

OSHA COVID-19 Vaccine Mandate

Wegman Hessler Client Alert

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On Thursday, November 4, the Occupational Safety and Health Administration (“OSHA”) released its emergency rule requiring that businesses with more than 100 employees must determine the vaccination status of each employee and prohibit unvaccinated employees from entering the workplace - unless the employer adopts a plan requiring nonvaccinated employees to provide a negative COVID test on a weekly basis and wear masks while on the job. Specifically, the rule provides:

- Beginning January 4, 2022, employees who are not fully vaccinated will not be permitted to work, unless they provide a negative COVID-19 test on a weekly basis and where masks at work.
- Beginning December 5, 2021, Employers must adopt a vaccination policy and provide paid time-off for employees to receive and recover from COVID-19 vaccinations.
- Employers who fail to comply—for example by failing to keep the appropriate records or allowing a nonvaccinated employee to work — can face fines ranging from \$13,653 for a serious violation and up to \$136,532 for a willful violation.
- The rule exempts employees who are unable to receive the vaccine for medical reasons or sincerely held religious beliefs, but requires that those employees wear a mask and provide proof of a negative COVID-19 test on a weekly basis.
- Employers are not required to pay for testing.

The recently released rule provides the specifics of the “vaccine mandate” proposed by President Biden earlier this year. Essentially, the rule requires that, beginning January 4, 2022, all employers who employ more than 100 people must determine each employee’s vaccination status and prohibits employers from allowing employees who are not “fully vaccinated” from working unless they qualify for an exception or accommodation, provide weekly testing, and wear a mask. For purposes of the rule, an employee is “fully vaccinated” when “two weeks after the full required vaccine course is completed.” In other words, two weeks after the second dose of the Pfizer or Moderna vaccine or a single dose of the Johnson & Johnson vaccine. To encourage vaccination, employers must provide paid time off for employees to get vaccinated as well as paid time off for recovery from any side effects.

Under the rule, acceptable proof of an employee’s vaccination status that an employer must maintain can take the form of (1) a copy of the employee’s COVID-19 Vaccination Record Card, (2) a copy of the employee’s medical records documenting the vaccination, (3) a copy of immunizations records from a public health, state, or tribal immunization information system, or (4) A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s). If the employee is unable to provide this documentation, an employer may also accept a sworn statement from the employee attesting to the employee’s vaccination status and attesting that the employee has lost or is otherwise unable to produce the required documentation.

By December 5, 2021, employers must issue a vaccination policy and require nonvaccinated employees to wear a mask. And by January 4, 2021, nonvaccinated employees must provide a negative COVID-19 test on a weekly basis. The mask and weekly test requirements remain in place for employees with a medical or religious exemptions. Although the rule itself does not require the employer to cover the cost of these tests, but certain collective bargaining agreements or state or local laws might.

The rule also imposes certain reporting requirements in the event of a COVID-19 related hospitalization or death of an employee. Specifically, employers are required to notify OSHA within eight hours of learning that an employee has died of COVID-19 and with 24 hours of learning that an employee has been hospitalized in relation to COVID-19.

The rule does, however, include certain exemptions for employees who are working alone, working from home, or working exclusively outdoors, as well as exemptions for employees (1) for whom a vaccine is medically contraindicated, (2) for whom a medical condition requires a delay in vaccination, or (3) for employees entitled to a reasonable accommodation under federal disability or because of a sincerely held religious belief.

Because the rule spans nearly 500 pages, it is impossible to address all potential scenarios that employers might face or provide detail on all of its provisions in this summary. Further, it is certain that suits will be filed challenging the rule, which may affect all or some of its provisions. This rule is perhaps the most significant legal development affecting employers and employees since the state emergency order announced in the pandemic’s early days.

Wegman Hessler stands ready to help your business navigate the quickly evolving regulatory landscape and will continue to monitor this and other regulations and provide additional detail as requested. Please contact us with any of your concerns or questions regarding the mandate.