



Hurry Up and Wait: Employers Await the OSHA Rule Requiring Either Vaccine or Weekly COVID-19 Testing for Employees of Larger Employers

Despite the fact that the COVID-19 vaccines are highly effective against serious illness/death and are free to all eligible Americans, our country has struggled with a recent surge of COVID-19 hospitalizations and deaths. In response, President Biden made an unprecedented move by directing the Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard requiring private employers who employ 100 or more employees to mandate that employees either receive the COVID-19 vaccine or in the alternative undergo weekly testing for COVID-19. OSHA requires all employers under its General Duty Clause to provide a safe workplace which is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees."

While there are a number of large employers including Apple, Microsoft, Tyson Foods, and United Airlines who have mandated the COVID-19 vaccine or testing for (some or all of) their employees, to date, the vast majority of employers have opted to not require but encourage employees to obtain the vaccine. This has been met with limited success with only $\frac{3}{4}$ of American adults receiving at least one COVID-19 vaccine shot. While every state in the U.S. has mandated vaccines for children to attend public schools, it has never been the role of an employer to mandate a vaccine. With this OSHA rule, the federal government has attempted to remove the onus from the employer.

As of yet, OSHA has not released the rule or any related guidance. Employers can take a breath because it will take time for OSHA to draft the rule and then to actually implement it. The rule will outline the key terms such as: timeline for compliance; requirements related to the notification to employees; verification of vaccine status; process for obtaining and verifying medical or religious exemptions; alternative weekly COVID-19 testing process. Both federal laws such as the Americans with Disabilities Act and Title VII, as well as state laws, require employers to consider reasonable accommodations to a vaccine mandate or testing mandate if a qualified employee with a disability requiring a reasonable accommodation or if an employee has a sincerely held religious belief which prohibits the employee from obtaining the vaccine. Employers will need to navigate any request for disability or religious accommodation in compliance with the applicable laws.

In regard to the alternative weekly testing option, we are short on facts. OSHA must develop rules to establish the process for employee testing and verification. According to the White House, the requirement will be that "any workers who remain unvaccinated are to produce a negative test result on at least a weekly basis before coming to work." This statement implies that the employee will be able to obtain a test outside of work and submit the result. However, off-site or at-home testing requires an employer to trust that the employee will timely complete this step to be eligible to work as scheduled. It is also unclear whether the employer must reimburse the employee for the cost of the test given that it is required condition of employment.



Employers will need to develop a plan for when an employee fails to submit the required test and how to ensure adequate staffing.

Employers will also face mixed reactions about the OSHA vaccine/testing mandate from their employees. It will be critical to remind employees to keep any discussion professional and to remind them that any discussion cannot violate your company's policies, including, but not limited to, policies prohibiting discrimination.

In the meantime, employers are stuck trying to not only answer their own questions on how to logistically meet this new requirement but also respond to critical questions and concerns raised by employees. For employees who reject both the vaccine and the weekly testing without an exemption, termination or unpaid leave appear to be the only option. The State of Oregon has previously stated that employees who quit their jobs to avoid a COVID vaccine mandate will generally not be entitled to unemployment. Other states are likely grappling with this issue right now.

There will be time to implement the OSHA rule and we will provide timely updated guidance to help. Of course, we anticipate that as soon as the OSHA rule is published that there will be numerous lawsuits objecting to the imposition of a vaccine mandate or alternative testing. These lawsuits could result in different state or even nationwide injunctions which will prohibit OSHA from enforcing the rule. While this OSHA rule will impact less than 3% of American employers, it is anticipated to impact many millions of employees.

Contact Us:

Any questions regarding employees and vaccines, please reach out to our Employment attorneys at any of the email addresses below or 503.228.6044.

Kelly Tilden ktilden@fwwlaw.com

Kim McGair kmcgair@fwwlaw.com

Trish Walsh twalsh@fwwlaw.com

Jon Himes jhimes@fwwlaw.com