

Q&A – A Closer Look at OSHA’s Vaccination Requirement for Employers With 100+ Employees

November 8, 2021

On November 4, the US Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA) released an emergency rule (the OSHA Rule) that will obligate all employers with 100 or more employees to require their employees (with some exceptions) to be fully vaccinated or, if unvaccinated, to produce a negative test result at least weekly and wear face coverings in the workplace. Although the OSHA Rule is facing multiple legal challenges, employers should familiarize themselves with the Rule’s requirements so they can comply if and when the Rule becomes effective. The following Q&A addresses the most significant and practically relevant points, and references additional resources available to help educate you about the OSHA Rule.

What does the OSHA Rule require?

The OSHA Rule requires covered employers to develop, implement, and enforce either a mandatory COVID-19 vaccination policy, *or* a policy requiring employees to get vaccinated or undergo weekly COVID-19 testing and wear a face covering at work. Covered employers have until January 4, 2022 to ensure their employees (other than those that fall into an exception) are either fully vaccinated or submit to weekly testing and mandatory masking.

What is the current status of the OSHA Rule?

On November 6, the United States Court of Appeals for the Fifth Circuit stayed enforcement of the OSHA Rule nationwide. Other circuits also are considering the validity of the OSHA Rule, as at least 27 states have filed lawsuits challenging the mandate. Given the myriad legal challenges, the ultimate fate of the OSHA Rule is unclear. Nevertheless, because the Rule may be upheld and the due dates for action are fast-approaching, covered employers should begin preparing now to comply.

Which employers are covered by the OSHA Rule?

The OSHA Rule generally covers employers with a total of 100 or more employees in the United States, whether or not they are dispersed throughout various locations. The 100+ employee threshold includes:

- part-time and full-time employees;
 - seasonal employees (not obtained from a temporary staffing agency);
 - temporary employees (not obtained from a temporary staffing agency);
 - remote-work employees;
 - employees who work exclusively outdoors; and
 - minor employees (who may need parental consent to be vaccinated or tested for COVID-19).
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The following workers are **not** included in the employee count:

- independent contractors; and
- workers obtained through a staffing agency.

An employer will be covered if it attains the 100+ employee threshold at any time while the OSHA Rule is in effect, even if its employee count later dips below the threshold.

Which employers are NOT covered by the OSHA Rule?

In addition to employers with fewer than 100 employees, the following employers are not subject to the OSHA Rule:

- employers covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (the Federal Contractor rule);
- employers covered by the Centers for Medicare & Medicaid Services' emergency rule (the CMS Rule, released simultaneously with the OSHA Rule); and
- employers in health care settings that are subject to OSHA's Emergency Temporary Standard (29 CFR 1910.502) (ETS) issued in June 2021 (specifically, employers whose employees provide health care services for the purpose of promoting, monitoring or restoring health, such as hospitals, ambulatory care and medical clinics, long term care facilities, home health and hospice care, emergency medical response, and patient transport companies); note, however, that this health care ETS is expected to lapse in December 2021, at which point such health care employers may be covered by the OSHA Rule if they meet the criteria.

Which employees of a covered employer are exempt from the Rule's vaccination or testing/masking requirements?

Covered employers need not impose a vaccination or testing/masking requirement on employees who do not report to a workplace where other individuals are present (such as employees who work from home), and those who work exclusively outdoors. Employees who work in a hybrid arrangement (i.e., sometimes works remotely/outdoors and sometimes reports to a facility) are subject to the OSHA Rule's vaccination or testing/masking requirements. Note that the OSHA Rule does **not** exempt employees who may have "natural immunity" or the presence of antibodies from a previous infection.

Are employers required to inform employees about the OSHA Rule and the policy they adopt?

Yes. Employers must provide each employee, in a language and at a literacy level the employee understands:

1. a written policy describing which approach (e.g., mandatory vaccination or the vaccination with testing/masking alternative) the employer is adopting;
2. information about the requirements of the OSHA Rule;
3. the Centers for Disease Control (CDC) document [Key Things to Know About COVID-19 Vaccines](#);
4. information about OSHA prohibiting employers from discriminating or retaliating against employees for exercising rights afforded by the OSH Act; and
5. information about potential criminal penalties for knowingly supplying false statements.

What are the requirements for a mandatory vaccination policy, if a covered employer chooses this option?

A mandatory vaccination policy must require COVID-19 vaccination of all employees, including new employees as soon as practicable, unless the employee has a medical contraindication or is legally entitled to a reasonable accommodation under federal civil rights laws due to a disability or sincerely held religious beliefs, practices or observances that conflict with the vaccination requirement.

OSHA has provided a sample mandatory vaccination policy, available here:

<https://www.osha.gov/sites/default/files/covid-19-ets2-sample-mandatory-vaccination-policy.docx>

What are the requirements for a vaccination or testing and masking policy, if a covered employer chooses this option?

A vaccination or testing and face covering policy must provide that each employee who is not fully vaccinated:

1. is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer); and
2. wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.

Note that all COVID-19 tests approved for emergency use by the Food and Drug Administration are permitted, including PCR tests and rapid antigen tests.

OSHA has provided a sample vaccination or testing and face covering policy, available here:

<https://www.osha.gov/sites/default/files/covid-19-ets2-sample-employee-choice-vaccination-policy.docx>

Can an employer have a mandatory vaccination policy for some areas or positions, and a vaccination or testing/masking policy for other areas or positions?

Yes. Employers may implement mandatory vaccination policies that apply to only certain portions of their workforce. Of course, a covered employer must ensure that the remainder of its workforce is covered by a vaccination or testing/masking policy compliant with the OSHA Rule.

How should an employer respond to employees who claim to need a disability or religious accommodation?

If an employee seeks a medical or religious exemption, the employer may request verification to determine whether the employee is legally qualified for such accommodation. If accommodation is warranted, the employer may require that the employee select from the two alternatives (vaccination or testing/masking) in the OSHA Rule, or it may engage in an interactive process with the employee to explore other appropriate accommodations.

Do employers have to provide employees with paid time off for COVID-19 vaccination?

Yes. Regardless of which policy employers implement (mandatory vaccination or vaccination or testing/masking), employers must provide up to four hours of paid time off for their employees to get vaccinated. Employers also must provide a reasonable amount of paid sick leave, which can be capped, for employees to recover from side effects. Employers are required to provide this leave starting December 5. Note that paid time off to get the vaccine is a new and separate entitlement and cannot be offset against paid vacation or sick leave accruals available to the employee under an existing company policy or statutory entitlement. In contrast, paid time off to recover from the side effects of the vaccine can come out of the employee's paid sick leave or PTO banks, but cannot be designated as vacation time.

Do employers have to provide employees with paid time off for COVID-19 testing?

While the OSHA Rule does not require employers to provide paid leave for testing, it is possible that other federal, state or local laws or regulations, or a collectively negotiated agreement, may require compensation. Note also that in those states with business expense reimbursement laws, employers may have to cover the cost of the testing itself.

What are the record-keeping requirements for vaccination status?

Employers must determine the vaccination status of each employee, obtain acceptable proof of vaccination from vaccinated employees, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status. Employee vaccination records must be maintained as confidential medical records and retained for the duration the OSHA Rule is in effect. Employers who already have vaccination records from employees do not need to re-verify that status.

The OSHA Rule requires employers to make available for examination and copying an employee's COVID-19 vaccination documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Employers also are required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

What are the reporting and record-keeping requirements for weekly testing?

The OSHA Rule requires that employers establish and distribute procedures for employees to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19. Upon notice, an employee must be immediately removed from the workplace, regardless of vaccination status, until they meet the CDC's return-to-work criteria. Employers also must maintain a record of each test result provided by each employee, which must be maintained as confidential medical records and retained for the duration the OSHA Rule is in effect.

In the event that an employee receives a positive COVID-19 test or is diagnosed with COVID-19, the employer should not require that employee to undergo COVID-19 testing for 90 days following the date of their positive test or diagnosis. However, when the employee returns to work they must continue to wear a face covering in accordance with the OSHA Rule.

What is the penalty for violations of the OSHA rule?

Employers that fail to comply with the OSHA rule may be subject to fines. OSHA's penalties are up to \$13,653 per serious violation.

Department of Labor Resources on the OSHA Rule

- OSHA Rule Webinar – <https://www.youtube.com/watch?v=ixxkn3Y8z6g>
- About the OSHA Rule – <https://www.osha.gov/sites/default/files/publications/OSHA4161.pdf>
- OSHA Rule Summary – <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>
- Department of Labor FAQs – <https://www.osha.gov/coronavirus/ets2/faqs>

CONTACTS

For more information or assistance with OSHA vaccine compliance or developing vaccination-related policies, contact your Katten attorney or any of the following attorneys.

CHICAGO



Julie L. Gottshall
+1.312.902.5645
julie.gottshall@katten.com



Janet R. Widmaier
+1.312.902.5546
janet.widmaier@katten.com



Andrew J. Schuyler
+1.312.902.5471
andrew.schuyler@katten.com

LOS ANGELES – CENTURY CITY



Stacey McKee Knight
+1.310.788.4406
stacey.knight@katten.com



Janella T. Gholian
+1.310.788.4445
janella.gholian@katten.com

NEW YORK



Michelle A. Gyves
+1.212.940.6585
michelle.gyves@katten.com



Tenley Mochizuki
+1.212.940.8568
tenley.mochizuki@katten.com

Katten

katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

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