

# Answers to 13 common questions about new federal vaccine, testing mandates

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*When President Joe Biden recently announced a six-pronged strategy to contain COVID-19's spread, one of the most notable measures was a vaccination and/or weekly testing mandate affecting employers and employees nationwide. We still don't know many details, but here are answers to some of the most common questions we've received since the mandates were announced.*

### ***What employers want to know***

**Who is affected?** The proposed mandates will apply to an estimated 100 million workers who are employed by the federal government, federal contractors, or companies with 100 or more employees or work in certain industries such as health care and education.

**What is the vaccine and/or testing mandate for employers with 100 or more employees?** The larger employers will be required to ensure employees are either fully vaccinated against COVID-19 or submit to weekly testing and provide proof of a negative test result to report for work. Covered employers also must provide paid time off (PTO) to employees for the time it takes them to get vaccinated and/or recover from any side effects.

**What are the vaccination rules for federal workers and employees of federal contractors?** All federal workers and employees of companies that contract with the federal government must be vaccinated against COVID-19. Once the rule is in effect, they will no longer be able to opt out of the shots by wearing masks, social distancing, or being tested weekly for the virus.

**What are the vaccine requirements for Medicare and Medicaid service providers?** The Centers for Medicare and Medicaid Services (CMS) is requiring COVID-19 vaccinations at all Medicare- and Medicaid-certified facilities. The rule will affect hospitals, nursing homes,

dialysis facilities, ambulatory surgical settings, home health agencies, and other medical providers.

**When will the mandates take effect?** The rule for employers with more than 100 employees will be implemented through an emergency temporary standard (ETS) issued by the Occupational Safety and Health Administration (OSHA). Under federal law, the agency can enact an ETS if it determines workers are in "grave danger" because of a workplace hazard.

An ETS typically takes effect immediately and can stay in place for up to six months without going through the usual notice and comment period. OSHA was expected to announce the new standard quickly and allow 75 days before it begins enforcement to be consistent with the proposed timeline for all federal workers to receive the COVID-19 vaccine.

As for the federal contractors' employees, the vaccine mandate won't take effect until the Office of Management and Budget approves guidance from the White House's Safer Federal Workforce Task Force, which was expected to be issued by September 24.

For healthcare workers, CMS is developing an interim final rule (with a comment period) that will be issued sometime in October 2021. The agency has urged unvaccinated workers at covered facilities to begin the shot process immediately.

**Who is considered a federal contractor for vaccine mandate purposes?** President Biden's Executive Order (EO), issued on September 9, generally requires certain companies that enter into new, extended, or renewed federal contracts after October 15, 2021, to mandate COVID-19 vaccinations for their employees. A previous EO issued in January 2021 applied only to employees performing work at federal sites.

The new vaccine mandate will apply to the following types of contracts:

- Procurement contracts for services, construction, or a leasehold interest in real property;
- Contracts for services covered by the Service Contract Act;
- Contracts for concessions; and
- Contracts entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The EO doesn't cover grants, contracts valued at \$250,000 or less, or subcontracts solely to provide products. Also not covered are employees who perform work outside the United States.

**Which workers count toward the 100-employee threshold?** Until OSHA issues the ETS, it isn't clear which workers will count toward the threshold, including whether it will be on an individual worksite or companywide basis and whether any joint employer analysis will come into play. Based on existing federal laws, however, it's likely employees will be counted on a companywide (not per-location) basis.

Two possible guideposts for determining who is an "employee" are workers who are considered "employees" for EEO-1 annual report purposes or must be listed on an employer's OSHA 300 log of work-related injuries and illnesses. That would include all employees on an employer's payroll as well as those who aren't on the payroll if the company supervises them on a day-to-day basis (including employees of temporary help services, employee leasing services, personnel supply services, and contractors).

While exclusively remote workers may count for purposes of reaching the 100-employee threshold, it's unlikely they will be subject to the COVID-19 vaccination and/or weekly testing requirements.

**If we are a private employer with 100 or more employees that offers weekly tests as an alternative to vaccination, who pays for the testing?** We don't yet know how or whether the anticipated rules will address the weekly testing. Current Equal Employment Opportunity Commission (EEOC) COVID-19 guidance hasn't addressed the issue, but its guidance from before the pandemic required employers to pay the cost of any mandatory testing.

While insurance may cover the testing cost, a number of states require employers to pay for mandatory medical tests or reimburse employees for them. One prong of President Biden's plan is expanding access to free COVID-19 testing through a partnership with retail

pharmacies. Therefore, more testing options may be available at little to no cost in the future, but the details remain speculative.

**If we are a larger private employer that offers weekly testing as an option, do we have to pay employees for the time spent getting the shots?** We don't yet know how or if the anticipated rules will address whether you must compensate for the time spent receiving a COVID-19 test. Under current EEOC guidance for the Fair Labor Standards Act (FLSA), however, employers must pay employees for (1) time spent waiting for and receiving medical attention (including coronavirus testing) at the employer's direction or on the company's premises during normal working hours as well as (2) any time spent receiving such a test on the employee's days off if the test is "necessary for them to perform their job safely and effectively during the pandemic."

Finally, you should note the FLSA doesn't allow items considered to be primarily for the employer's benefit or convenience to be included as wages, which would likely apply to mandatory COVID testing. Nor does the Act allow employers to make pay deductions for the items if the withheld amount would reduce the employee's pay below the minimum wage.

**What are the penalties employers may face for violating the vaccine mandate?** Although media reports have stated penalties for failure to comply with OSHA's ETS for large employers would be up to \$14,000, the current statutory maximum penalty amount is \$13,653 per violation.

**Will there be any exemptions to the vaccine mandates?** At this point, it isn't clear whether the new vaccine mandates will provide any exemptions. Guidance issued earlier this year by the EEOC advises that Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) require an employer to provide reasonable accommodations (such as remote work or weekly testing) for employees who, because of a disability or a sincerely held religious belief, practice, or observance, don't get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.

**Can the federal government legally mandate vaccinations?** Congress' powers include the ability to regulate activities affecting interstate commerce. In 1970, it passed the Occupational Safety and Health Act (OSH Act) and gave the U.S. Department of Labor (DOL) broad authority to regulate issues affecting employee health and safety. As discussed above, the labor secretary through OSHA can issue an ETS without

going through the typically protracted notice and comment period when a hazard presents a risk of grave damage to workers.

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In fact, earlier this year, OSHA issued an ETS for occupational exposure to COVID-19 that required certain healthcare employers to help protect their workers in settings where suspected or confirmed coronavirus patients are treated. The forthcoming ETS requiring vaccinations or weekly testing for all employers with more than 100 workers goes much farther than the previous standard, and legal challenges are a certainty.

Litigation challenging OSHA's new vaccine mandate will likely focus on whether:

- The COVID-19 pandemic meets the legal standard required to issue an ETS;
- The coronavirus poses a "grave danger" so that the proposed rule is necessary to protect workers; and
- OSHA has the authority to mandate PTO for employees.

Any people who may be adversely affected by the ETS may file a petition within 60 days seeking judicial review of the standard with the federal appeals court for the circuit in which they live or have their principal place of business. Filing an appeals petition, however, won't delay the standard's enforcement unless the appeals court specifically orders it. Under the law, if the court determines OSHA has substantial evidence to support its emergency rule, the rule will generally be allowed to remain in effect.

In at least two previous cases, the U.S. Supreme Court has held vaccine mandates are constitutional. Both cases were decided, however, well before the OSH Act was enacted, and recent decisions from the current Court appear to be skeptical of federal statutes that grant broad regulatory authority to federal agencies.

In sum, we expect there will be legal challenges to the vaccine mandates once the final rules are released. The litigation may stop or delay the implementation and enforcement of any COVID-19 vaccination or testing mandate.

**Where can I find more information?** We've covered only a small sampling of employers' numerous questions about the new COVID-19 vaccination and testing mandates. We'll continue to follow the developments closely and keep readers up to date on all of the requirements under the new rules.