

COVID VACCINE MANDATE OVERVIEW AND BEST PRACTICE

Federal Vaccination Mandate:

- Vaccination mandate is only for federal workers
- Private companies with 100+ employees must mandate vaccine or require weekly testing of employees
 - The clock starts ticking for implementation when the Department of Labor / Occupational Safety and Health Administration (OSHA) issues its Emergency Temporary Standards (“ETS”), expected in coming weeks. After that, private companies are likely to have a period of 50 to 90 days to comply.
 - The 21 states + Puerto Rico that have state plans that cover private employers must adopt their own standards on vaccination and testing that must be “at least as effective in providing safe and healthful employment” (e.g., Cal/OSHA). Those plans must be published within 30 days of the ETS.
 - Violations of ETS are categorized as either “serious” or “willful” and result in a fine. The current fine for a serious violation is \$13,653 per violation. The current maximum penalty for a “willful” violation is \$136,532.
 - The published ETS will clarify certain open items such as (a) the definition of an employee (e.g., confirming that “volunteers” are not subject to the mandate) and (b) whether the employer must pay for testing.

Implementation:

1. Draft a Policy – Key Elements Include:

- a. Purpose: Communicate to staff WHY this policy is being put into place.
- b. Scope: Who does the policy apply to (All employees? Only those in a certain public-facing department?)
- c. By when do employees need to comply
- d. How will they show proof of vaccination (keeping in mind that there are now many ways to obtain fraudulent documentation)
- e. Maintaining fully vaccinated status (e.g., will you require boosters?)

2. Reasonable Accommodations (based on Disability and Sincerely-Held Religious Belief)

- a. If an employee asks not to comply, is the request for an “exception” or a “reasonable accommodation”?
- b. If it’s a request for an exception: No legal duty to provide an exception and the employer can mandate compliance or terminate the employee.
- c. If it’s a request for a reasonable accommodation, the employer has the duty to engage in the “interactive process.”

- d. How do you know an employee is asking for a reasonable accommodation? It's when a disability or sincerely-held religious belief creates a barrier to the employee's ability to perform the "essential functions" of the job.
- e. The interactive process is a good faith back-and-forth discussion between the employer and employee in an attempt to identify a change to the employee's position that will accommodate the religious belief or disability.
- f. Threshold: The employee must first demonstrate they have a "disability" or "sincerely-held religious belief."
 - i. Disability – Employer can require employee to provide a medical certification
 - ii. Sincerely-Held Religious Belief – Employer can ask follow up questions confirming the belief is based on a religion and whether it is sincerely held.
- g. Undue Hardship: An employer may deny a request for a reasonable accommodation if it would cause an "Undue Hardship" or "Undue Burden." The definition varies slightly depending on your state. In California, "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the cost of the accommodation, the employer's financial ability to provide the accommodation, and the nature of the business or operation.
- h. Direct threat: A "direct threat" in the workplace is a significant risk of bodily harm. If the requested accommodation would constitute a direct threat to the health or safety of others and such risks cannot be sufficiently mitigated or eliminated by another reasonable accommodation, employers may deny the request for reasonable accommodation.

What to Do Now?

1. **Does ETS apply to your workplace?** Stay on the lookout for OSHA standards
 - a. If yes, are you going to require vaccination?
 - b. If no, how are you going to facilitate testing and how will employees report results? Determine if your organization is required to pay for testing? If so, does the organization's insurance policy cover surveillance testing?
2. **If your organization decides to implement a vaccine mandate:**
 - a. Analyze Job Descriptions – Ensure "essential functions" are clear for each position
 - b. Think through the process for rolling out mandate
 - c. Provide a training for managers to have a basic understanding of the issues and triage conversations with employees.
 - d. Determine how to provide paid time off for vaccination and/or side effects
 - e. Identify who is responsible for leading the interactive process with employees
 - f. Determine a protocol for record-keeping
 - g. Identify policies you will implement for contractors or volunteers
 - h. Identify who in your organization will interface with employees who refuse vaccination and/or testing.