

Court of Appeals Reinstates OSHA COVID-19 Vaccination/Testing Mandate For Businesses With 100+ Employees

A federal appeals court has reinstated OSHA's "Vaccine and Testing Emergency Temporary Standard," which generally requires that employers with 100 or more employees develop, implement, and enforce a mandatory COVID-19 vaccination and/or testing policy.

OSHA issued the standard on November 5, to go into effect on December 5. Several business groups and state governments immediately challenged the standard in various courts around the country. One federal appeals court quickly issued an injunction temporarily barring OSHA from enforcing the standard. In accord with federal court procedural rules, all of the various cases challenging the standard then were consolidated for further proceedings to take place before one federal appeals court, which was then picked by lottery. OSHA then asked that court (the Court of Appeals for the Sixth Circuit, based in Ohio), to dissolve the temporary injunction and permit the standard to go into effect.

The Sixth Circuit issued its decision on December 17. The court concluded that OSHA had the legal authority to issue the standard, that the standard was a reasonable exercise by OSHA of that statutory authority, and that the standard did not violate the U.S. constitution. The court therefore "dissolved" the temporary injunction barring OSHA from enforcing the standard.

The parties challenging the mandate already have appealed to the U.S. Supreme Court. Unless and until the Supreme Court takes definitive action, covered employers should continue to prepare for compliance with the OSHA standard.

We know that many of our clients will have some of the following questions about the standard, and about the status of the ongoing legal challenges to the mandate:

When Does The Mandate Go Into Effect?

Technically the mandate already is in effect, and has been since December 5. OSHA had been temporarily barred from enforcing the mandate by the terms of the initial federal court order. The Sixth Circuit's ruling dissolving that initial order means that OSHA now does have the legal authority to enforce the mandate as written.

However, OSHA has recognized that the passage of time between the initial federal court order barring enforcement and the December 17 ruling dissolving that order makes it impractical to insist upon immediate compliance. Therefore, OSHA announced on December 18 that it would



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not issue citations for noncompliance with any requirements of the standard before January 10, and that it would not issue citations for noncompliance with the testing provisions of the standard before February 9, “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

Under those circumstances, and unless the Supreme Court takes intervening action, the practical result of the Sixth Circuit’s decision and OSHA’s announcement is that covered employers must have a written policy in place requiring vaccines and/or testing, and must have verified each covered employee’s vaccination status no later than January 10. The testing mandate for covered employees who are not vaccinated will go into practical effect on February 9.

Does The OSHA Standard Apply To Us?

The standard applies to all employers who had 100 or more employees on November 5, and to all employers who reached or reach that 100-employee threshold at any time after November 5 (subject to two exceptions, below).

The standard does not differentiate between full- or part-time status, and does not include any longevity component; each worker counts toward the 100-employee threshold, regardless of whether the worker is full-time or part-time, and regardless of when the worker was hired.

The 100-employee threshold applies even when the employer has fewer than 100 employees at any given location; if the employer has a total of 100 employees or more among all locations, the standard applies.

Each worker counts toward the 100-employee threshold regardless of whether he or she works at the employer’s site, at a client’s site, or even exclusively from his or her home.

Two exceptions: The standard does not apply to federal contractors and subcontractors who are covered by the vaccine mandate provisions of Executive Order 14042, issued in September. Nor does the standard apply to healthcare employers who are subject to the vaccine mandate provisions of OSHA’s Healthcare Emergency Temporary Standard, issued in June.

Does The OSHA Standard Apply To All Of Our Employees?

The standard does not apply to employees who do not report to a workplace where other persons are present, or who work exclusively outdoors. Nor does the standard apply to employees while they are working from home.

(Note that all such workers still count toward the 100-employee threshold for determining whether the employer is covered by the standard; such workers simply might not be individually covered by the standard’s requirements.)

What Does The Standard Actually Require That We Do?

Written vaccine policy: Each covered employer must establish, implement, and enforce a written mandatory vaccination and/or testing policy, covering the points discussed below. The policy must require each covered employee to be fully vaccinated or undergo regular testing (subject to the exceptions below).

Vaccine exceptions: The vaccine is not mandatory for (1) employees for whom a vaccine is medically contraindicated; (2) employees for whom medical necessity requires a delay in vaccination; or (3) employees who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or because the vaccination requirement conflicts with their sincerely held religious beliefs, practices, or observances. (Such employees still may be subject to the testing and masking requirements discussed below.)

Further exception: The vaccine also is not mandatory if the employer establishes, implements, and enforces a written policy allowing employees to choose either to be fully vaccinated against COVID-19 or comply with the testing and masking requirements discussed below.

Vaccine status: The employer must determine the vaccination status of each employee, including a determination as to whether he or she is fully vaccinated. The employer must require each vaccinated employee to provide appropriate written proof of vaccination status, including whether he or she is fully or partially vaccinated. (The employer must verify the vaccination status of all current employees by January 10; thereafter the employer must verify the status of new hires before permitting them to come into the workplace.)

Record of vaccine status: The employer must maintain a record of each employee's vaccination status, and must retain appropriate written proof of vaccination for each employee. The employer also must maintain a roster of each employee's vaccination status. These records and roster are considered to be employee medical records and must be maintained in a confidential manner.

Employer support for vaccination: The employer must "support" employee efforts to be vaccinated, including (1) providing up to four hours of paid time off to enable the employee to receive his or her vaccine(s); and (2) providing "reasonable time and paid sick leave to recover from side effects" for each dose. The employer may not require that the employee use available paid sick time, vacation time, or other paid leave to cover the vaccination time; the employer may require that the employee use such available paid time to cover any necessary recovery time.

Mandatory testing for unvaccinated employees: Starting February 9, the employer must require that unvaccinated employees who report at least once per week to a location where other persons are present undergo weekly testing for COVID-19. An employee who has not been in the workplace for seven or more days (such as an individual who is working remotely from home) must provide the employer with written documentation of a negative COVID-19 test within the past seven days before he or she may come back to the workplace. The employer must maintain a record of each test result; such records are considered to be employee medical records and must be maintained in a confidential manner.

Cost of testing: The OSHA standard does not require that employers pay for or reimburse employees for the cost of mandatory testing. Nor does the standard require that employers provide paid time off to enable such testing.

Positive COVID-19 tests: The employer must require that each employee notify the employer if he or she tests positive for or is diagnosed with COVID-19. The employer must remove each such employee from the workplace until he or she meets certain defined medical and/or testing criteria.

Mandatory face masks for unvaccinated employees: The employer must require that unvaccinated employees wear face coverings when indoors and when occupying a vehicle with another person for work purposes, except in certain defined situations (such as when the employee is eating or drinking, when the employee is alone in a room with floor to ceiling walls and a closed door, or when a mask is "infeasible or creates a greater hazard"). The employer must ensure that such masks are worn properly; that is, that they "fully cover the employee's nose and mouth." The standard does not require the employer to pay for any costs associated with masks.

Information to employees: The employer must inform each employee about the requirements of the vaccine mandate standard. The employer also must provide each employee with a copy of the OSHA document, "Key Things to Know About COVID-19 Vaccines." The employer also must inform each employee about the anti-retaliation provisions of federal law, and about the

provisions of federal law imposing criminal penalties for knowingly supplying false statements or documentation.

Reporting COVID-19 fatalities and hospitalizations to OSHA: The employer must report to OSHA each “work-related COVID-19 fatality” within eight hours of learning about the fatality. The employer also must report to OSHA each “work-related COVID-19 in-patient hospitalization” within 24 hours of learning about the hospitalization. Under OSHA regulations, an illness is “work-related” if “an exposure in the work environment either caused or contributed to the resulting condition.”

What Are The Penalties For Non-Compliance?

OSHA has indicated that a failure to comply with the standard will be considered a “serious” violation of federal law. Under current rules, the maximum fine for a “serious” violation is \$13,653.00; the maximum fine for “willful or repeated” violations is \$136,532.00.

Employers also need to keep in mind that the anti-retaliation provisions of federal law apply to the standard; an employee who complains about a perceived violation of the standard is a “whistleblower,” and federal law prohibits disciplining or discharging any employee because of any such complaint.

What About The Continuing Legal Challenge To The OSHA Standard?

As noted, several employer groups, state governments, and other parties to the Sixth Circuit case have filed notices of appeal, asking the U.S. Supreme Court to take up the legality of the standard and issue a definitive ruling. While those notices are simply “pending” at this time, the Supreme Court is likely to consider the issue within the next few weeks.

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We will continue to monitor the implementation of and challenges to the vaccine and testing mandate. In the meantime, we encourage employers who have specific questions about the OSHA standard, about obtaining a sample “mandatory vaccination policy” designed for compliance with the standard, or about any employment law topics, to contact Don Johnsen at (602) 530-8437 or dpj@gknet.com.