

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

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The Honorable Marty Walsh
Secretary of Labor
Washington, DC 20210

Dear Mr. Secretary:

President Biden recently directed the Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS) requiring employers with more than 100 workers to ensure their employees are vaccinated against COVID-19. If employees cannot or will not get vaccinated, the ETS will require employers to provide weekly testing for any employee that enters the employer's facilities. The anticipated ETS has generated a large number of questions from businesses around the country.

I write today to share the many questions the Chamber has received. We hope OSHA will address these issues as it completes drafting the ETS. Additionally, we strongly urge OSHA to post supplemental guidance, ideally in an FAQ format, after issuing the ETS.

Below are questions that have been submitted to us from our members:

Questions related to coverage:

- How will the 100 employees be counted?
 - Will it be 100 employees for the entire business or 100 employees per individual location?
 - Will part-time employees be included in the 100-employee threshold?
 - Do employees who are working from home count towards the 100-employee minimum?
 - How will temporary or seasonal workers be addressed in the employee count?
 - Will independent contractors count towards the 100-employee threshold?
- How will the ETS address Professional Employer Organizations (PEO's) and staffing companies?
- Will the ETS apply to nonprofits?
- Will the ETS apply to workers who are full-time work from home / never come into an office or workplace?
- Will the ETS cover individual independent contractors that are engaged by a company with more than 100 employees?

- Would a local government with more than 100 employees, located in a state without an approved state plan, not subject to OSHA as a public entity, still be subject to the employer vaccine mandate?
- How will the ETS apply to unionized workplaces?
 - What will happen if there are union employees and the relevant union objects to requiring vaccines or testing?
 - Will OSHA work with other agencies such as the National Labor Relations Board to ensure that imposing a workplace vaccine requirement without reopening collective bargaining is not considered an unfair labor practice?

Questions related to implementation:

- Although the ETS will go into effect immediately, will it contain a grace period for employers to develop their programs and for employees to become vaccinated?
- Will employer obligations end at creating a vaccine policy in accordance with the ETS or will employer obligations extend to verifying that each employee complies with the vaccine workplace policy?
- How will OSHA resolve the conflict between the vaccine mandate and state laws that explicitly prohibit employers from requiring employees to be vaccinated?
- Could a state plan state adopt a stricter standard, i.e., one that eliminates the test-out option?
- If a state with an OSHA-approved state plan refuses to develop their own version or enforce the federal rule, how would OSHA respond?

Questions related to vaccinations:

- Is an employer in compliance when a worker has started a course of vaccinations or will compliance be achieved after a two-dose regime plus two weeks for the vaccine to reach full effectiveness (i.e. roughly six weeks)?
 - Will the vaccine requirement include boosters if approved?
 - Will employees who have received full doses of a vaccine that is still in clinical trials, but has been shown to efficacious, be considered fully vaccinated?
- Will there be any provision for employees who have natural immunity through previous COVID-19 infection?
- How will employers verify a request to opt out due to medical concerns or religious exemptions?
- How will businesses “ensure” that employees are vaccinated?
 - Will there be a level of proof of vaccination required or is a self-attestation sufficient?
 - How will an employer know that an employee’s vaccine status is accurate?
 - What’s an employer’s liability if an employee is fraudulent in representing their vaccine status?

- Will there be a system for validating vaccine records?

Questions related to testing:

- If an employee shows proof of a certified disability/religious accommodation as a reason to not get the vaccine, would they still need to be tested weekly?
- Will unvaccinated employees who work remotely be required to be tested weekly?
- What type of testing will be acceptable?
- Must the testing be done by a medical professional?
- What happens if the employer cannot get enough tests to do weekly?
- Will DOL proscribe how tests are to be administered?
- Who will cover the costs of testing? One estimate for PCR testing suggests a range of \$80-140 for testing/processing, so this weekly testing could become a significant cost.
 - Will there be an option to pass on the cost of the testing to employees if they choose to remain unvaccinated and do not have a medical or religious reason precluding them from being vaccinated?
 - Will employers be allowed to deduct the cost of weekly testing from employee wages?

Employer options with respect to non-compliance:

- If an employee refuses to be vaccinated, does not have an exemption (medical or religious), and refuses a regular testing requirement, what should happen?
 - Can an employer have an employee work from home?
 - Will there be “immunity” for an employer who terminates an employee for failing to provide proof of vaccination or a negative test?
 - If an employee is vehemently opposed to getting the vaccine, can they simply submit negative tests indefinitely or would there be a certain number of weeks/times they could do that?
 - Will an employee who is terminated for refusing a vaccine count against an employer’s UI experience rating?

Questions related to providing leave:

- If an employer already provides paid leave / PTO, will this be sufficient?
 - Can employers require employees to use their available vacation days or personal holidays to get their vaccine and feeling ill afterwards and/or taking care of “loved ones”?
 - Will there be a specifically defined time period for paid leave for employees to recover if they are under the weather post-vaccination?
 - What type of vaccine-related injuries will require employers to provide an employee with paid time off?
- How will an employer verify the employee’s vaccine-related injury?

Questions related to enforcement:

- How will OSHA enforce this ETS?
 - Will the field staff follow the usual process?
 - Will there be active inspections?
 - Will additional staff resources be allocated for enforcement?
 - How will employers demonstrate or prove compliance?
 - How will this be enforced with remote workers?
- Will there be weekly reporting requirements to OSHA, potentially including internal documentation if OSHA requests it?
- Will there be some form of affirmative defense or safe harbor that employers can assert if they take certain steps in a good faith effort to comply with the ETS?
- Will the ETS ensure that employers are not subject to penalties for any violations that occur due to circumstances beyond the employer's control?
- Will the Department consider less punitive fines than the \$14,000 that has been reported publicly?
- Will fines be per employee or per location?

COVID-19 has presented an unprecedented crisis, and it has required many unprecedented actions. The U.S. Chamber has been unequivocal in our support for getting employees vaccinated, subject to the limited exemptions. We urge the Department to address the questions above to ensure that, should an ETS become enforceable, employer compliance will be as clear, simple, and cost-effective as possible.

Sincerely,



Neil L. Bradley