

# Pausing to Look at the Recent Executive Order on Vaccination Q & A

On September 21, 2021, MRA welcomed two attorneys, Christine Liu McLaughlin with Godfrey and Kahn law firm and Sean Scullen with Quarles and Brady law firm, to address the September 9, 2021, announcement of President Biden's COVID-19 Action Plan as it relates to employers. There were many insights shared and the session provided great information to help employers know who the Executive Orders applies to, the timeline for implementation and compliance, and what employers can do to be prepared until we have more information.

Although no clear direction has been provided by the Department of Labor, OSHA is expected to release a new Emergency Temporary Standard (ETS) related to vaccinations in the workplace which will apply to both federal employees as well as private employers. During the session we asked the attorneys to address member questions in an effort to ease the anticipation of what lies ahead.

### **Q. What is known about mandatory vaccination or weekly testing requirements?**

**A.** These requirements will be implemented by OSHA through an ETS, which is expected to be published in the coming weeks. It is expected that it will not apply to workers who are working completely remotely.

***What is not known at this time:** It is not known how long employers will have to implement the requirements of the ETS once it is issued, or how the employee number will be counted—by location or employer. Legal challenges are also anticipated, and it is unknown if the ETS will withstand those on the state or federal level.*

### **Q. How far will the mandate for federal employees and contractors extend?**

**A.** The mandate will extend to all federal employees and employees of contractors working with the federal government. It will only apply to certain covered contracts entered into on or after October 15, 2021, and will be issued by the Safer Federal Workforce Taskforce no later than September 24, 2021. \*

***What is not known at this time:** It is not known if the requirement will extend to subcontractors. It is also not known what the consequences will be for noncompliance.*

\* The Safer Federal Workforce Taskforce issued a [FAQ](#) on September 24 with guidance for federal employees and contractors. This information was not available at the time of the webinar but is being provided in response to this question.

### **Q. How does the Executive Order impact health care workers?**

**A.** The Executive Order extends to a larger group of health care professionals and includes hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. The Centers for Medicare & Medicaid Services (CMS) is developing an interim rule to include a comment period that will be issued on or before October 30.

***What is not known at this time:** It is not known if this will apply to all sizes of medical facilities, how to comply, if there is an option to test rather than be vaccinated, or what the consequences for noncompliance will be.*

### **Q. How will time off for vaccination and side effects be treated?**

**A.** Employers will be required to provide paid time off to get vaccinated, recover from side effects, and for testing if exposed or experiencing symptoms, whether vaccinated or not.

***What is not known at this time:** It has not been determined if employers or group health plans will be required to cover the cost of testing. Further guidance is also needed to determine if at-home testing will qualify or if employers will need to provide it. It is also not known if there will be an adequate number of tests available to meet the demand.*

**Q. Will employees be able to request accommodations if they are unable to get vaccinated?**

A. Yes. It is presumed that employees may still request accommodations for medical reasons in accordance with ADA requirements and for religious reasons in accordance with Title VII protections. Employers may request documentation from a health care provider to support a medical exemption request and there is a high threshold to prove undue hardship. Exemption requests for sincerely held religious beliefs have a much lower threshold and do not need to be considered if the cost is more than *de minimis* value or burden. Things that could be considered to impact cost or burden include overtime, additional job duties transferred to other employees to the extent of creating a larger workload, or excess cost related to testing procedures.

**Q. What can employers do now to be more prepared for when the ETS is issued?**

A. There is still much unknown about what the ETS will look like, so it is not recommended that employers change policies or procedures until more is known. It is suggested that employers communicate they are aware of the pending ETS and will provide more details once they become available.

In addition, employers can be proactive in the following ways:

- Contact any collective bargaining organizations to discuss the potential impact and problems that may arise if vaccination is required.
- Collect employee counts by organization and location, including seasonal and temporary employees.
- Survey employees to find their views on vaccination requirements.
- Identify methods of collection and protecting vaccination information.
- Talk with your risk management team.
- Contact your worker's compensation provider to determine how claims will be handled related to side effects.

While many questions were answered during the webinar, there were several additional questions asked using the chat feature during the presentation. They are addressed by topic below.

**Vaccination Verification and Testing****Q1. Must we comply with this mandate if we do not have to comply with OSHA?**

A. As OSHA will be the agency responsible for issuing and enforcing the ETS, all employers covered by OSHA must comply with the forthcoming ETS.

**Q2. Will employers be required to collect proof of vaccination? Is an employee attestation in lieu of proof of vaccination acceptable? Will new hires need to be vaccinated prior to starting?**

A. We are awaiting guidance on requirements for employers to collect proof of vaccination and verification of vaccination status.

**Q3. What is considered confidential information and what is not? How does HR communicate someone cannot come into the office or attend an in-person event because a negative test result was not received, without disclosing they are an unvaccinated employee?**

A. The ETS will address more specifics around administration and tracking of vaccine status and weekly test results. It is important that employers implement a tracking system that maintains the confidentiality of all medical information received including vaccination documentation and COVID-19 tests results. As with all medical information, this should be maintained within HR and stored in a separate medical folder. Information should only be shared with managers out of business necessity. Employers should refrain from communicating, in general, about employee's vaccination or testing status.

**Q4. Should we start collecting information on who has received a vaccine already?**

A. Employers can begin to prepare for the ETS and develop a system for asking employees whether they have been vaccinated and maintain confidential records of employee vaccination status. If you decide to collect vaccination records, it is recommended that you treat those records as you would other medical records.

**Q5. What do you recommend if you survey employees and they refuse to disclose their vaccination status?**

A. If an employee chooses not to disclose their vaccination status, that person is considered unvaccinated.

**Q6. At the time the ETS is effective who will determine if employees need to be vaccinated or submit to the weekly testing? Is the decision based on an accommodation? Will an accommodation exempt an employee from getting vaccinated AND getting tested weekly, or just getting vaccinated?**

A. While we are awaiting additional guidance in the ETS, it is ultimately up to the employer to determine if they will mandate the vaccine or allow employees or choose weekly testing as an alternative. More specifics will be outlined in the ETS for employers; however, it is likely that an employee will be required to either be vaccinated or submit to weekly testing and not exempt from doing either unless they work 100 percent remotely.

**Q7. Some companies are coming out with programs to help with the administration to track vaccine status. Do you have a list of companies?**

A. MRA has not compiled a list of vendors who administer vaccine tracking status. Employers can contact their HRIS or payroll provider to confirm if they assist with tracking. Your benefits broker may also be able to provide vendor referrals.

**Q8. If we are required to keep documentation of vaccination status, how long will we need to retain records? Retention laws for employee medical files states 30 years, so would this be the same?**

A. It is not clear what the retention guidelines will be at this time.

**Q9. What type of testing will be allowed under the ETS? Will employers be allowed to require onsite testing? Will employees be able to test at home? Will rapid tests be acceptable?**

A. It is expected that the ETS will clarify the kinds of testing that will be acceptable and will include the types of tests as well as where testing can be conducted.

**Q10. If weekly testing is required, does the testing need to be done on the same day each week? If an employee tested positive for COVID and is still within the 3 months following, is testing or vaccination still required?**

A. We expect clarification on the specifics of testing requirements to be included in the ETS. There may be alternatives for employees who work rotating or irregular schedules. Testing would be required of anyone who has not been vaccinated, regardless of if that employee has recently tested positive for COVID-19. Much is unknown about the length of time each person retains antibodies and a recent diagnosis is not considered and exemption from testing or vaccination.

**Q11. Will we be required to pay employees for all time spent testing? How will this be done if they test from home or at a location other than the worksite? Will pay be required for employees who test because they have symptoms as well as weekly?**

A. All time spent testing is compensable if it is required by the employer, regardless of the location. Currently, testing when experiencing symptoms is not compensable but we may see further guidance issued in the ETS.

## **Remote Workers and Qualifying Employees**

**Q12. How will remote workers be impacted by the ruling? How is remote worker defined?**

A. We anticipate receiving more information in the ETS, but Labor Department officials confirmed that employees who are 100 percent remote and do not come into contact with others are exempt from the emergency rule. Employees who have a hybrid work arrangement (they work some days in the office and some days remote), employees who primarily work remote but occasionally come to the office for meetings, projects, etc., will be impacted by the ruling.

**Q13: How will the workers be counted to determine the “100 workers” threshold?**

A: We are awaiting more guidance to determine if this threshold will include temporary and seasonal workers, owners, fully remote employees, and employees on layoff or leave of absence. We are also awaiting guidance to determine how common ownership impacts the worker count, if employees are counted based on location or entity, and how employers need to address a variable workforce where the employee count rises above or drops below the 100-worker threshold during the effective dates of the ETS.

## **Federal Employers and Contractors**

**Q14. We are working onsite at a federal construction project. Are we required to show proof of vaccination status / test now, or does the on or after October 15th contract date come into play?**

**A.** Employers working on federal construction projects do not need to comply with this order yet. In addition, the Contractor Order will only apply to certain new contracts and contract-like instruments, new solicitation of contracts and contract-like instruments, extensions or renewals of existing contracts or contract-like instruments, and exercises of options of existing contract and contract-like instruments entered on or after October 15, 2021. Under the Contractor Order, the Safer Federal Workforce Task Force must issue guidance, define relevant terms, explain protocols, and identify any exceptions by September 24, 2021.

## **Exemption and Accommodation Requests**

**Q15. How do we verify the validity of a vaccination exemption request? Can employees choose testing as an alternative to vaccination if they don't request an accommodation?**

**A.** It is recommended that employees requesting a medical exemption complete a [medical accommodation request form](#). This form requires a statement from a medical professional to verify the medical condition. Employees requesting an accommodation due to a sincerely held religious belief should complete a [religious accommodation request form](#). Employees may choose testing as an alternative for vaccination, as long as the employer offers that as an option.

**Q16. If a vaccination exemption is requested, can we require weekly testing as well as masking and social distancing?**

**A.** Yes. Testing is an alternative in all situations, unless an accommodation is requested for that as well. It is still recommended that employees follow all company policies and continue to follow the recommendations set forth by the CDC.

**Q17. Can an employee request exemption for testing if it is provided as an alternative to vaccination?**

**A.** If an employee requests an accommodation from vaccination and testing, it is recommended that the employer go through the interactive process, gather information to support the request, and consider if there are any suitable accommodations that do not pose an undue hardship on the employer. Working remotely is the most common alternative but is not appropriate in all situations.

**Q18. If we receive a request for an accommodation that is not clear or we are not able to determine the need, can we contact the medical professional to clarify, similar to FMLA?**

**A.** Similar to FMLA, if the information provided is not clear, employers are encouraged to contact the employee to request additional information be provided.

## **Miscellaneous**

**Q19. What happens when you are under the Centers for Medicare & Medicaid Services (CMS) umbrella, but you have less than 100 employees? Must health care companies that also have 100-percent remote employees comply? Does the definition of health care employers include outpatient clinics?**

**A.** Health care workers are separate from President Biden's private sector employer mandate; however, many health care-related employers will also be covered under the OSHA ETS. [President Biden is requiring](#) vaccinations of staff within all Medicare and Medicaid-certified [facilities](#) that receive Medicare or Medicaid reimbursement, including, but not limited to, hospitals, dialysis facilities, ambulatory surgical settings, home health agencies and nursing homes.

CMS is currently developing an Interim Final Rule with a comment period that will be issued in October to extend the mandate to health care workers and to provide additional guidance and clarification for employers. In the meantime, CMS is encouraging health care employers to begin implementing a vaccine mandate in anticipation of the Interim Final Rule being released.

**Q20. Under CMS guidelines, must employees be vaccinated, or could employees supply weekly tests?**

**A.** We are awaiting additional guidance to determine if weekly testing will be an option for employers under the CMS umbrella, either separately or as an accommodation.

**Q21. Can employers provide incentives to employees to encourage getting vaccinated?**

**A.** Yes; however, under HIPAA, when employers tie a reward to an action related to health status, a health contingent program is created. Offering an incentive or providing a reward to employees who meet the qualifications also requires that an alternative be provided so those unable to earn the incentive for health-related reasons may also qualify. Employers should also keep in mind that when tying a health-contingent qualification to an incentive, a wellness program is created. To be compliant, the value of wellness plan incentives cannot exceed 30 percent of the total cost of medical plan coverage (50 percent if tobacco-cessation incentives are included).

**Q22. If an employer takes no action when the ETS is effective, is the penalty per person or \$14,000 in total?**

**A.** We are awaiting further clarification from OSHA on how the mandate will be enforced and how OSHA will issue citations and penalties.

**Q23. How will the new vaccine mandate be looked at from an unemployment perspective? Will this new vaccine mandate be considered a "change in employment conditions" relative to unemployment?**

**A.** No information has been provided related to unemployment eligibility under this new vaccine mandate. We anticipate further guidance and clarification will be provided once the ETS is published.

**Q24. Is there any information to indicate the American Rescue Plan Act (ARPA) will be extended past September 30? If employees miss work due to COVID illness or quarantine, will employers need to pay for time missed after ARPA ends?**

**A.** There is no indication if ARPA will be extended past September 30. Companies should begin planning how they will communicate accommodating absences related to COVID-19 after September 30. This may include reference to company policies surrounding the use of paid time off during approved leaves of absence.