



## What We Do and Don't Know About the New COVID-19 Vaccination Mandates

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On September 9, 2021, President Biden announced a new six-pronged strategy to contain the spread of COVID-19. Most notable are plans for COVID-19 vaccination and/or weekly testing mandates that will affect employers and employees nationwide. There are many details we still do not know, but below are answers to some of the most common questions we have received since the mandates were announced.

### **Who is impacted?**

The proposed mandates will apply to an estimated 100 million workers who are employed by the federal government, federal contractors, companies with 100 or more employees, or who work in certain industries including healthcare and education.

### **What are the vaccination and/or testing requirements for employers with 100 or more employees?**

All employers with 100 or more employees will be required to ensure their employees are either fully vaccinated against COVID-19 or submit to weekly testing and provide proof of a negative test result in order to report to work. Covered employers must also provide paid time off to employees for the time it takes them to get vaccinated against COVID-19 and/or to recover from any side effects of vaccination.

### **What are the vaccination requirements for federal workers and employees of federal contractors?**

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All federal employees and employees of companies who contract with the Federal Government must be vaccinated against COVID-19. Once the rule is in effect there will no longer be any option to opt out of vaccination by wearing masks, social distancing, or being tested weekly for COVID-19.

## **What are the vaccination requirements for Medicare and Medicaid service providers?**

The Centers for Medicare and Medicaid Services (“CMS”) is requiring COVID-19 vaccination at all Medicare and Medicaid-certified facilities. This requirement will impact hospitals, nursing homes, dialysis facilities, ambulatory surgical settings, and 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, OSHA is permitted to enact such Emergency Temporary Standards if it determines workers are in “grave danger” due to a workplace hazard. An ETS typically takes effect immediately,<sup>[1]</sup> and can stay in place for up to six months without going through the usual notice and comment period. Although OSHA has not yet announced when it will release the ETS, it is expected to be issued quickly, likely in the next few weeks. Until the rule is issued, we will not know when OSHA will begin enforcing the ETS, but it is expected that OSHA will 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 employees of federal contractors, the vaccine mandate will not take effect until after the Office of Management and Budget approves guidance from the White House’s Safer Federal Workforce Task Force that is expected to be issued by September 24, 2021.

For healthcare workers, CMS is developing an Interim Final Rule with comment period that will be issued sometime in October 2021. CMS has urged unvaccinated workers at covered facilities to begin the vaccination process immediately.

## **Who is considered a federal contractor for purposes of the vaccine mandate?**

The September 9, 2021, Executive Order generally requires certain companies who enter into new, extended, or renewed federal contracts after October 15, 2021, to mandate COVID-19 vaccinations for their employees. The previous Executive Order issued in January 2021 only applied to employees performing work at federal sites.

The new vaccine mandate will apply to the following types of contracts: (1) procurement contracts for services, construction, or a leasehold interest in real property; (2) contracts for services covered by the Service Contract Act; (3) contracts for concessions, and (4) 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. Grants, contracts valued at equal or less than \$250,000, and subcontracts solely for the provision of products are not covered by the Executive Order, nor are employees who perform work outside the United States.

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## **Which workers count towards the 100 employee threshold?**

Until OSHA issues the ETS, it is not clear which workers will count toward the 100 employee threshold, including whether it will be on an individual worksite or companywide basis and whether any joint employer analysis will come into play. However, based on existing federal laws, it is likely that employees will be counted on a companywide, not per location, basis. Two possible guideposts for determining who is an “employee” are: (1) workers who are considered “employees” for purposes of EEO-1 annual reports, or (2) workers who are considered “employees” who must be listed on an employer’s OSHA 300 log of work-related injuries and illnesses, which includes all employees on an employer’s payroll as well as workers who are not on the employer’s payroll if the employer supervises these workers on a day-to-day basis (including employees of temporary help services, employee leasing services, personnel supply services and contractors). While they may count for purposes of reaching the 100-employee threshold, it is unlikely that employees who are exclusively remote workers will be subject to COVID-19 vaccination and/or weekly testing requirements.

## **If we are a private employer with 100 or more employees who offers weekly testing as an alternative to vaccination, who is responsible for the cost of the testing?**

We do not yet know how or if the anticipated rules will address the costs of weekly testing. Current EEOC COVID-19 guidance has not addressed the issue, but EEOC guidance that pre-dates the COVID-19 pandemic requires that employers pay the cost of any mandatory testing. While insurance may cover the cost of testing, there are a number of states that require employers to pay for mandatory medical tests or require that employers reimburse employees for any such testing. One prong of President Biden’s plan is expanding access to free COVID-19 testing through a partnership with retail pharmacies so there likely will be more widely available testing options at little to no cost in the future, but the details remain speculative at this time.

## **If we are a private employer with 100 or more employees who offers weekly testing as an option, do we have to pay the employee for the time spent getting tested?**

We do not yet know how or if the anticipated rules will address the issue of whether time spent receiving a COVID-19 test must be compensated by the employer. However, current EEOC guidance under the Fair Labor Standards Act states that employers must pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at the employer’s direction or on the employer’s premises during normal working hours, as well as any time spent receiving a COVID-19 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, employers should note that the FLSA does not allow items that are considered to be primarily for the benefit or the convenience of the employer to be included as wages, which would likely apply to mandatory COVID testing, nor does the FLSA allow employers to make pay deductions for these items if the deduction would reduce the employee’s pay below the minimum wage.

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## **What are the penalties employers may face for violations of the vaccine mandate?**

Although media reports have stated that 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 vaccination mandates?**

At this point, it is not clear whether the new vaccine mandates will provide any exemptions. Guidance issued earlier this year by the EEOC advises that Title VII and the Americans with Disabilities Act 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, do not 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?**

One of Congress's powers includes the ability to regulate activities that affect interstate commerce. As a part of that power, Congress passed the Occupational Safety and Health Act in 1970 and gave the Department of Labor broad authority to regulate issues affecting employee health and safety. As discussed above, the Secretary of Labor through OSHA has the authority to issue Emergency Temporary Standards without going through the typical protracted notice and comment period when there is a hazard that presents a risk of "grave danger" to workers. 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 COVID-19 patients are treated. The newly-announced forthcoming ETS requiring COVID-19 vaccination 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, and whether COVID-19 poses a "grave danger" such that the proposed rule is necessary to protect workers. Other challenges may focus on whether OSHA has the authority to mandate paid time off for employees. Any person who may be adversely affected by the ETS may file a petition within 60 days seeking judicial review of the standard with the U.S. Court of Appeals for the circuit in which the person lives or has his or her principal place of business. Filing an appeals petition, however, will not delay the enforcement of a standard, unless the Court of Appeals specifically orders it. Under the law, if the Court of Appeals determines that OSHA has substantial evidence in support of its emergency rule, the rule will generally be allowed to remain in effect.

In at least two prior cases, the Supreme Court has held that vaccine mandates are constitutional. However, both cases were decided well before the Occupational Safety and Health Act was enacted, and recent decisions from the current Supreme Court appear to be skeptical of federal statutes that grant broad regulatory authority to federal agencies.

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

## **Where can I find more information?**

The above is only a small sampling of the numerous questions for employers regarding the newly-announced COVID-19 vaccination and testing mandates. Burr & Forman is following these developments closely and will keep our clients up to date on all of the requirements under these new rules. For more information about COVID-19 vaccination and testing mandates and how they may impact your operations, please contact Amy Jordan Wilkes at [awilkes@burr.com](mailto:awilkes@burr.com), Nafela Helou at [nhelou@burr.com](mailto:nhelou@burr.com), or the Burr & Forman attorney with whom you usually work.

[1] In states with their own occupational safety and health plan such as California, Tennessee, Virginia, North Carolina, etc., the state agencies will either have to either adopt OSHA's ETS or their own identical or "just as effective" standard within 15 to 30 days.