

Toolkit for COVID Vaccine Legal Challenge

Last updated on 11-9-21

EXECUTIVE SUMMARY

On November 9, 2021, American Trucking Associations and the state trucking associations of Texas, Mississippi and Louisiana, as well as other supply chain stakeholders, brought suit in the Fifth Circuit Court of Appeals to stay and ultimately vacate the Occupational Safety and Health Administration's (OSHA) November 5, 2021 COVID-19 Emergency Temporary Standard (ETS) requiring vaccination or testing for all private sector employers with 100 or more employees.

The Court had already issued an administrative stay of the regulation prior to ATA's filing but will now proceed to a decision on the request to stay the requirement until the merits are fully adjudicated.

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 four hours) or recovery from vaccination (reasonable time and can require use of accrued leave);
- Verify vaccination status and track that status; and
- Maintain records and require distancing and masking for employees who are not vaccinated by December 6.

The required weekly testing for the unvaccinated must be implemented by January 4, 2022 (assuming test availability).

While the Secretary of Labor has suggested that the rule exempts truck drivers generally, a specific request by ATA for written guidance from OSHA effectuating that carve out had not been answered prior to the filing. **We continue to believe commercial truck drivers fit within the rule's 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 even if the rule is upheld.** *(If the rule is upheld, team drivers from different households would likely 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.)*

Given the effects on the rest of the trucking workforce, a mere 30-day implementation for most of the requirements, and the current stress on the supply chain, ATA and its leadership determined the only way to sufficiently protect our members and the nation's supply chain from extreme disruptions was to bring suit.

The OSHA rule is separate from 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. While other entities are challenging that rule, it is important to note that ATA members who are federal contractors will still be subject to those requirements as implemented in their contracts if a court does not act on that issue.

TIMELINES

We expect the Court to rule on ATA's and other preexisting requests for a stay within the week. The full merits briefing and argument will take longer. Also, because there are suits in a number of other circuits, it is likely all cases will all be consolidated and assigned to a random circuit court in the near future.

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 four hours) or recovery from vaccination of an employee by December 6, 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. ATA's Challenge today again does not affect federal contractor deadlines.

GOOD FAITH AND SAFE HARBOR

We expect a decision quickly on ATA's request and that the Court will likely look favorably on it. With that said, the case could be transferred to a less favorable venue, and the Fifth Circuit's stay could be lifted. **We expect to prevail but advise members to be prepared to comply in the event the decisions go against us.** We will keep you informed of timelines and briefing schedules so members can be ready to comply should the courts uphold the requirements.

Also, when it issues a new rule, OSHA will in most instances announce its use of 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 that, 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, having a draft policy and process prepared for implementing masking and social distancing; providing paid leave for vaccination and recovery; or tracking vaccine status of employees after December 6). The key is documentable good faith activity to implement the requirements.

COMMON QUESTIONS FROM EMPLOYEES ABOUT THE 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 late last week (November 5). The deadlines for our workplace are not immediate however and our trade association is challenging them in court and the requirements have been stayed by a circuit court pending that and other challenges.

(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 was 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. The rule currently stayed and we hope to keep that way until it is vacated by a final court decision.

(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 and whether your state is proceeding with a similar mandate or holding off pending the court decision. We expect most states will want the legality of the mandate resolved prior to issuing their own standards.)

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 expect our trade association to prevail in their lawsuit but even if not, we will only have to implement some requirements by December 6, with the deadline for vaccination or testing beginning on 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. They were successful in getting Labor Secretary Walsh to issue a public statement that most commercial truck drivers should not be covered. 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.

ATA brought the suit when OSHA did not respond to requests to provide that exemption for drivers in writing and also because the effect on other trucking employees in the essential supply chain is unacceptable and the mandate is generally outside OSHA's authority.

Q: Will 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 separate federal contractor mandate (a federal contractor or subcontractor), their company will likely be requiring vaccination but there are exceptions and that requirement is also being challenged by other entities currently.

Q: If I caught COVID, do I still have to be vaccinated or tested if the requirement goes into effect?

A: Those who contracted COVID and recovered will either need to be tested or vaccinated at some point if this rule is upheld. 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 if it goes into effect 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. This may not be the last word on the issue if they go that route.

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. ATA issued a press release on the legal challenge and we'd be happy to share a copy of their motion if you are interested.

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