

Answering Questions About the New Rules From OSHA on Covid

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FULL TEXT

We're answering your questions about the new OSHA rules for employers with 100 or more workers. This F.A.Q. was last updated at 7 p.m.

Corporate America has entered the next phase of its effort to counter the spread of the coronavirus. Companies of 100 or more employees have until Jan. 4 to ensure all their workers are either fully vaccinated or submit to weekly testing and mandatory masking. The measure was announced by President Biden in September, and details were released on Nov. 4 by the Labor Department's Occupational Safety and Health Administration.

OSHA's rule will affect some 84 million private-sector workers across the country, including some 31 million who are believed to be unvaccinated.

Here are answers to some of the most commonly asked questions about what OSHA's rule means for American workers and their employers.

This F.A.Q. was most recently updated at 7 p.m. Eastern time on Nov. 4 to add answers to the following questions: Is there any corporate liability if a worker experiences adverse effects from the vaccine? What constitutes a sincerely held religious belief?

Who Is Affected

Which employers are covered by OSHA's rule?

Companies of 100 or more employees must require their workers to be fully vaccinated or submit to weekly coronavirus testing and mask-wearing while in the workplace.

Health care providers are covered by a different OSHA rule, and government contractors and Medicare and Medicaid providers have separate mandates they must comply with.

When does the rule go into effect?

Workers must be vaccinated or start getting tested by Jan. 4. The deadline for employers to enforce the mask mandate is Dec. 5.

What about smaller employers?

OSHA is considering whether to extend the rule to employers with fewer than 100 workers.

Do part-timers and contractors count toward the 100-worker threshold?

All employees, including those working part time and those working from home, count toward the threshold.

Independent contractors do not.

Will the vaccine-or-test requirements apply to remote workers?

Tele-workers and people who work exclusively outdoors will not be required to be vaccinated or submit to weekly testing because OSHA's rule is focused specifically on ensuring people's protection against the coronavirus in the workplace. Employees who work part of the time in the office and the rest of the time remotely are required to follow the rule.

If employees are spread across various workplace locations, is the company still expected to comply with OSHA's rule?

Yes, companies whose 100 or more employees are distributed across different sites are expected to comply, according to the Labor Department.

Will this rule apply to employers that are not private-sector businesses, such as local governments and public school districts?

OSHA's rule applies to the private sector, including nonprofits. However, certain states have their own workplace safety rules that extend to the public sector as well. Those states' rules are required to be at least as effective as the federal government's.

Does OSHA's rule cover employees of colleges and universities?

Private colleges and universities are covered under OSHA's rule. Public ones could be covered in states with their own workplace safety agencies.

Does OSHA's rule cover health care workers?

This rule does not cover health care workers because there was a previous set of emergency temporary standards specific to the health care industry, which faces more stringent vaccine requirements. And all workers at health care centers receiving either Medicare or Medicaid funding must be vaccinated by Jan. 4 and do not have the option to be tested instead.

Do companies affiliated through common ownership have to count all employees when looking at the 100-worker threshold?

Labor lawyers said that if related companies are managed in a way that combines control of occupational safety and health measures, then their employees should be counted together toward the 100-worker threshold.

Does the 100-worker threshold count just United States-based employees, or all employees globally?

Labor lawyers argue that a company must have at least 100 United States-based employees to be covered by OSHA's rule.

If several small businesses adding up to over 100 workers share a work space, are they required to comply with the rule?

Employers are only required to count the employees connected to their own business, not any other workers who might be in a shared site.

How will this affect nonprofits with large volunteer bases?

Volunteers are not employees and they're not part of OSHA's requirements. Certain companies might decide to apply their policies more widely, including to volunteers.

The Vaccine Requirement and Exemptions

Which vaccines count toward the requirement?

Workers can get any vaccine listed for emergency use by the World Health Organization, including two doses of Moderna or Pfizer-BioNTech and one dose of Johnson & Johnson.

Do workers who recently tested positive for the coronavirus still have to comply?

OSHA has determined that it would not be feasible for employers to permit exemptions based on prior infection.

Who can claim an exemption? Who will determine those exceptions?

Employers are required to give two kinds of exemptions to the vaccine mandates: medical and religious.

Exemptions for people with certain medical conditions are protected under the Americans With Disabilities Act.

Many employers require people to present a doctor's note to qualify for this exemption. Exemptions for people with sincerely held religious beliefs are protected under Title VII of the Civil Rights Act. So far, no major religion has barred its members from taking the coronavirus vaccine.

What constitutes a sincerely held religious belief? Are there tests or criteria that can be applied?

It is up to employers to determine who qualifies for a religious exemption from getting the vaccine on a case-by-case basis. Typically this involves an inquiry about whether an employee's stated belief is consistent with their behaviors.

Will employees be given time off to get vaccinated or to recover from side effects?

Employers have to provide paid time off for their workers to get vaccinated, up to four hours, as well as paid sick

leave for them to recover from side effects. They are required to provide this leave starting Dec. 5.

Do employers have to provide their workers with paid time to get booster shots?

Booster shots are not currently required under OSHA's rule, so employers most likely don't have to provide paid time for workers to get them.

Can employers fire workers who don't comply?

The religious and medical exemptions will come into play here -- but when it comes to people who do not have exemptions, employers are generally free to discipline people who don't follow their rules. They may face pushback, though, under collective bargaining agreements.

If workers are fired for not following the rules, are they eligible for unemployment?

A worker's eligibility for unemployment is determined on a state-by-state basis. Typically, people qualify for unemployment if they're terminated through no fault of their own, but each state has its own standards and what that means is up to highly varying interpretations.

Is there any corporate liability if a worker experiences adverse effects from the vaccine?

Employers mandating vaccines are adhering to OSHA's requirements and most likely can't be held liable for any adverse effects. Covid-19 vaccines carry little known risk.

The Test-Out Option

Can workers opt out through testing? Who will pay for those tests?

It will be up to employers to determine whether workers can opt out of getting vaccinated by submitting to coronavirus testing. If workers opt to be tested weekly instead of being vaccinated, they must also be masked in the workplace. OSHA does not require employers to pay for or provide tests, given that the vaccine is free and highly effective, but businesses may be required to pay under collective bargaining agreements or local laws.

Is it legal for employers to require vaccines without giving workers an option to instead submit to testing?

Unless workers qualify for an exemption, employers have the right to mandate vaccines without a testing option. In fact, labor lawyers said that OSHA has indicated it prefers employers to mandate the vaccine.

What tests meet the standards of this rule?

All coronavirus tests approved for emergency use by the Food and Drug Administration are permitted, including so-called PCR tests, considered the gold standard for detecting infection, along with antigen tests, which return generally results more quickly but are less sensitive.

Do employers have to provide their workers with paid time off for Covid testing?

No. Employers have to provide paid time for getting the vaccine and sick leave for recovering from side effects, but they are not required to provide leave for testing.

Enforcement

How will the rule be enforced?

OSHA is expecting that the vast majority of workplaces will comply with its rule, but it will investigate complaints that workers raise. The agency has a whistle-blower system that allows workers to report any possible violations at their workplaces. The agency has tended to be short-staffed on inspectors, labor lawyers said, but it is likely to make enforcement of the rule a high priority.

How will employers verify that workers are vaccinated?

Employers are expected to keep documentation of their workers' vaccination status, such as a copy of their vaccination cards or a signed and dated employee attestation.

How long will employers have to put the new standard into effect?

The deadline for workers to be fully vaccinated is Jan. 4. Employers must start requiring unvaccinated workers to be masked and start offering benefits like paid time off to get vaccinated by Dec. 4.

What is the penalty for violations?

Companies that fail to comply with the rule may be subject to fines, according to an administration official. OSHA's penalties are up to \$13,653 per serious violation.

How can workers report company violations to OSHA?

To report employers who are not in compliance with OSHA's rule, workers can file a written complaint, submit a whistle-blower complaint online or call the agency at 1-800-321-OSHA.

Does the federal rule supersede any conflicting state laws on vaccine mandates?

OSHA's standard pre-empts the existing rules of state governments, except in states that have their own OSHA-approved agencies dealing with workplace issues. Those state agencies have to enact a rule at least as effective as OSHA's.

If a state with its own workplace safety agency refuses to create its own rule and files a lawsuit, will companies have to comply with OSHA's rule until the suit is heard in court, or will the rule be blocked until that time?

The court hearing the legal challenge would address the question of whether or not the employer had to follow the rule.

Once OSHA's rule is put in place, what portion of the American population is expected to be vaccinated?

It is estimated that about 31 million of the 84 million workers covered by the rule are currently unvaccinated and that 72 percent of them will get the vaccine because of the new requirements. A Goldman Sachs analysis in September found that about 90 percent of American adults will have received at least one dose of the vaccine by mid-2022. As of early November, about 80 percent of adults in the United States had been vaccinated.

What legal authority does OSHA have to create this rule?

The Occupational Safety and Health Act gives OSHA authority to respond quickly to emergency situations when workers are confronted with grave threats. Because of the serious threat posed by the pandemic, the agency has issued an emergency temporary standard allowing it to put in place this new rule. Labor lawyers say this is within OSHA's legal authority. Still, the rule is likely to face challenges, and dozens of attorneys general have already threatened to sue.

"The pushback is going to be on the question of, 'Is this an occupational hazard?'" said Doug Brayley, an employment lawyer at the law firm Ropes & Gray. "When you've got a virus circulating everywhere, is it within OSHA's authority to regulate it as an occupational health matter? I think OSHA will prevail, but I'm not certain."

Where can I read OSHA's full rule?

The text of OSHA's guidance is available here.

Photograph

Employers will be required to provide paid time off for workers to get vaccinated, and also sick leave to recover from side effects. (PHOTOGRAPH BY EMILY ELCONIN FOR THE NEW YORK TIMES)

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