



OSHA Releases Emergency Temporary Standard for COVID-19 Vaccination, Testing, and Face Coverings

BRIAN P. GOODMAN, STORM B. LARSON | 11.05.21

On November 4, 2021, the Occupational Safety & Hazard Administration (“OSHA”) released its Emergency Temporary Standard (“Rule”) which requires most private-sector employers with 100 or more employees (“Covered Employers”) to adopt COVID-19 vaccination and testing policies. Public employers in Wisconsin are not subject to this rule. The effective date of this Rule is November 5, 2021. After the effective date, Covered Employers have 30 days to comply with all provisions of the Rule with one exception: the mandatory weekly testing provisions of the Rule will not take effect for 60 days. This means that employees have until January 4, 2022, to be fully vaccinated against COVID-19 to avoid the weekly testing provisions. The Rule provides that Covered Employers must comply with this Rule notwithstanding any state or local law that prohibits employers from implementing policies that require vaccination, face-covering, or testing as a condition of employment.

Covered Employers who have already implemented policies regarding vaccinations and/or other mitigation efforts should revisit those policies to ensure that they are compliant with the requirements of the Rule, which are very specific. While OSHA has provided model policies for compliance with this Rule, OSHA encourages Covered Employers to consult with legal counsel in the drafting and administration of their individual policies. Additionally, this Rule sets forth the minimum standard of compliance which Covered Employers must take. Covered Employers may enact additional precautionary measures. Similarly, Covered Employers must comply with any state or local laws that require additional precautionary measures so long as those measures are stricter than the Rule’s mandates.

The same day the Rule was issued, a lawsuit was filed with the U.S. Court of Appeals for the Seventh Circuit (which covers Wisconsin) seeking to block the Rule from taking effect. That court has not yet ruled on the lawsuit, and so Covered Employers should begin assessing steps to come into compliance with the Rule's requirements.

Who Qualifies As A “Covered Employer?”

Generally, any private-sector employer that has at least 100 employees on November 5, 2021, or at any point thereafter is a Covered Employer. If a Covered Employer drops below 100 employees after November 5, 2021, the Covered Employer remains a Covered Employer for the duration of the Rule.

Employers are required to count every employee across the United States regardless of where the person performs work. So, even if an employer has multiple locations, so long as the total number of employees combined is at least 100, the Rule applies to that employer. Employers are required to count employees who work from home as well as part-time employees. However, independent contractors are not included in the count. An employer is not a Covered Employer if they are covered under the COVID-19 obligations for federal contractors or for healthcare services.

How Do Covered Employers Comply with the Rule?

The Rule provides two options for Covered Employers to be compliant with the Rule. Covered Employers must choose one of the two options and implement a *written* workplace policy that complies with the requirements of the selected option and the Rule.

Under Option 1, a Covered Employer must implement a mandatory vaccination policy that requires each employee to be fully vaccinated against COVID-19. This is OSHA's stated preferred option. Under this option, only the following three categories of employees can potentially qualify for an exemption from the employer's vaccine mandate: (1) employees for whom a vaccine is "medically contraindicated" (this term is not defined by the Rule); (2) employees who, out of medical necessity, require a delay in vaccination; or (3) employees who are legally entitled to a reasonable accommodation under federal law due to a disability or a sincerely held religious belief, practice, or observance.

The Covered Employer must make the determination if an employee falls into one of those categories, consistent with applicable law. If the Covered Employer determines an employee does not fall into one of those categories and the employee remains unvaccinated, the Covered Employer will not be in compliance with the Rule. Such a Covered Employer will need to take steps to ensure the employee becomes vaccinated, make the employee work from home, or contemplate unpaid leave or termination of the employee to ensure compliance with the Rule.

However, if a Covered Employer determines that an employee falls into one of the three categories and therefore cannot receive the vaccine, the employer will still be deemed compliant with the Rule, provided the employee complies with the testing and face-covering requirements discussed further under Option 2. If an employee has been fully vaccinated and still chooses to wear a face-covering in the workplace, the Rule states that “[e]mployers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face-covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).”

Under Option 2, a Covered Employer must establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing (once every seven days) and wear a face covering while in the workplace (with limited exceptions such as employees in an enclosed room by themselves or eating or drinking). The main difference between Option 1 and Option 2 is that Option 1 would only allow employees to use testing in lieu of vaccination in the three enumerated exceptions. Under Option 2, employees could use testing in lieu of vaccination regardless of the reason for the employee’s vaccination status. The Rule includes specific requirements for the weekly testing, including that the test not be solely self-administered by the employee without observation. Test results must be reported to the Covered Employer. In some cases, an employee may claim that testing for COVID-19 conflicts with a sincerely held religious belief, practice, or observance or an employee’s disability. In such instances, the employee may be entitled to a reasonable accommodation, and the Covered Employer should consult legal counsel to discuss options.

Employees who work exclusively remotely from their homes, work at a worksite where there are no other individuals present, or work exclusively outside (except for de minimis time indoors, such as to use the bathroom) are not required to comply with either the vaccination, testing, or face-covering requirements of the Rule. However, those employees still count toward the 100-employee threshold discussed above.

In addition to adopting a formal policy, Covered Employers must provide information to employees on vaccine safety, employee protection from discrimination or retaliation under the Occupational Health and Safety Act (“OSH Act”), and the prohibition on employees knowingly supplying false statements or documentation and the potential criminal penalties associated with such false statements or documentation.

What Are the Major Obligations of a Covered Employer?

The Rule requires Covered Employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each

employee's vaccination status, and maintain a roster of each employee's vaccination status. These records should be stored as confidential medical records under the Americans with Disabilities Act and kept separate from regular personnel files. Additionally, the Rule requires Covered Employers to provide an employee (or the employee's representative) with access to their own records upon request. The Rule also requires Covered Employers to provide employees up to four hours of paid time off at their regular rate of pay to receive **each** primary vaccination dose. Thus, employees who will receive a two-dose vaccination such as those offered by Moderna or Pfizer must be given up to 4 hours of paid time off for each dose.

Additionally, Covered Employers must provide reasonable paid time off for employees to recover from side effects experienced following each dose if those employees do not have accrued sick leave available to use for such a purpose. OSHA has stated that providing up to two days of paid time off as needed by an employee to recover from side effects is presumptively reasonable under the Rule.

For Covered Employers with employees who need to submit to weekly testing, the Rule does not require Covered Employers to pay for the costs associated with testing, subject to other applicable laws or collective bargaining agreements. However, Covered Employers might be obligated to pay hourly employees for the time associated with getting tested, particularly if that testing is performed at the worksite.

The Department of Labor interprets the Fair Labor Standards Act to require employers to pay hourly employees for the time associated with testing if the testing "is necessary for them to perform their jobs safely and effectively during the pandemic." This time would also count towards whether that employee is eligible for overtime in a given workweek. Covered Employers should consult with legal counsel if they have questions about whether the time employees spend testing is compensable time in a given situation. Covered Employers are permitted to voluntarily assume all the costs associated with getting testing.

Covered Employers are also 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. Covered Employers should take care not to reveal any otherwise confidential medical information about any employee in the course of making this vaccination rate information available.

What Else Should Covered Employers Know?

All employees, regardless of vaccination status, must promptly notify Covered Employers if they test positive for or are diagnosed with COVID-19. Such employees

cannot return to work until they have met the requirements to return to work established by the Rule. Notably, the Rule does not require Covered Employers to notify employees of positive cases in the workplace or conduct contact tracing to determine if any employees or other individuals were close contacts of an employee with COVID-19. A Covered Employer could take such measures on a voluntary basis as a mitigation strategy. Covered Employers are also not required to provide paid leave to employees who cannot perform work because they have COVID-19. Covered Employers must report in-patient hospitalizations (within 24 hours) or deaths (within 8 hours) due to COVID-19 to OSHA if the employee's COVID-19 infection was work-related, regardless of how long after the infection the employee was hospitalized or died.

Conclusion

This article is designed to cover some of the major issues employers will face under the Rule, but there are additional complexities and details in the Rule that could be relevant in a given situation. Also, OSHA will likely release additional guidance and information about this Rule. Covered Employers are advised to start assessing the steps they need to take to come into compliance with the Rule by the deadline, subject to further legal developments. Please reach out to the authors of this article or any member of the Boardman Clark Labor & Employment Practice Group with questions about the Rule and its applicability.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

Authors

Brian P. Goodman
(608) 283-1722

Storm B. Larson
(608) 286-7207