

OSHA Issues COVID-19 Vaccination Rule: What Employers Need to Know

By Morris L. Hawk

Yesterday, OSHA released its emergency COVID-19 vaccination rule. Under the rule, employers with over 100 employees must implement a policy by December 5th requiring all employees to either be vaccinated or to undergo regular COVID-19 testing and wear a face covering at work. Regular testing of unvaccinated employees must begin by January 4th. It is important to point out that federal contractors and healthcare employers are subject to different OSHA standards and that Ohio public employers are not covered by OSHA at all. In addition, since the rule was announced, the attorneys general for multiple states, including Ohio and Florida, have announced that they will challenge the rule in court. Because we cannot predict the outcome of these challenges, it is important for employers to know the requirements of this new rule. These requirements are outlined below.

How do we determine if we meet the 100-employee threshold? OSHA has stated that the 100-employee threshold will be determined at the corporate-wide level, not based on individual employer locations. Off-site and remote employees are included in the employee count, as are part-time employees. However, although remote employees are counted to determine whether an employer meets the threshold, those employees would not be subject to the rule if they work exclusively from home. For example, if an employer has 150 employees (100 of whom work exclusively from home and 50 who work in an office), the vaccination rule would apply only to the 50 employees working in the office. Further, temporary agency employees are not counted. Thus, a manufacturer with 30 direct employees and 80 staffing agency employees working on site would not be covered by the rule.

Can we have a policy that requires employees to either get vaccinated or do weekly testing? Yes. The rule permits an employer to implement a policy that allows employees to choose to either: 1) get vaccinated; or 2) undergo weekly COVID-19 testing and wear a face covering at work. The employer must comply with the other requirements of the rule (including paid time off for those choosing to get vaccinated as outlined in more detail below).

If we adopt a mandatory vaccination policy, what are the permitted exceptions to the policy? If an employer adopts a mandatory vaccination policy (i.e. a requirement that all employees must get vaccinated), it must still provide exceptions for: 1) those employees for whom a vaccine is medically contraindicated; 2) those for whom medical necessity requires a delay in vaccination; or 3) those legally entitled to a reasonable accommodation because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

NOTE: Whether an employer chooses to adopt a mandatory vaccination policy or a “vaccine or testing” policy, the policy must include provisions addressing: 1) determining the vaccination status of your employees; 2) providing paid time off for vaccination; 3) testing the unvaccinated and removing employees testing positive for COVID-19 from the workplace; 4) providing certain information to employees; and, 5) disciplining employees for violating your policy.

How do we determine the vaccination status of our employees? The following can be used to determine vaccination status: 1) a record of immunization from a health care provider or pharmacy; 2) a CDC COVID-19 Vaccination Card; 3) other medical records documenting vaccination; 4) a copy of immunization records from a public health, state, or tribal immunization information system; 5) any other official documentation that contains the type of vaccine, date of administration, and the name of the health care professional or clinic administering the vaccine. If an employee has lost their record of immunization, the employee may also submit a written statement attesting to their vaccination status. The FAQs on the OSHA website explain the requirements for an employee's written statement. An employer must document partially and fully vaccinated employees. Thus, an employer's policy must require an employee to provide documentation of both the first and second dose of an approved vaccine. The vaccination records must be treated as confidential medical records. Finally, an employer must maintain a roster of all employees and identify each as: 1) fully vaccinated; 2) partially vaccinated; 3) not fully vaccinated due to a medical or religious accommodation; or 4) not fully vaccinated due to not providing proof of vaccination.

How much paid leave do we need to provide for vaccination? An employer needs to provide up to 4 hours of paid leave for an employee to get vaccinated (for two dose vaccinations that is up to 8 hours total). An employer cannot require an employee to use accrued sick leave or PTO for this purpose. An employer must also provide paid leave to employees who need to recover from the side effects of vaccination dose. An employer may require an employee to utilize accrued sick leave for time off for recovery. An employer may also set a reasonable cap on paid leave for recovery. OSHA's guidance states that it would consider a two-day cap (for each dose) to be a reasonable cap.

What are the testing requirements for unvaccinated employees? Unvaccinated employees who report at least once every seven days to a workplace where others are present (either employees or customers) must be tested weekly and provide documentation of the test results weekly. Employees who telework must obtain a test within seven days of returning to the workplace and provide the test results on or before the day that they return. Newly-hired employees must also obtain a test and provide the results on or before their first day of work. Although employers may choose to conduct testing, they have no obligation to do so and no obligation to pay for testing (although an employer may have an obligation to pay under a collective bargaining agreement). OSHA notes unvaccinated employees can obtain rapid antigen tests at many locations (including pharmacies, urgent care facilities and doctor's offices) and that results are ordinarily available within 15 to 20 minutes. An employee can use a purchased over-the-counter test, but may not both self-administer and self-report the results. The results of the test must be observed by the employer or an authorized telehealth proctor. Unvaccinated employees who do not timely provide test results must be removed from the workplace until they produce a negative test.

What are masking requirements for those who are not fully vaccinated? Employees who are not fully vaccinated must wear face coverings or surgical masks in the workplace unless an employee is alone in a room with floor-to-ceiling walls and a closed door; when eating or drinking; wearing a respirator or facemask; or if the employer can show that masking is infeasible or creates a greater hazard. Gaiters are permissible but must be folded over to provide two layers of protection. Face coverings must fully cover the nose and mouth.

What happens if an employee tests positive? Employers must require that employees promptly notify them of a positive COVID-19 test or diagnosis. Employees testing positive for COVID-19 or diagnosed with COVID-19 must be removed from the workplace but may work remotely if able to do so. Employees can return to work if: 1) they obtain a negative nucleic acid amplification test (NAAT) after a positive antigen test; 2) they are released to return to work by a licensed healthcare provider; or 3) they meet the

CDC requirements for return (i.e., after 10 days if no symptoms, or if the individual experienced symptoms, 10 days after the first symptom and at least 24 hours without a fever). Employers are not obligated to provide extra paid time off for employees testing positive, but those employees are, of course, permitted to use accrued paid time off.

What information must we provide to our employees? Employers are required to provide a copy of their vaccination policy to employees in a manner similar to how they notify them of other employment policies (including translation into an employee’s language where appropriate). Employers must also provide employees with the CDC’s document “Key Things to Know About COVID-19 Vaccines” and notify them of the anti-retaliation provisions of OSHA and of the criminal penalties for knowingly supplying false statements and information under 18 U.S.C. 1001 and Section 17(g) of OSHA.

How long do unvaccinated employees have to get the vaccine if they do not wish to do weekly testing? Employees must get the one-dose Johnson & Johnson vaccine or complete both doses of the Pfizer or Moderna two-dose vaccines by January 4th.

What if an employee refuses to comply with our policy? OSHA states in its FAQs that an employer policy should include that an employee is subject to discipline for failing to comply with an employer’s policy. As noted above, an employer is required to remove from the workplace an unvaccinated employee who fails to timely provide test results.

When does our policy need to be in place? Employers must have compliant policies in place 30 days from today (December 5, 2021).

Please reach out to your Roetzel attorney if you need assistance with implementing a vaccination policy in compliance with OSHA’s new rule; determining whether you meet the 100-employee threshold; or any other question related to the day-to-day administration of these new requirements. Roetzel will also be hosting a webinar next week to discuss this topic more in-depth.

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