



Henderson Brothers, Inc. White Paper

Reactions to COVID-19 Vaccine Mandate Vary Among Employers

The Emergency Temporary Standard OSHA announced in early September has been met with a wide array of responses from employers, industry groups, and employees. It appears that just about all viewpoints have been captured in response to the announcement. While some employers have welcomed the announcement as a path forward to returning to a more normal work environment many others have been reluctant to accept the proposed regulation. OSHA has not been forthcoming with details regarding the ETS which has further complicated this already charged issue. Regardless of business' position on vaccination mandates, staying abreast of the ETS process is critical.



As expected, reactions to the recently announced COVID-19 vaccine mandate have been mixed and vary greatly among employers and employees alike. The recently announced vaccine mandate via the OSHA Emergency Temporary Standard (ETS) has created additional vaccine mandates for workers at employers with 100 or more employees in addition to the existing mandates for federal workers and those employed in healthcare industries.

The specifics of the mandate have yet to be released. The absence of firm information on the proposed mandates and the implementation process has left many employers struggling to answer even the most basic of questions. Industry experts are hopeful to have some answers to these questions in the form of OSHA and industry listening sessions, draft ETS materials, or administration updates in the next several weeks.

Until OSHA releases its rule, employers are left to do their best in preparing for the upcoming mandate. The only thing we currently know regarding the ETS is that applicable employers will soon need to require COVID-19 vaccinations for non-remote employees or allow them to show proof of a negative test each week. The specific criteria for demonstrating vaccination status and the types of test results permitted are yet to be announced. Generally, employers and employees alike, fall into three categories regarding the ETS: the eager, the cautious, and the hesitant. On the state government end of the vaccination debate, at least 24 states have threatened legal challenges to the mandates on a variety of grounds.

The Eager

The announcement of the mandate has been welcomed by employers that were struggling to initiate their own mandates. Many large companies were planning or had already implemented their own vaccine mandates

ahead of the administration's announcement. With a fully approved COVID-19 vaccine (Pfizer BioNTech) and federal vaccination mandates in place, employers now have some cover to make policy changes.

One of the most high-profile mandates in Corporate America was introduced by United Airlines, the first airline to require its employees to get vaccinated. Recently, United said that more than 99% of its ~67,000 US workers have complied with the workplace mandate and that a minority of 593 employees face termination. Other corporations, particularly those in aviation have followed suit with similar vaccination programs or incentives.

Another closely watched mandate was

There is currently no timeline for the ETS, it could be weeks or months away. Regardless of your business' position on the proposed vaccine mandate, the ETS is sure to continue to cause confusion and disruptions.

implemented by New York's health system, which required all workers to have at least one vaccine dose by Monday October 4th. The New York mandated created a significant spike in vaccinations. The recent vaccination surge has pushed the vaccination rate for healthcare employees into the 90% plus range. The high vaccination acceptance rates may indicate that mandates in the workplace

Now that the government is instituting stricter vaccine measures, these employers may feel they don't have to worry as much about potential employee backlash. Employers in this camp generally adhere to more strict vaccination policies and may not

necessarily allow workers to submit negative COVID-19 tests as an alternative. How testing works in the final draft of the ETS is still unknown; however, experts expect the ETS to prioritize vaccination over testing for most employees.

The Cautious

Cautious employers represent the largest group of mandate affected businesses. Most of these employers are taking a wait-and-see approach to the upcoming vaccine mandate. This includes making statements that laud the spirit of the requirement, yet don't explain any definitive action steps the companies will be taking. For instance, the sentiment expressed among these employers have largely been: "We are reviewing our policies and are awaiting more details." This position isn't surprising, considering how little is known about the upcoming mandate.

The Hesitant

Some employers are skeptical of the upcoming vaccine mandate for a litany of reasons. These organizations are concerned about alienating their workers and creating disruptions within the operations in a tight labor market. Employee resistance to mandates, while largely unknown at this point, has the potential to create labor issues regardless of the company's position on vaccines. Even if the company wants vaccinated workers, the fear is that employees will quit if forced between their jobs and vaccination, which may leave countless positions left unfilled and tank productivity.

This is a legitimate concern, particularly in geographical areas with low vaccination rates and entrenched viewpoints that oppose mandated vaccinations. Oneida Health in New York lost roughly 12% of its staff as a result of the vaccine mandate implemented within the state. This example stands in stark contrast with the overall New York mandate data.

In addition to localized vaccine mandate hesitancy, we are also seeing the start of national mandate resistance. Southwest Airlines recently experienced significant flight cancellations and business disruptions due to a suspected pilot lead sick out. It remains to be seen how these major disruptions will affect the long-term development and implementation of the ETS.

State Legal Challenges

In addition to hesitant employers and employees, at least 24 states have signed a letter threatening legal action should the mandate's efforts move forward. The 24 states that signed the letter made the following key allegations against the mandate, among others:

- It will affect the job market and the ability to fill positions
- It will increase vaccine skepticism
- It is too broad, not accounting for nuanced employee situations

The letter targets the Emergency Temporary Standard (ETS) as the crux of the authors' argument. The letter's authors attest that the OSHA ETS rules are very specific, and applying them to a vaccine mandate is an illegal overreach. It remains to be seen how these arguments may align with the reality of the mandate.

Preparing for Compliance

Regardless of your business' position on the proposed vaccine mandate or those mandates already affecting government contractors and health care workers, the ETS is sure to continue to cause confusion and disruptions. As a best practice we advise employers to begin to develop plans for a worst case ETS implementation scenario. Worst case planning can always be dialed back should the final rule be struck or significantly reduced in scope. Planning efforts now which include vaccine access logistics, procurement of testing supplies,

formalized communications, and back up plans for employee turnover may allow your business to weather this most recent COVID-19 storm with less than expected disruptions.

Having thoughtful discussions with management and employee representatives regarding the following questions may be helpful as you prepare for the implementation of the ETS. At the very least these questions will help you get a feeling for how your workforce may be expected to respond and what level of actions will be required of your management team and your line staff supervisors.

- Has your organization worked to determine your current workforce vaccination rate
- Has your organization begun taking steps to draft a COVID-19 vaccine/testing policy
- Will your policy allow employees to receive weekly COVID-19 testing in lieu of vaccination
- Has your organization considered how your policy will include a provision for employees to take paid time off to receive the vaccine, and, if necessary, take paid time off work due to potential side effects
- Has your organization considered how your policy will outline how employees can certify they have received a vaccination
- Has your organization considered how your policy will enforce disciplinary actions for not complying by the designated deadline
- Has your organization considered how your policy will allow some employees to be exempt from all or parts of a vaccine or testing mandate

There is currently no timeline for the ETS, it could be weeks or months away. However, once published, its rules will take immediate effect in states where federal OSHA has jurisdiction; State Plan states (such as California and Virginia) will be forced to enact similar programs. For now, employers

will need to wait until OSHA releases more details on the mandate. If you need any support navigating this new COVID-19 update, please know our team of risk management professionals are here to assist you in any way possible.