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**Federal Vaccine Mandates:
What's Next for Employers?**

Doug Desmarais, Esq. | *Smith & Downey*

October 13, 2021





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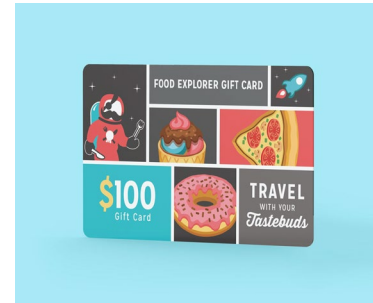
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UPCOMING

Federal Vaccine Mandate: Review of OSHA Guidelines


November 10th, 11 AM – 12 PM EST
Speaker: Stacy Barrow, Esq.

End of Year Compliance Roundup

December 8th, 12 PM – 1 PM EST
Speaker: Stacy Barrow, Esq.



Webinars



PREPARING FOR OSHA'S COVID-19 VACCINATION ETS: EMPLOYER CHECKLIST

The Occupational Safety and Health Administration (OSHA) has been directed to issue an emergency temporary standard (ETS) imposing vaccine mandates for private employers. This checklist is a jumping-off point for your organization as you prepare for the upcoming rule.

[Click here to see the checklist!](#)



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October 13 , 2021



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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

OSHA Standards

- The General Duty Clause under the OSH Act applies to virtually every workplace.
 - The Clause requires employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to...employees.”
 - The Clause also requires employers to comply with all occupational safety and health standards.
- The latest OSHA guidance recommends that employers at least encourage and prioritize employees wearing cloth face coverings when within 6 feet of one another.
 - It also recommends evaluating the feasibility of certain employees’ ability to wear a mask and consider alternatives when it is not feasible.
- Employers should be aware of CDC and OSHA Guidance and, even though not mandatory, such Guidance should be treated as a requirement.

CDC Guidance

- The CDC guidance on testing and transmission has rapidly changed during the past year and a half.
 - Previous guidance stating that those who have been exposed to COVID-19 do not need to be tested unless they were symptomatic has since been updated.
 - Now, the CDC has reverted back to its previous guidance and is urging all those who have been possibly exposed to be tested.
- CDC guidance recommends that employees be tested if they are symptomatic, have been exposed to COVID-19, or are asymptomatic and a special circumstance exists (such as inability to socially distance, or where the employee is in a critical infrastructure sector).

President Biden's New Orders

- The Plan is titled the “Path Out of the Pandemic.”
- Included within the Plan are vaccine mandates for Federal contractors, large private employers, healthcare employers, and portions of the federal government.
- Also included:
 - A requirement for certain employers to comply with the CDC guidelines on masking and social distancing;
 - Vaccine status screening requirements at certain entities; and
 - Expansion of the Economic Injury Disaster Loan program and improvements to the Paycheck Protection Program.

Federal Contractors

- Federal agencies will be required to include in any contract for services a clause mandating vaccines for the contractor's employees.
 - Unless this clause is incorporated in the contract (or option contract), the contractor does not have to ensure that its employees are vaccinated.
- Timing:
 - For contracts awarded prior to Oct. 15, 2021, the clause will be incorporated when the contract's option is exercised or an extension is made.
 - On or after Oct. 15, 2021, the clause must be incorporated into all contract solicitations, and federal agencies are "encouraged" to include it in awarded contracts.
 - On or after Nov. 14, 2021, the clause must be incorporated into all awarded contracts.
- Contractors will have until Dec. 8 to ensure all employees are "fully vaccinated."
 - The clause requires employees to be "fully vaccinated," which means that it has been at least 2 weeks since the employee has received his/her final dose.
 - There is no grace period after Dec. 8.

Federal Contractors (cont.)

- The mandate applies to all employees of the federal contractor and it “flows down” to all subcontractors.
 - This includes remote workers who are performing work on a covered contract.
 - Regulations do not currently require contractors to ensure that the employees of subcontractors are vaccinated – only that the clause is included in the contract.
- Federal contractors are also required to comply with the CDC’s guidelines on mask wearing and physical distancing.
 - This applies to visitors in the workplace (although the vaccine mandate does not apply).
 - But it does not apply to remote workers (although the vaccine mandate does apply).

Federal Contractors (cont.)

- Penalties for noncompliance:
 - Not yet defined.
 - Possible that there might be monetary fines.
 - Other possible penalties include contract suspension or debarment.
 - Suspension/debarment could occur anytime a contractor is not in compliance with a contract's requirements.
- Must still follow laws/regulations related to accommodations for vaccines.
 - Contractor is responsible for determining whether an employee is eligible for an accommodation based on his/her religion or disability.
 - There is no testing alternative permitted for employees who do not qualify for an accommodation.

Large Employers

- OSHA is now tasked with developing an Emergency Temporary Standard.
 - The Standard will require employers with 100 or more employees to ensure that their workplace is fully vaccinated.
 - It will also allow employers to instead require employees to face weekly testing.
 - (This alternative is absent from the federal contractor mandate.)
 - The Standard is estimated to impact 80 million employees.
- Large employers will also be required to give employees time off to get vaccinated and/or recover from any vaccine side effects.
 - Possible that it will also require written plans, testing requirements, and other changes.
- Noncompliant employers might face a fine in an amount up to \$14,000 per violation.
- There is no currently known timetable for the Standard.
 - And it is expected to be challenged in court by employers, employees, and states.

Healthcare Employers

- Healthcare employers who receive any Medicare or Medicaid reimbursement will also be required to ensure employees are vaccinated.
 - Anticipated to cover 50,000 employers, and 17 million healthcare workers.
- Mandate flows from the Centers for Medicare and Medicaid Services.
- Expands on previous mandate which applied only to nursing homes.

Federal Assistance Expansion

- President Biden also asked for the Economic Injury Disaster Loan program to be strengthened.
 - Will continue providing long-term, low-cost loans.
 - Includes expansion of funding to businesses from \$500k to \$2 million.
 - There will be a 30-day exclusive window for small businesses to apply (their applications cannot seek more than \$500k).
 - Repayments will be deferred for up to two years.
- The Paycheck Protection Program will also be altered.
 - This includes the promise of a streamlined debt forgiveness for loans of \$150k or less.

Reopening Guidance

What steps should an employer take to ensure a safe reopening environment?

- Before reopening, employers should:
 - Consider all local guidance and requirements to ensure compliance;
 - Identify areas at most risk of contamination;
 - Create a plan that will reduce the risk of contamination and promote safety;
 - **Communicate all new requirements with employees;**
 - Ensure that ventilation systems are *fully operational* (such as HVAC systems); and
 - Consider whether to conduct employee training on the risks of being back in the workplace.
- Rearranging workspaces and schedules – the CDC recommends:
 - Spacing seats and workstations further apart;
 - Installing shields/other barriers if rearranging is not feasible;
 - Posting signs, visual cues (such as tape on the floor) and other notices reminding employees of social distancing guidelines;
 - Placing employees in better-ventilated workplaces; and
 - Staggering work schedules (one employee group works mornings; the other group works nights).

Reopening Guidance (cont.)

What steps should an employer take to ensure a safe reopening environment?

- The CDC recommends to increase air quality by:
 - Increasing the frequency of air supply (use the “fan” feature on the HVAC unit);
 - Opening windows;
 - Using fans to redirect airflow between offices and air filtration systems;
 - Operating exhaust fans in restrooms at full capacity; and
 - Using ultraviolet germicidal irradiation to kill the virus.
- Promote healthy conduct in the workplace:
 - Consider screening employees daily;
 - Take proper sanitary steps, and encourage employees to do the same;
 - Limit occupancy in the office and common areas;
 - Require **masks** when moving in the workplace;
 - Encourage masks while employees are at their workstation;
 - Prohibit any and all handshaking, hugs, etc.;
 - Prohibit sharing materials/supplies unless necessary and sanitary steps have been taken;
 - Remind employees to properly wash their hands frequently;
 - Encourage employees to eat/meet outside;
 - Incentivize employees to not use public transportation; and
 - Remind all employees that if they are symptomatic or feeling ill, they should remain home and self-isolate until a healthcare provider deems them safe to return to work.

Testing Employees

Is an employer able to test employees for high temperatures/symptoms?

- Employers are permitted to conduct temperature/symptom checks of employees.
- If an employer decides to test employees, it should ensure safety measures are taken to prevent the possible spread of the virus, including:
 - Maintaining a distance of 6 feet among employees being tested;
 - Installing barriers to protect the screener's face from the employee being tested; and
 - Ensuring proper personal protective equipment is used at all times.
- Methods of testing:
 - Employers can ask employees to conduct their own temperature checks upon arrival (employers can give employees their own thermometer to lessen contact with others);
 - Perform employer-administered temperature checks (which should include using a new set of disposable gloves for each employee being screened);
 - Conduct a visual inspection of the employee for symptoms in addition to temperature checks (including looking for flushed cheeks or fatigue).
- Employers can refuse entry to an employee who objects to temperature screenings/questions.

Testing Positive

What must an employer do if an employee tests positive, or reports that he/she has tested positive for COVID-19?

- **Immediate steps to take:**
 - Separate positive employee from all others, provide a face mask, and send the employee home.
 - Request positive employees to identify all recent contacts in the workplace, and which common areas they used.
 - Alert the office staff that an *anonymous* employee has recently tested positive for COVID-19.
 - Conduct a thorough disinfection of workplace and remind employees of proper safety procedures.
- **Employers are required to determine whether a positive employee contracted the virus while at work:**
 - This means conducting an investigation into whether the employee's infection is related to work.
 - A reasonable investigation includes:
 - Asking the employee limited questions about how he/she believes COVID-19 was contracted;
 - Asking about the employee's work and nonwork activities and possible exposure; and
 - Examining the work environment to determine if and how exposure was possible.
 - Beware of boundaries of an employee's personal life.
- **OSHA Steps:**
 - If an employer is covered by OSHA, and an employee's infection is work related, and the infection results in (1) the employee's death, (2) time away from work, (3) restricted work/transfer, (4) medical treatment, or (5) the loss of consciousness, the employer *must record the COVID-19 case on the OSHA 300 log.*
- **If employees is only symptomatic:**
 - If an employee only shows COVID symptoms, but no positive test, the employee is likely still considered a "known danger" to others, and should be sent home.
 - The ADA's guidance has stated that being COVID-19 positive, or even showing symptoms of it, poses significant risk of *substantial harm* to the workplace.

Symptom Tracking

How can employers track an employee's COVID-19 symptoms while the employee is out on leave?

- Supplying ill employees with a self-certification and medical tracking chart is a good way to help employees track their symptoms to determine when they will be permitted to return to work.
 - NOTE: The CDC has changed its guidelines for returning to work from 7 days after the onset of symptoms to 10 days. Additionally, those with a severe case of the illness are advised to stay home for at least 20 days.
- The self-certification should include an employee attestation that:
 - The employee has not had a fever for at least three days without taking medications to reduce fever (while requesting the date of last fever of 100.4 degrees or higher); the employee's respiratory symptoms have improved for at least three days; and at least ten days have passed since the employee's symptoms first started.
- The medical tracking chart should include:
 - A spreadsheet that allows an employee to document his/her temperature, respiratory symptoms, and other symptoms; and
 - A disclaimer that the medical tracking chart is for the employee's use only and should not be provided to the employer.

Asymptomatic Employees

May an employer ask asymptomatic employees to disclose whether they have a medical condition that could make them especially vulnerable to COVID-19 complications?

- Generally, asking an employee about underlying medical conditions is a disability-related inquiry, which is highly restricted by the ADA.
- Because COVID-19 is a pandemic and is considered severe by health officials, employers have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19.
 - As such, an employer may make a disability-related inquiry of asymptomatic employees in order to identify those at higher risk of COVID-19 complications.
- Those who are at higher risk for severe illness from COVID-19, according to the CDC, are people with cancer, chronic kidney disease, COPD, immunocompromised immune systems, obesity, serious heart conditions, sickle cell disease, and type 2 diabetes.
- Those who might be at higher risk for severe illness are people with asthma, cerebrovascular disease, cystic fibrosis, hypertension, certain immunocompromised immune system, neurologic conditions, liver disease, pregnancy, pulmonary fibrosis, smoking habits, thalassemia, and type 1 diabetes.

Cost of Testing & Vaccines

- Testing (and vaccines) is still free for many individuals.
 - OSHA Standard will allow employers to require weekly testing instead of vaccines.
 - The Standard could require employers to pay for testing, which should incentivize employers to require vaccines instead of offering the testing alternative
- But if an employer requires testing and/or vaccines, should the employer pay for the test/vaccine and the time it takes for the employee to be tested/vaccinated?
 - Some state (California and Illinois) require employers to reimburse employees for required job-related expenses.
 - Maryland does not have any analogous requirement.
 - OSHA Standard will require employers to pay for employees to get vaccinated.
- It is an unanswered question for those not covered by the OSHA Standard, but the most conservative approach is to pay employees for the time they need to undergo required testing or to get a required vaccine.

Vaccinations – ADA

- The ADA requires that employees receive a reasonable accommodation due to a disability.
 - This requirement extends to mandatory vaccines.
- If the employee has a disability that would prevent him/her from safely receiving the COVID-19 vaccine, a reasonable accommodation might be required.
 - A reasonable accommodation in lieu of being vaccinated could be allowing the employee to continue working from home, or requiring him/her to wear a mask while in the office.
 - In rare instances, vaccinated individuals have had severe, but non-life-threatening, allergic reactions.
- An employer need not provide a reasonable accommodation under the ADA if it would create an undue hardship.
 - “Undue hardship” under the ADA means a significant difficulty or expense in providing the accommodation.

Vaccinations – ADA (cont.)

- The EEOC’s latest guidance does not treat vaccinations as an ADA “medical examination.”
 - Workplace medical examinations must be job-related & consistent with a business necessity.
 - However, pre-screening questions may implicate ADA’s disability-related inquiries provision (which is an inquiry likely to elicit information about a disability).
 - Must show that pre-screening question is “job-related and consistent with business necessity.”
 - Requesting proof of receipt of a vaccination is not considered an inquiry, however, asking why the individual did not get vaccinated likely is an inquiry.
- At least until the pandemic subsides, unvaccinated employees could be considered a “direct threat” to the workplace and prohibited from the office.
 - Employers should nonetheless consider a reasonable accommodation and assess the employee on an individualized basis, since the “direct threat” threshold is high.

Vaccinations – Title VII

- Title VII also requires reasonable accommodations for an employee’s religious-based objection.
- The same ADA reasonable accommodation (work from home or required to wear a mask while in the office) can also be used if the employee has a religious objection to the vaccination.
- However, Title VII’s “undue hardship” definition is any accommodation that would result in more than a *de minimis* cost to the employer.
 - This is a lower standard than the undue hardship definition under the ADA and requires only that an employer show that the requested accommodation would cause more than a trivial cost to the employer’s operations.
 - But the undue hardship reasoning should still be used with caution.
- An employee may object due to his/her sincerely held religious beliefs.
 - Determining what is a true, sincere religious belief is often tricky.
 - Supporting information verifying the employee’s sincere beliefs may be requested.

FMLA/ADA Updates

- Refresher on ADA:
 - EEOC recommends that employers balance reporting COVID-19 cases and symptoms with protecting employee confidentiality.
 - If all employees work from home, is there a need to report COVID-19 cases to the staff?
 - Employers should also make every effort to limit the number of people who get to know the name of the employee who tests positive.
 - Only supervisors who need to know for employment and accommodation purposes.
 - And even if coworkers can figure out who the coworker is who tested positive, employers are still prohibited from confirming that individual (without his/her permission).
 - It is not an ADA confidentiality violation for an employee to inform his/her supervisor about a coworker's COVID-19 symptoms.
 - After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

FMLA/ADA Updates

- Testing:
 - Employers may require employees to take COVID-19 tests, to determine if the employee's presence poses a "direct threat" to the office – these tests may be periodic.
 - However, employers may not require employees to take anti-body tests to determine if they have previously been exposed to COVID-19.
- Questioning Employees:
 - Employers may continue to ask employees if they have COVID-19 symptoms or have been tested for COVID-19.
 - However, employers may not ask if **family members** have COVID-19 or COVID-19 symptoms.
 - Employers may ask if the employee has been exposed to "anyone" with a known case or symptoms, but asking specifically about family members is prohibited.
 - Employers may also ask if the employee has recently traveled (as it is not a medical inquiry).
 - If asking a particular employee if he/she has COVID-19, the employer needs a reasonable belief based on objective evidence for doing so.

FMLA/ADA Updates (cont.)

- Test Accuracy:
 - Some tests, such as rapid tests, are not as accurate as others.
 - And a negative test does not mean the employee will not contract COVID-19 later.
- Barring Employees from Entry:
 - Employers *may* bar an employee from the office if he/she refuses to undergo screening, such as temperature checks or questionnaires.
 - However, the EEOC recommends that an employer asks the employee why he/she is refusing, to give the employer an opportunity to reassure the employee, or address his/her concerns.
- Accommodations are Unique:
 - Employees are entitled to accommodations whether working in the office or at home, however, the accommodation an employee received while working in the office might not be reasonable if the employee is now working remotely (e.g., arriving to work late), and the accommodation can differ based on location of work.
 - And, even if an employee works remotely now, it does not necessarily mean it will be a reasonable accommodation once the pandemic is better controlled.



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