

December 1, 2021

Summary of Current Status of COVID-19 Vaccine Mandates

Employer Vaccine Mandates

- Federal law does not prohibit employers from mandating COVID-19 vaccination for their employees as long as they provide reasonable accommodation for people who cannot be vaccinated on the basis of a disability under the ADA or on the basis of a sincerely-held religious view under Title VII of the Civil Rights Act.
- While few states have enacted laws prohibiting vaccine mandates, these laws are likely to be preempted with respect to most private sector employees, federal employees, and employees of federal contractors and subcontractors covered by President Biden's Executive Orders discussed below.

President Biden's Executive Orders

On September 9, 2021, President Biden issued three Executive Orders regarding workplace vaccinations:

- Federal Employees
 - Requires all federal employees to be fully vaccinated by November 22, 2021.
 - Provides medical/religious exceptions for employees who can be accommodated.
- Federal Contractors and Subcontractors
 - With limited exceptions, all employees working on or in connection with a covered contract will be required to be fully vaccinated by January 18, 2022.
 - Applies to new contracts, extensions or renewals of contracts, and the exercise of an option on an existing contract.
 - Provides medical/religious exceptions for employees who can be accommodated.
- OSHA Emergency Temporary Standard
 - President Biden directed the Occupational Safety and Health Administration (OSHA) to issue an emergency temporary standard (ETS) requiring vaccination or weekly COVID-19 testing of all covered employees.

OSHA's ETS on Vaccination or Testing Rule

Pursuant to President Biden's Executive Order, OSHA released an ETS requiring most private sector employers, with 100 or more employees, to mandate COVID-19 vaccination or regular testing and the wearing of face coverings for their employees.

Among other things, the ETS requires covered employers to do the following:

- Implement a policy mandating COVID-19 vaccination for all employees, with or without a testing alternative.
 - Limited exemption for those employees for whom the vaccine is medically contraindicated; employees with a legally protected disability or sincerely-held religious view that conflict with the vaccine requirement; or employees working exclusively remotely with no physical contact with other co-workers or customers.
- Require employees who are not fully vaccinated to get tested at least once every seven days where testing is provided as an option.
- Require employees who are not fully vaccinated to wear face coverings when indoors or occupying a vehicle with another person for work purposes.
- Require employees to promptly notify the employer if diagnosed with COVID-19.
- Immediately remove from the workplace any employee diagnosed with COVID-19 until cleared to return to the workplace by a healthcare provider or certain conditions are satisfied under the CDC guidelines.
- Provide reasonable paid time off (up to 4 hours) for employees to get vaccinated.
- Provide reasonable paid time off for employees to recover from any side effects associated with taking the vaccine.

Current Status of OSHA's ETS

As of December 1, 2021, the ETS is blocked by a federal court pending final determination on its legality and constitutionality. Given the matters urgency, the determination is expected to be made very soon.

Employer's Duty to Bargain

The extent to which the employer would be required to bargain with the union over vaccine mandates would, at the outset, depend on the collective bargaining agreement and whether the agreement permits the employer to unilaterally make these types of workplace policies.

Assuming the collective bargaining agreement does not bar bargaining, the employer's duty to bargain will be as follows:

- If the vaccine mandate is required by law, such as the OSHA ETS and Executive Orders discussed above, the employer is not required to bargain over its decision to mandate vaccination.
 - However, if the statutory mandate offers the employer some discretion, then those aspects of the mandate that are subject to the employer's discretion would be subject to bargaining. This includes, for example, the employer's choice between imposing a strict mandatory vaccination policy or a vaccine policy with a testing (and face covering) alternative under OSHA's ETS.
- Even if the union cannot bargain over the decision to require vaccines, it can bargain over the effects of that decision – that is, how the mandate will be implemented. These subjects of bargaining include, but are not limited to the following:
 - How the exceptions will be determined
 - What happens to employees who refuse the vaccine
 - Will employees be paid for the time required to take the vaccine or the test
 - Will employees be paid if they have a reaction to the vaccine and need to be off work; will any time taken be counted against the employee's vacation or sick time
 - What information will be required to verify that the employee has either taken the vaccine or the weekly test
- Where the duty to bargain exists, the union and employer must bargain in good faith. However, they are not obligated to come to an agreement. If the two parties are unable to come to an agreement and they reach a deadlock in the negotiations, there is said to be an "impasse." Upon reaching impasse, the employer will be permitted to unilaterally implement its vaccination mandate as presented in its last proposal to the union.