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EMPLOYER NEWSLETTER

LARGE EMPLOYER VACCINE MANDATE: THE DETAILS EMERGE

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On November 4, 2021, the White House released much-anticipated policies and regulations that require employers with more than 100 employees to require their employees to become vaccinated or test weekly for COVID-19 by January 4, 2022. The rules and regulations ([COVID-19 Large Employer Vaccine Mandate](#)) cover 490 pages. Below are some key details:

What is the basic requirement?

Private-sector employers with at least 100 employees¹ must get vaccinated or, alternatively, produce a negative COVID-19 test each week (and wear a face mask). The Administration estimates that the new rules will cover 84 million workers. Separate rules apply for (1) federal employees; (2) employees who work for federal contractors; and (3) employees who work at health facilities that receive Medicare and Medicaid reimbursement.

What are the deadlines for employers to comply?

January 4, 2022 is the deadline for employees to become vaccinated. If employees are not vaccinated by that date, then employers may² allow unvaccinated employees to continue to work if they test negative for COVID-19 at least once a week and wear masks. Employees who test positive for COVID-19, must be excluded from the workplace.

By December 5, 2021, employers must adopt applicable policies and ensure that unvaccinated employees wear a mask in the workplace.³

¹ Full and part-time employees are covered, even if they are spread out across different work sites. Teleworkers and people who work exclusively outdoors will not be required to be vaccinated or submit to weekly testing because OSHA's rule focuses on protecting employees in the workplace. Employees who work part-time in the office and part-time out of the office are covered. Independent contractors and volunteers are not covered.

² Employers have the right to require vaccines without a testing option – unless the employee qualifies for an exemption.

³ The rules require employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Also, employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).

What are the penalties for employers if they do not comply?

Fines of up to \$13,650 per violation.

What if unvaccinated workers refuse to become vaccinated or get tested weekly?

It is unclear. But, it is likely that employers will be forced to terminate their employment or place them on an unpaid leave of absence until they comply. Some large employers fear employees will simply quit⁴ or go to work for a small employer or an employer that is not in compliance with the mandate.

Can employees ask for exceptions to the vaccine mandate?

Yes. Employees opposed to the vaccination may request, and employers may grant, reasonable accommodations to employees based on an employee's disability, medical condition or sincerely held religious belief or practice. When considering accommodation requests, employers should engage with employees in the "interactive process" as provided by existing laws (*i.e.*, the Americans with Disabilities Act for medical accommodations and Title VII of the Civil Rights Act of 1964 for religious accommodations).

What proof of vaccination do private-sector workers need to show?

Employees need to show proof that they are fully vaccinated. Being "fully vaccinated" means receiving two doses of the Moderna or Pfizer vaccine or one dose of the Johnson & Johnson vaccine. Acceptable documentation to demonstrate vaccine status include a record of immunization from a health provider or pharmacy; a copy of a U.S. Covid-19 vaccination card; medical records; immunization records from public health, state or tribal immunization information system; or a copy of other official documentation that contains the type and dates of vaccination. When documentation can't be obtained, a signed and dated statement from the employee attesting to his or her vaccination status is permitted.

Do employees get paid time off for vaccinations?

Yes. Starting December 5, 2021, employers will need to pay workers for the time it takes (up to four hours) to get vaccinated. They will also need to offer paid sick leave for individuals who experience side effects from the vaccine.

Who pays for weekly Covid-19 tests for unvaccinated employees?

Employers may, but are not required, to pay the costs of weekly testing. An employer can require employees to pay testing costs – although many tests are free. All coronavirus tests approved for emergency use by the FDA are permitted, including so-called PCR tests (generally, the most effective test) and antigen tests (which show results quicker).

⁴ It is unclear if workers who quit or are terminated will be eligible for state unemployment insurance benefits.

What records must employers keep?

Employers will need to keep records of an employee's vaccination status; proof/documentation of an employee's vaccination status (or weekly COVID-19 test results); and the total numbers of fully vaccinated employees and total employees at each workplace.

How will compliance with the vaccine or testing mandate be enforced?

The Occupational Safety & Health Administration ("OSHA"), or the state equivalent agency, may conduct physical inspections. However, OSHA is already short staffed so it is much more likely that OSHA will rely on company records and anonymous complaints, not on in-person inspections.

What if the federal mandate conflicts with state anti-vaccine or anti-mask mandates?

The federal government's vaccine mandate pre-empts any inconsistent state or local laws unless courts rule otherwise.

Will there be legal challenges to the new rules?

Yes. It is uncertain and yet-to-be-determined if the vaccine mandate is legal. Legal challenges have already been filed, and it is certain there will be more. The state of Arizona (and others) filed suit in September 2021 to stop the mandate. Stay tuned . . .

What should employers do right now?

Considering the time required for unvaccinated employees to receive both doses of the Moderna or Pfizer vaccines, employers should do the following right away: (1) identify non-vaccinated employees; (2) attempt to obtain voluntary compliance through education and, possibly, incentives; (3) adopt a vaccine-or-weekly-test policy⁵ that determines what will happen to employees who refuse to comply and how accommodation requests will be handled; (4) develop contingency plans to deal with the possibility of losing critical employees; and (5) stay tuned for more details and the results of legal challenges.

Please let us know if we can help answer your questions or help you implement appropriate policies and response plans. Mr. Clark's contact information is (480) 844-0039 or etc@clarkfirm.com.

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⁵ The rules require employers to provide employees the following in a language and at a literacy level the employees understand: (1) information about the requirements of the rules and workplace policies and procedures established to implement the rules; (2) the CDC document "Key Things to Know About COVID-19 Vaccines"; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.