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Questions Surrounding the New Vaccine Executive Order

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By [Anthony Kaylin](#), courtesy of SBAM Approved Partner [ASE](#)

Last week, President Biden directed OSHA to issue an Emergency Temporary Standard (ETS) that will require all employers with 100 or more employees to ensure that their employees are either

fully vaccinated or that the unvaccinated employees produce a negative test weekly before coming to work. The ETS will also require these employers to provide paid time off for their employees to get vaccinated or to recover if they are “under the weather post-vaccination.”

The ETS will be issued without any formal opportunity for comment, and no timetable has been announced. The directive is expected to affect more than 80 million workers in the private sector nationwide, which is around two-thirds of private-sector workers according to data from the Bureau of Labor Statistics. Fines up to \$14,000 per violation per individual could be imposed for employers that do not comply.

The vaccination requirements are part of the President’s six-prong, comprehensive national strategy outlined in the [COVID-19 Action Plan](#).

But there are a number of questions that employers have concerning this Executive Order.

How does an employer count employees for purposes of the 100 employee headcount?

According to Susan Gross Sholinsky, a member at Epstein Becker Green, these types of questions are becoming very common. For example, should part-time, casual, or temporary workers be counted the same as full-time employees? Are contractors a part of the head count?

Different laws for counting employees will come into play from the WARN Act to the EEO-1 reporting requirements. Emily Harbison, a partner at Reed Smith LLP, believes that employers that are legally required to file the EEO-1 surveys will likely be subject to the vaccine mandate or weekly testing requirement that OSHA is crafting. Therefore, counting employees should begin with regular full-time and part-time employees. However, it should be noted that the Family Medical Leave Act (FMLA) will count temporary employees on payroll for the 50 or more count for employer eligibility even though temporary employees are not counted for EEO-1 purposes.

The OSHA rules should provide guidance for the headcount coverage.

When does the paid time off (or time worked) for receiving a vaccine come into play?

There is guidance already from the U.S. Department of Labor that any testing that occurs on an employer’s premises or during work time is compensable, but it is far less clear whether an employee must today in all states be compensated for the time and expense of testing or

vaccination outside of their normal work hours, even when required by employer policy.

This situation could be likened to employees who must maintain certification to keep their jobs. When employees take those classes, unless the employer approves, it is on their time and for the express purpose for keeping their job. Although taking a vaccine is not a training issue, if an employer mandates vaccinations to keep their jobs, it would be considered employee time to get the vaccine – similar to training.

The OSHA rules should again provide guidance for the paid time off and time worked issue.

What about vaccination incentive plans?

Many employers instituted carrot and stick policies. The incentive programs, which the EEOC has blessed, have been useful initially, but as the vaccination rates stalled, penalty programs have been started, most commonly, surcharges to health plans.

For example, the Delta Airlines imposition of \$200 surcharge has moved nearly 20% of the remaining 20,000 previously unvaccinated workers to start the vaccination process. Yet 80% of the 20,000 still haven't.

Kim Wilcoxon, a partner at Thompson Hine LLP, who specializes in employee benefits, said the design of incentive programs that employers adopt or consider “really determines what laws will apply to that program and what compliance requirements apply.” HIPAA wellness program rules say “if it's a health-contingent program, is that the program be voluntary,” but the imposition of a mandate could turn an employer's existing program into one that runs afoul of HIPAA, states Wilcoxon.

What about booster shot requirements?

As the CDC determines the need for the booster shot, will employers be penalized if employees do not get booster shots and stick to the current vaccination regimen?

It is expected that OSHA rules will provide guidance for booster shots.

What about the administrative and financial burdens of testing and shots?

Stephanie K. Rawitt of Clark Hill PLC, an ASE member, said another key issue for employers is

determining how to manage the new testing requirement for unvaccinated workers. That includes implementing the testing program itself, establishing processes for documenting everything, and handling the “influx of additional paperwork,” according to Rawitt.

“I do think that a lot of employers ... were having a hard debate about whether to mandate [a vaccine] or not, and ... that debate will be over,” Rawitt said. “And the question becomes, how do we implement a process to do the testing, make sure we have enough tests, implement the testing, and keep the records of the employees who are being tested.” There is a strong likelihood there won’t be enough tests available initially.

And who pays for it? Most employers don’t have that deep of pockets. Judith Wethall, a partner at McDermott Will & Emery LLP, states that if costs become prohibitive, employers are “either going to avoid the testing altogether” and simply say that everyone has to be vaccinated, or they’re “going to have to cut out other incentives for vaccination in order to pay for the alternative testing.”

What about employers whose employees are remote?

If employees are working remote and not expected into a physical facility, do they need to get vaccinated? And if they must go into work on an irregular basis, would testing be sufficient? OSHA rules are expected to provide guidance for the remote workforce.

There are a number of other questions that employers have that range from possible discrimination claims depending on who in the workforce is not vaccinated to whether union negotiations for these requirements need to be effectuated. When the ETS is announced and published, it is highly recommended to work with the safety department or consultants and legal counsel to minimize risks and set up a cost-effective process.

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