

Toolkit for COVID Vaccine Mandate

Last updated on 11-4-21

Executive Summary

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its Emergency Temporary Standard (ETS) to implement the September 9, 2021, direction from President Biden to implement a COVID-19 vaccine or testing mandate for all private sector employers with 100 or more employees. Under the OSHA rule, employers are allowed to require the employee to pay for testing if they are not entitled to a religious or medical accommodation (the employer must pay if an accommodation is given). Employers must also provide paid time off for vaccination (up to 4 hours) or recovery from vaccination (reasonable time and can require use of accrued leave), verify vaccination status and track that status, maintain records and require distancing and masking for employees who are not vaccinated by December 4. The required weekly testing for the unvaccinated must be implemented by January 4, 2022 (assuming test availability).

Notably, **OSHA's rule exempts those who work outdoors or work remotely or do not come in contact with any other employees or customers or only de minimis contact (e.g., using a bathroom)**. This is because the COVID infection rates are low or nonexistent in those circumstances and would not meet the legal threshold to be regulated. **We believe commercial truck drivers fit within those exclusions generally and should therefore be exempt from the mandatory vaccination or testing requirements when operating in the cab of their truck without other employees** (Team drivers would be required to be vaccinated or test regularly and if unvaccinated drivers come into the office for training you would have to test for that period).

The OSHA rule follows a prior requirement that all federal contractors and subcontractors implement a mandatory vaccination program without a testing option (with the exception of those legally qualifying for a medical or religious accommodation). For federal contractors or subcontractors, all employees who work on or in connection with a federal contract will need to be vaccinated by a new date of January 4, 2022 (originally December 8, 2021) or on the first day of performance on the contract, whichever is later. Any worker who may come in contact with those working on or in conjunction with the government contract must also be vaccinated. Covered contractors must also designate a person or persons to coordinate COVID-19 workplace safety efforts and comply with regionally appropriate levels of masking, social distancing, etc.

There are answers frequently asked questions and other materials on the OSHA website <https://www.osha.gov/coronavirus/ets2> or federal contractor task force website (<https://www.saferfederalworkforce.gov/faq/contractors/>) and we will be seeking additions to the FAQs for trucking specific aspects.

Timelines

The OSHA rule requires identification of unvaccinated employees and implementation of masking and distancing as well as implementation of paid time off for vaccination (up to 4 hours) or recovery from vaccination of an employee by December 4, 2021. On January 4, 2022, all employees must be vaccinated or tested -- if not vaccinated -- weekly. In hybrid situations where an employee is working remotely but periodically comes into a setting with other employees, unvaccinated employees must be tested within seven days of returning to the workplace/interacting with other employees and produce that test result before or when they enter the workplace.

Federal contractors will need to comply when they enter a contract, option, extension or amendment with a contractual clause requiring vaccination and should be informed of the requirement as part of the contracting process. The government has stated they want all contractor employees vaccinated by **January 4 (December 8 originally)**. Some agencies have been giving additional leeway in certain instances.

Good Faith Safe Harbor

When it issues a new rule, OSHA will in most instances announce that it will use its enforcement discretion for employers who are making a good faith effort to comply. They did exactly that when they issued a similar emergency rule on health care earlier this year. This “non-enforcement policy” means even if someone has not met all requirements by the deadlines set in the rule, OSHA will not cite them as long as there is evidence of good faith (for example, document attempts to order tests if you cannot purchase and/or do not receive them by the compliance deadline). The key is documentable good faith activity to implement the requirements.

Common Employee Questions About Federal Vaccine Mandate:

Q: What is the vaccine mandate?

A: On Sept. 9, 2021, President Biden directed the Occupational Safety and Health Administration (OSHA) at the US Department of Labor to create a regulation directing companies with more than 100 employees to enforce a mandate for either COVID-19 vaccination or weekly testing and that requirement was released earlier today (November 4). The deadlines for our workplace are not immediate however.

(Note: For companies who do federal contracting work, including subcontractors, there is a vaccine mandate for all employees (except those entitled to religious or medical exemptions) working on government contracts after January 4, 2022. Details are still being refined, and the contracting officer may be able to make accommodations, including the timeline for implementation possibly.)

Q: When will it happen and be enforced?

A: The OSHA rule will be formally published on November 5, 2021 and effective when published but has deadlines at 30 and 60 days after publication. Also, when it issues a new rule, OSHA will in most instances announce that it will use its enforcement discretion not to cite employers who are making a good faith effort to comply for several months after the standard issues.

(Note: Employers in the following states are under state OSHA jurisdiction and likely will have an additional 30 days following the federal rule being issued before they implement a similar requirement: Alaska, Washington, Oregon, California, Hawaii, Nevada, Utah, Arizona, New Mexico, Wyoming, Minnesota, Iowa, Michigan, Indiana, Kentucky, Tennessee, South Carolina, North Carolina, Virginia, Maryland, Vermont. You will need to monitor your state OSHA for exactly when the deadlines of their requirements come into force.)

Q: Do I have to get vaccinated to keep my job here? I don't want the vaccine and won't take it.

A1 (fewer than 100 employees and not a federal contractor): No

A2 (100+ employees and not a federal contractor): You DO NOT have to be vaccinated to keep your job. If you're not already vaccinated, you also likely won't have to be vaccinated or tested right away either. We will have to implement social distancing and masking requirements by December 4, but the deadline for vaccination or testing is January 4, 2022. If you don't want to be vaccinated, the government will require employers to require a weekly test after January 4 possibly. The details of what type of test and how to report it aren't done yet, but we'll share as soon as we can.

(note: Whether to require vaccination-only is a decision for the employer if they have more than 100 employees and are not a government contractor. It is unclear that enough testing will be available, feasible or reportable, and we await details.)

Q: What are you as my employer and the trucking industry doing about the mandate?

A: ATA has raised concerns on your and our behalf about the impact on trucking and truck drivers and asked that our drivers be exempted. It doesn't make sense for trucking and the supply chain, and we believe we can keep drivers, employees and Americans safe with other options – like masks and social distancing. In fact, we've been doing that pretty successfully throughout the pandemic.

OSHA's rule in fact exempts those who work outdoors or work remotely or do not come in contact with any other employees or customers in part because the COVID infection rates are low or nonexistent in those circumstances. We believe commercial truck drivers fit within those exclusions generally and should be exempt from the mandatory vaccination or testing requirements when operating in the cab of their truck without other employees (Team drivers

would be required to be vaccinated or test regularly and if you come into the office for training we would have to test).

We have evidence to back this up based on the reported infection rates for drivers being substantially below the population rates during the pandemic. ATA will be requesting that OSHA specifically provide clarity that a truck driver who works alone in the cab of their truck is not covered by the testing or vaccination mandate. In the event that OSHA denies that request, we expect a legal challenge to be brought for failure to meet the high legal standard and recognize that this requirement is unnecessary and invasive for our drivers as well as extremely difficult to administer because of the mobility of our drivers.

Q: Does anybody else in my family have to get the vaccine?

A: Not because you work here. If they work for a company subject to the mandate (100+ employees or a federal contractor or subcontractor), their company will likely be responsible for the same federal mandate.

Q: If I caught COVID, do I still have to be vaccinated or tested?

A: Those who contracted COVID and recovered will either need to be tested or vaccinated at some point. There are possible delays for the requirement however because false positives are likely for several months after infection. The OSHA web page and CDC materials provide guidance on that issue.

Q: If I get the vaccine, and if I get sick, do I get paid time off?

A: The OSHA requirement requires employers to allow up to 4 hours paid time off for vaccination and reasonable periods of leave for getting back to work if you have side effects. *(note: employers can require use of accrued leave to be used for recovery from complications)*

Q: When will this mandate end?

A: The type of rule President Biden is using expires in 6 months. OSHA may try to make it permanent after that but that will require additional notice and opportunity for comment by the public to do so.

Q: If I want to learn more about this, what should I do?

A: OSHA has a dedicated website at <https://www.osha.gov/coronavirus/ets2> that has more details as well as answers to frequently asked questions.