



## OSHA Rule - Explained More Questions and Answers on Return to the Office

### PRIVATE SECTOR EMPLOYERS WITH OVER 100 EMPLOYEES SHOULD PREPARE TO IMPLEMENT A MANDATORY VACCINATION POLICY

As expected, OSHA's new rule requiring private sector employers with over 100 employees to have a mandatory vaccination policy is being challenged in courts across the country. Just recently, the Fifth Circuit Court of Appeals issued a [temporary stay](#) preventing the rule from being enforced nationwide. While we cannot predict whether any of these legal challenges will ultimately be successful, it would be wise to begin thinking about the rule's requirements and how your organization will implement them. Here are the basics of what you need to know:

#### **Who does the rule cover?**

Employers with a total of 100 or more employees **at any time the rule is in effect**. We have heard nothing definitive (at this time) about a similar rule being issued by State OSHA

#### **What's required?**

Covered employers must have a **written policy** requiring all employees, including newly-hired employees, to be fully vaccinated. Employees can claim an exemption from the vaccination requirement for certain medical and religious reasons.

An employer may allow any employee not subject to mandatory vaccination ***to choose to provide proof of regular testing (once a week) and to wear a face covering.***

**How will you know who's vaccinated or who is getting tested?**

The rule requires employers to keep a roster of employees' vaccination status. Vaccinated employees must provide proof of vaccination to the employer, which in most cases would be a copy of their vaccination card. For employees getting tested, the employer has to keep a record of the test results. ***All vaccination records and test results must be maintained confidentially (separate from the employee's personnel file).***

**Who pays?**

Employers have to provide ***paid time*** to allow employees to get vaccinated and for recovery from any vaccine side effects. The OSHA rule ***does not specifically require that employers pay for testing.*** However, the rule notes that other laws may require that the employer pay. For example, it is unlawful under the federal Fair Labor Standards Act, for any required costs incurred by an employee (such as testing) when subtracted from the employee's hourly wage to bring the wage below the required minimum wage.

**What if employees don't comply?**

Any employee who is not vaccinated, does not claim a recognized exemption and does not abide by testing requirements, must be removed from the workplace.

**What happens when an employee tests positive for, or is diagnosed with, COVID-19?**

These employees must be immediately removed from the workplace.

**Anything else?**

Yes, employees have to be informed of the requirements of the rule in a language and at a literacy level the employee understands. The employee must also be informed of the vaccines' effectiveness, safety and the benefits of being vaccinated, according to the CDC.

The OSHA rule includes a number of important details, which aren't covered here, such as what is considered a permissible face covering and circumstances in which an employee may be excused from mask requirements. If you have questions on the new rule, its implementation in your workplace or need help drafting a vaccination policy that will comply with the rule, let us know how we can help.

**[MORE RETURN-TO-THE-OFFICE QUESTIONS](#)**

We continue to get questions about employees' return to the office. Following are just a couple of your questions and some general thoughts. Of course, what is legally permissible will depend on the specific circumstances involved. Please note that some of these ideas were developed based in part on a webinar on this topic, which was recently hosted by the [National Employment Law Institute](#).

- **What do you do when an employee says he can't or won't return to the office?**

Begin by looking for a simple solution. *Ask what you can do to help the employee.* Maybe something as simple as a schedule change or a move to a different workspace can resolve the employee's issue so that he or she is more comfortable working in the office.

If you can avoid a detailed discussion of an employee's medical issue, by all means, do so. If there is no easy fix, then you may have to discuss whether the employee has a disability (engage in an 'interactive process' with the employee) to determine if you are legally required to offer an accommodation to the employee, such as working at home. If the discussion reaches this point, focus on whether on-site presence is necessary for the employee to fulfill his or her job duties.

\* It is critically important that the details of all communications with the employee be fully documented. Document what the employee requested, what the employer offered in response to the request and what each person said in any meeting or phone discussion about the issue.

- **Can you or should you ask questions when an employee refuses to be vaccinated because of a religious exemption?**

Due to the sheer number of requests for religious exemption, limited questioning may be necessary to weed out those requests that are clearly based on a reason other than the employee's religious beliefs. You may consider asking employees claiming a religious exemption to any vaccine or mask requirement to complete a simple form/questionnaire stating the nature of the religious belief and whether the employee has previously received any vaccine.

- **Is there anything I can do to prepare for the inevitable flood of work-from-home requests?**

Now that many employees have become accustomed to the convenience of working from home, many employees will want to continue doing so. It could be a difficult argument to make from the employer's side that the job duties cannot be performed remotely when employees have been doing the job remotely for several months.

Employers should consider documenting in performance evaluations that the pandemic required that employees worked from home and, while the employee performed well, there were certain essential functions of the job that could not adequately be performed from home and list those job functions. Also note, after the employee returns to the office, "Now that X has returned to the office, she can perform all the essential functions of the job, including \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_." This helps to establish that there are some essential job functions that cannot be performed at home. An employer may argue, in effect, that the job when working remotely has different requirements than the job has when working in the office. For example, a teacher teaching classes remotely when school is closed has different responsibilities than the teacher has when the school reopens to in-person learning. Taking these steps now will help establish a basis for denying a work at home request made by an employee seeking an accommodation for a disability in the future.

*If you have concerns about this or any other workplace or litigation issue, please contact David Ryan at [david.ryan@ryan-ryan.net](mailto:david.ryan@ryan-ryan.net) or by telephone at 860.460.7139 (mobile) or 203.752.9794 (office).*