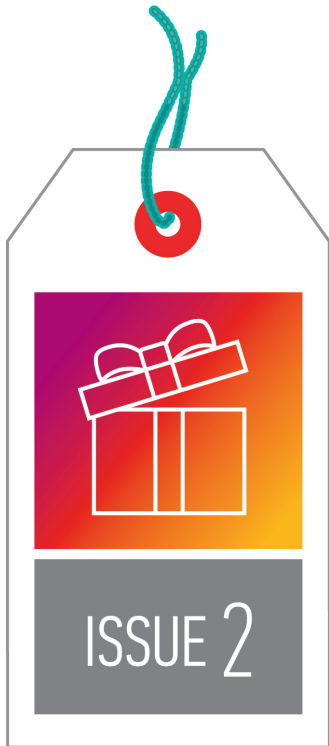


Employers Are Offering Different Types of Shots at This Year's



Employer vaccination policies are probably the hottest workplace topic in this final

quarter of the calendar year. Some employers are even planning to offer COVID-19 vaccination shots at holiday parties to make it easier for employees to get vaccinated.

On Friday, November 5, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued its long-awaited emergency temporary standard (ETS) requiring all employers with 100 or more employees to mandate vaccination and/or weekly COVID-19 testing. The employee count for these purposes includes employees across all U.S. workplaces, regardless of where the work is performed, so most national retailers likely fall within the ETS.^[1] At the time of this writing, the ETS is being challenged by a number of lawsuits, alleging it was not properly enacted and its application should be enjoined. While it is unlikely the legality of the nationwide ETS will be fully resolved before this article is published, employers are still able to implement mandatory vaccination policies at their own volition, regardless of the outcome of the challenges, and subject to applicable state or local regulations.^[2]

Survey Workforce and Hold Information Sessions

Before implementing a mandatory vaccination policy, or even starting a companywide vaccine drive, employers might want to take the temperature of their workforce to try to anticipate, and address, any potential negative repercussions. For example, if a company decides to mandate vaccination and it turns out 80% of its workforce is disinclined towards vaccination and not subject to any exemption, are they prepared to fire all those people on the eve of a busy holiday season? Have they contemplated other measures, such as frequent testing? Do they know how their employees would react to that? Companies can more effectively plan how best to tailor their policy if they are able to anticipate their employees' reactions.

Along those lines, many individuals' initial thoughts about vaccines are based on false or limited information, so companies may wish to provide some educational resources to help address common misperceptions about the vaccines. ([Click here](#) for one example.) Individuals should be encouraged to speak with their own healthcare providers.

Set a Reasonable Compliance Deadline

Because the two-dose Pfizer and Moderna vaccines are given 21 and 28 days apart, respectively, and a person is not considered fully immunized until two weeks have passed following their last dose, employers will need to provide at least two months from implementation of a mandatory vaccination policy to compliance, if not more (to allow for scheduling challenges).

Consider Incentives

Carrots always work better than sticks. Even if the eventual outcome is that noncompliance with a mandatory vaccination/testing policy will lead to termination from employment, employers are more likely to encourage compliance if they incentivize employees to do so. One idea is to have a raffle for an enticing prize, and each employee who is vaccinated gets a raffle entry. The prize value could increase depending on the number of entries, thus incentivizing more people to participate. To similarly incentivize individuals who are not able to be vaccinated due to medical or religious reasons, employers can offer them an entry into the competition if they complete a COVID-19 workplace awareness training session.

Offer Paid Time Off for Inoculation

The ETS contemplates up to four hours of paid time off if workers are not able to obtain the vaccine during their off-duty hours. A good practical tip is to provide employees with a list of nearby vaccine providers, with information about appointment scheduling and costs (if any). While some states require employers to cover the costs of testing and/or vaccination if required by company policy, if it can be demonstrated that free providers were available nearby, a company can argue that the costs were not reasonably incurred and, thus, are not

reimbursable.

Offer Paid Time Off for Side Effects

If employees experience side effects from the vaccine, allow them to take up to two days of accrued sick leave (or other applicable leave) to recover. If the employee does not have accrued paid sick leave or PTO, consider offering supplemental paid time off for this reason.

Consider Reasonable Accommodations When Warranted

Under federal law, the only grounds on which an employer is required to grant exemptions are if an employee's medical condition (disability) or a sincerely held religious belief prevents the employee from being vaccinated. Of note, this does not require employers to accommodate (exempt) individuals who simply choose not to be vaccinated. The accommodation/exemption question should be considered on an employee-by-employee basis. Some examples of accommodations include offering testing in lieu of vaccination, requiring unvaccinated employees to adhere to additional workplace safety protocol (such as masking or limited interpersonal contact), or authorizing remote or off-hours work schedules, if applicable (such as for inventory/stock personnel or bookkeepers). If a worker requests a reasonable accommodation because the worker cannot be vaccinated, be tested for COVID-19, and/or wear a face covering because of a disability (as defined by the Americans with Disabilities Act) or because it conflicts with their religious beliefs, the company will need to assess whether these employees can be reasonably accommodated without imposing an undue hardship.

Testing as an Option

If employers decide to offer testing as an option to vaccination, the ETS requires testing at least once every seven calendar days, regardless of an employee's work schedule. The requirement also would apply to new hires before their start date. COVID-19 tests satisfying the requirements of the standard include tests with home or on-site collected specimens that are processed by a laboratory, proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing are either done or observed by the employer.

Verify Compliance, but Maintain Confidentiality

Under the ETS, employers must obtain, verify, and maintain records documenting vaccination status, as well as the results of any COVID-19 tests taken as an alternative to a workplace vaccination policy. Regardless of the

status of the ETS, it is a good practice to verify compliance and to retain records of same. These records should be treated like confidential medical records, should be password-protected, and should not be disclosed to others (including other employees, vendors, customers, etc.) except as required by law. One recommendation is to have a limited COVID-19 task force trained in the relevant issues that exclusively handles records and accommodation requests.

While this update is not intended to cover all potential scenarios, these are some of the high-level considerations related to implementing a workplace vaccination policy. We are continuing to track the ETS and related legal challenges.

Endnotes

[1] This article does not discuss the mandatory vaccination requirements applicable to federal contractors.

[2] While the recommendations also would comply with the requirements established in the version of the ETS published November 5, 2021, implementation of those requirements has been temporarily halted via a U.S. Court of Appeals for the Fifth Circuit injunction while the substantive legal challenges are briefed and reviewed in federal court.

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