or being regarded as having this type of impairment.



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Disability Exemption


- If the employee has a disability that is contraindicated by the vaccine, the employer will be required to provide reasonable accommodation to the employee up to the point of undue hardship.
- Undue hardship is generally defined something that is more than a minimum cost or that would significantly hinder business operations.
- The ADA does not allow employers to conduct any medical examinations of their employees.
- The EEOC has declared that a vaccination is not an examination.
- Employers still need to be careful, as pre-vaccination screening questionnaires could be considered violating the ADA on disability-related questions.
- Employers need to show that any disability screening questions are related to the job and consistent with their business needs.



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Disability Exemption



- Employers in these cases could indicate that not having the employee vaccinated could create a direct health or safety threat for themselves or others.
 - Direct threats are considered to be a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reduced or reasonable accommodation.”
- To determine whether an employee is a direct threat if they are not vaccinated, the EEOC will need to consider four factors:
 - (1) duration of the risk,
 - (2) nature and severity of the potential harm that could be done,
 - (3) likelihood that there will be harm done; and,
 - (4) imminence of the potential harm.



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Disability Exemption



- **What Types of Reasonable Accommodation Could an Employer Offer a Disabled Employee?**
 - Allow the employee to wear a mask and continue with the local social distancing guidelines. It is also possible to have the employee work in a different area of the workplace, where they will not present a risk to others.
 - Allow an employee to work from home.
 - In some cases, making accommodations would not be possible. They could cause the employer undue hardship. To determine whether an employee is a direct threat if they are not vaccinated, the EEOC will need to consider four factors:
 - › In those instances, they would not be required to provide accommodations for the employee and could sever their employment or place them on a leave of absence, as long as there are no violations of state or local laws

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Healthcare Provider Vaccination Mandate



- The surge in COVID-19 obviously requires a more proactive response, but there is another important reason for the mandate.
- While acknowledging the benefits of vaccinations, many healthcare providers have been hesitant to impose a mandate out of fear that anti-vax employees would bolt to other employers without a mandate.
- By making the mandate nearly universal, the Administration may limit the migration of healthcare workers away from the healthcare entities that mandate vaccinations and help stabilize the workforce at frontline facilities.

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To which healthcare workers will the vaccine mandate apply?


- President Biden's plan actually includes three separate mandates:
 - (1) healthcare workers in Medicare- and Medicaid-certified facilities and perhaps others;
 - (2) employers with more than 100 employees that are subject to OSHA; and
 - (3) federal employees and contractors.
- Each mandate will have separate requirements, and a healthcare provider may be subject to more than one mandate.

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To which healthcare workers will the vaccine mandate apply?


- We do not know the specific scope of the healthcare worker mandate yet.
- The White House’s website confirms:
 - COVID-19 vaccinations [will be required] for workers in most health care settings that receive Medicare or Medicaid reimbursement, *including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.*
 - *This action builds on the vaccination requirement for nursing facilities recently announced by CMS, and will apply to nursing home staff, staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care.*



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To which healthcare workers will the vaccine mandate apply?

- HHS’s corresponding announcement suggests that the mandate may be limited to Medicare and Medicaid-participating “facilities”:
- The Biden-Harris Administration will require COVID-19 vaccination of staff *within all Medicare and Medicaid-certified facilities* to protect both them and patients from the virus and its more contagious Delta variant. *Facilities across the country should make efforts now to get healthcare staff vaccinated to make sure they are in compliance when the rule takes effect.*
- The Centers for Medicare & Medicaid Services (CMS), in collaboration with the Centers for Disease Control and Prevention (CDC), announced today that emergency regulations requiring vaccinations for *nursing home workers will be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others*, as a condition for participating in the Medicare and Medicaid programs.



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The mandate will apply to:


✓ Hospitals	However, the CMS announcement links to the CMS website for “facilities,” which also includes:
✓ Nursing facilities	❖ Inpatient rehabilitation facilities (IRFs)
✓ Ambulatory surgery centers (ASCs)	❖ Comprehensive outpatient rehabilitation facilities (CORFs)
✓ Dialysis facilities	❖ Federally qualified health centers (FQHCs)
✓ Home health agencies	❖ Rural health centers (RHCs)
	❖ Durable medical equipment suppliers (DMEs)
	❖ Hospices
	❖ Clinical labs
	❖ Ambulances



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What is the deadline for healthcare workers?


- CMS will publish an interim rule in October but there will almost certainly be some lead time to vaccinate staff. With that said, CMS has encouraged facilities that will clearly be covered (i.e., hospitals, nursing facilities, dialysis facilities, ASCs, and HHAs) to begin the vaccination process now:
- CMS is developing an Interim Final Rule with Comment Period that will be issued in October.
- CMS expects certified Medicare and Medicaid facilities to act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements.



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Will there be exceptions to the healthcare vaccine mandate for disability or religious concerns?

- We do not know.
- OSHA and EEOC guidance as well as state and private mandates have generally recognized exemptions for disability and/or "sincerely held religious beliefs" under the ADA and Title VII.
- There will likely be a disability or medical exemption in order to align the mandate with Supreme Court precedent upholding vaccine mandates.
- The religious exemption may be somewhat less certain. The Religious Freedom Restoration Act of 1993 generally requires the federal government to have a compelling interest to enact any law that infringes on religion, but the need to curb the current COVID-19 crisis would seem to be compelling.



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Employer Rights to Discipline for Non-compliance by Employees



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Employer Rights to Discipline for Non-Compliance with Mandatory Vaccine Policy

As mandatory COVID-19 vaccines become more widespread, many employers are asking what they can do if workers refuse. Some employers are firing workers who won't take the vaccine and others are requiring unvaccinated employees to submit to weekly testing and take other safety precautions.



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Employer Rights to Discipline for Non-Compliance with Mandatory Vaccine Policy

The Equal Employment Opportunity Commission (EEOC) has weighed in with guidance that answers some workplace vaccination questions. For example, the agency said that federal anti-discrimination laws don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for COVID-19. Employers that encourage or require vaccinations, however, must comply with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 and other workplace laws, according to the EEOC.



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Employer Rights to Discipline for Non-Compliance with Mandatory Vaccine Policy


"An employee with a religious objection or a disability may need to be excused from the mandate or otherwise accommodated," noted John Lomax, an attorney with Snell & Wilmer in Phoenix. "Additionally, if an objecting employee is a union-represented employee, the employer may need to bargain and reach an agreement with the union before mandating vaccines."



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Terminations and Heightened Safety Measures

Many companies, including some large employers, are implementing vaccine mandates, since the vaccination rate has stalled, and COVID-19 cases have spiked due to the Delta variant. In mid-June, the U.S. Centers for Disease Control and Prevention (CDC) reported an average of about 12,000 new COVID-19 cases each day, but the rate recently surpassed 60,000 a day on average. "An increase in the number of cases will put more strain on healthcare resources, lead to more hospitalizations and potentially more deaths," according to the CDC. The agency said that vaccines are the best protection against variants.




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Terminations and Heightened Safety Measures

In response to the uptick in cases, the federal government and some state and local governments also are requiring certain public employees, as well as those that work in healthcare and other high-risk settings, to get inoculated. Rules vary, but many directives ask employees to show vaccination proof or submit to weekly COVID-19 testing, wear masks, and keep physically distant from other workers and visitors.

Some organizations are firing employees who don't comply with a vaccine mandate. A federal judge recently sided with a large hospital system that chose to fire employees who refused the shot. The lead plaintiff who challenged the policy "is refusing to accept inoculation that, in the hospital's judgment, will make it safer for [workers and patients]," the judge said. So far, many states disqualify such an employee from unemployment benefits.




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Encouraging Vaccinations

The U.S. Food and Drug Administration fully approved the Pfizer-BioNTech COVID-19 vaccine on Aug. 23, which public health experts said might make it easier for employers to mandate the shot.


"If an employer plans to require its employees to get a COVID-19 vaccine, it should develop a written policy," Hechtkopf recommended. For employees who refuse to be vaccinated, she said, the employer needs to find out why.




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Encouraging Vaccinations

In addition to legally protected reasons, employees may have general objections to receiving a COVID-19 vaccination that do not require a reasonable accommodation. "Employers considering mandating vaccines should give very serious consideration to this issue," said Brett Coburn, an attorney with Alston & Bird in Atlanta. If a significant portion of the workforce refuses to comply, the employer may be put in the very difficult position of either adhering to the mandate and terminating all of these employees, or deviating from the mandate for certain employees, which Coburn said can increase the risk of discrimination claims.



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