

White House Announces Vaccine Mandates for Large Employers

September 10, 2021

Private employers with 100 or more employees will be required to mandate COVID-19 vaccines or require weekly testing for their employees, the White House announced Thursday. The Occupational Safety and Health Administration (OSHA) will issue an emergency temporary standard (ETS) implementing the new obligation. Noncompliance with the ETS will expose employers to significant fines.

Employees will get paid time off to get vaccinated and recover from the vaccine, although it's not yet clear whether employers may be able to claim refundable tax credits to reimburse them for the paid time off. The American Rescue Plan Act of 2021 already allows businesses with fewer than 500 employees to do this. But this law sunsets on September 30, 2021.

Employees who refuse the vaccination will have to produce at least weekly negative test results to their employers. An ETS takes effect immediately (without a public comment period) and stays in effect until superseded by a permanent standard. The validity can, and will, be challenged in the courts.

Some employers will be pleased by the ETS. Many businesses have not implemented mandatory vaccination policies fearing a mass exodus of their workforce (particularly those industries already suffering from employee shortages). Employees contemplating an employment departure over an employer's vaccine mandate may now stay with an employer because the employer's competitors, even without a vaccination mandate, will likely be subject to the ETS requiring vaccines. Employers may still require the vaccine for all employees (subject to EEOC reasonable accommodation considerations for disability and religion).

The ETS raises wage and hour issues. While COVID-19 testing is generally available free of charge, it's likely that more insurance companies will stop paying for routine COVID testing. It's possible that employees, not employers, will bear these costs per the ETS to pressure employees to get vaccinated. However, until we know more, employers should be cautious of nonexempt, hourly

workers bearing the cost of testing where such expenses bring a worker's hourly rate below the minimum wage in violation of the Fair Labor Standards Act.

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