

OSHA ADVISORY

What Will Enforcement of an OSHA Vaccine Mandate Look Like? Willful Noncompliance Could Be Costly.



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Most employers are aware that the Biden Administration has ordered OSHA to issue an Emergency Temporary Standard (“ETS”) requiring employers with 100 or more employees to mandate vaccines or require unvaccinated employees to be subject to mandatory testing. While many details have yet to be ironed out, one thing is clear: a vaccine mandate will be issued and most likely will be enforceable, at least until the inevitable court challenges run their course. The reason for this is that in order for a court challenge to result in the stay of such an ETS, a challenger must demonstrate that enforcement of the standard is ultimately likely to succeed and that the challenger will suffer irreparable harm if the stay is not issued. This is a high bar to clear. Therefore, the ETS, whatever its form, may take effect in the near-term, even if it is ultimately struck down.

What should be of concern to employers is the manner in which OSHA will enforce the new standard. A “serious” violation of an OSHA standard can result in penalties above \$13,000 dollars. However, if OSHA determines that a violation is “willful,” i.e., if an employer intentionally disregards a standard’s mandates, or acts with “plain indifference” with respect to the same, OSHA can issue fines of up to \$136,532. In the case of mandatory vaccines, employers covered by the ETS will be well aware of the new requirements. While good-faith efforts to implement the required vaccination program will likely not result in heavy-handed enforcement, covered employers who choose not to take the required steps—for whatever reasons—run the risk of incurring significant fines.

As always, we recommend that employers who are facing a new standard come into compliance with the terms thereof. Because we do not yet know the precise requirements of the ETS, it is difficult to tell what steps we should take now. At the very least, employers should begin considering the following:

- how to administratively handle a vaccine mandate and testing, e.g., how you will determine and track the vaccination status of employees while maintaining privacy, and how you will undertake testing;



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- how to prepare your workforce for the fact that a mandate will be implemented, e.g., make sure they are aware that the requirements for employers will not be optional;
- how to take the appropriate disciplinary actions for employees who do not comply with your policies; and
- whether employees can continue—or go back to—remote work, as OSHA standards typically are not enforced at home worksites.

We will continue to monitor OSHA's ETS and provide further updates as appropriate.