



Buelow Vetter

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The Solution Starts Here.

President Biden's Vaccination Mandate to Go Into Effect Friday, November 5, 2021

Today, the Biden Administration, through the Occupational Safety and Health Administration (OSHA), issued an emergency temporary standard (ETS) mandating vaccinations or weekly testing for workers of employers with 100 or more employees.

Who is covered by the mandate?

The ETS applies to businesses with 100 or more employees “firm or company-wide.”

The 28 states and territories with their own worker safety agencies (which does not include Wisconsin) have 30 days to implement the federal OSHA standard or their own mandate.

The ETS only applies to private employers. That means, at this point in time, it does not apply to public-sector employers in Wisconsin, such as school districts and municipalities. However, the Wisconsin Department of Health Services may adopt a separate standard applicable to public sector employers.

What are the compliance deadlines?

The ETS becomes effective Friday as soon as it is published in the Federal Register. There are two key deadlines:

By Dec. 5, employers must:

- have their compliance program in place;
 - start offering paid time off for vaccinations (up to 4 hours) and paid time off to recover from a vaccination (a “reasonable amount of time”); and
 - require unvaccinated workers to wear masks.
- The deadline for workers to be vaccinated or start being tested is Jan. 4.

Note that employees must test at least once every 7 days until fully vaccinated. “Fully vaccinated” means two weeks after the second vaccination shot (or 2 weeks after the single Johnson & Johnson shot). This means unvaccinated employees will need up to six weeks to be fully vaccinated, depending on which vaccine is chosen.

How long does the ETS remain in place?

As an emergency temporary standard, the mandate is in effect for six months. After that, OSHA must replace it with a permanent standard.

What are the penalties for failing to comply?

Companies are subject to random inspection. However, it is more likely that an employee calls and reports an employer that is failing to comply with the ETS. If a company cannot produce

records showing the firm is following the standard, OSHA has up to six months following that inspection to issue citations.

Each “serious” violation of the standard could result in a maximum fine of \$13,653. The cap for willful or repeat violations is \$136,532. However, the Build Back Better Act, if it becomes law, would raise maximum fines for all OSHA rules to \$70,000 for serious violations and \$700,000 for willful or repeat violations.

Who pays for testing?

Unvaccinated employees must pay for their own testing. Employers have no obligation to pay for the testing unless required under a collective bargaining agreement.

Who pays for and/or provides masks?

All employees who are not fully vaccinated must wear face masks. The employer is not required to pay for “any costs associated with face coverings.” OSHA will accept a wide range of masks, even homemade masks, if a mask completely covers the employee’s nose and mouth; is made with two or more layers of a breathable, tightly woven fabric; and is secured to the head with ties, ear loops, or elastic bands that go behind the head.

What next?

There are many legal challenges already filed. This will likely result in a stay of the ETS pending resolution in the courts. However, until a stay is issued, impacted employers should begin to plan for compliance immediately.

We will be providing updates as they arise.

If you have any questions or concerns, please contact Joel S. Aziere at jaziere@buelowvetter.com or (262) 364-0250 or Kirstin Mathers at kmathers@buelowvetter.com or (262) 364-0251 your Buelow Vetter attorney.