



## Frequently Asked Vaccine Mandate Questions

October 13, 2021

President Biden announced on September 8, 2021, that he directed the Department of Labor to require all businesses with 100 or more employees to ensure their workers are either vaccinated or tested for COVID-19 once a week. No Executive Order or other rule has been issued for private employers at this time to discuss the time frame, requirements, or potential fines for failing to do so. The White House website reflects only the following:

*The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.*

It is expected that the Temporary Emergency Standard promulgated by OSHA will allow employees to request exemptions based on good faith religious or medical reasons. As of today, OSHA has yet to issue any such Emergency Standard.

In the same speech September 8, President Biden issued an [Executive Order](#) requiring that all federal employees be vaccinated. He has directed the Safer Federal Workforce Task Force ("Task Force") to implement rules within seven days.

Shortly after, he issued a second [Executive Order](#) that required all federal contractors to follow the guidelines promulgated by the Task Force. The Task Force subsequently issued those guidelines for federal contractors on September 24, 2021.

This FAQ will address questions for private employers or federal contractors in determining requirements under these Executive Orders and the expected guidance.

### **I am a federal contractor. What do I now have to do?**

Federal contractors and subcontractors with contracts that include the new mandatory vaccination clause will be required to have almost all of their employees vaccinated by December 8, 2021. Specifically, as of December 8, 2021, all covered federal contractors and subcontractors must:

- Confirm full COVID-19 vaccination for all full-time and part-time employees, except in limited circumstances where an employee is legally entitled to an accommodation based upon legitimate religious belief or disability. The vaccination requirement includes

employees who are not working on or in connection with a covered contract and those that are working remotely;

- Review employees' documentation to prove vaccination status;
- Enforce compliance by individuals, including employees and visitors, related to masking and physical distancing while in covered contractor workplaces; and
- Designate a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

**I am a federal contractor. What if my existing federal contract does not include the new mandatory vaccination clause?**

If you have no federal contract that contains the mandatory vaccination provision you need not comply with the mandate. Keep in mind however that the new mandatory vaccination clause will be added to all federal contracts that are renewed, extended or modified. Agencies have been encouraged to add the new clause to existing contracts to the extent possible.

**I am a federal contractor. Are there any exceptions to the vaccination requirement other than the religious or medical exemption?**

Yes, but very a very limited one. There is a limited exemption for employees working in separate facilities from those working on the Federal Projects. Employers must affirmatively determine that none of the employees in the separate facility will come in contact with covered employees. The exemption's requirement extends to prohibiting contact in common areas such as lobbies, elevators, etc.

**I am a federal contractor. Is there anything else that I have to do when covered by the new vaccine requirement?**

Yes. Over and above the vaccination requirements, covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at the workplace. In areas of high or substantial community transmission, fully vaccinated people generally must wear a mask in indoor settings. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings regardless of the level of community transmission in the area. To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

**I am a private employer. How is the 100+ employee count determined?**

Until OSHA has issued its standards, it is not clear exactly how this will be counted. However, OSHA has responded to questions indicating that this would include the employee count for the entire company, not by location. It is expected that the guidance will include a discussion on how to count part time employees, as well as whether employees of different company affiliates will be counted together. Although fully remote employees will be included in the number of total employees, a worker working remotely full time may be excluded from the vaccination rules.

**If my company is a federal contractor or private employer with 100+ employees, do I have to require all employees to be vaccinated or can I allow any employees who do not want to be vaccinated to test weekly?**

The information available from the White House appears to allow employees of private companies with 100+ workers to either be vaccinated or receive weekly COVID testing. Employers who are required to enforce a mandatory vaccination policy will not be able to allow employees who choose not to vaccinate for political or personal reasons to opt out. Covered federal contractors, subcontractors, and all federal employees must be vaccinated and comply with all other federal requirements.

**Do these Executive Orders and the upcoming OSHA rule mean all employees have to be vaccinated?**

The Executive Orders regarding federal employees and federal contractors require all employees of the federal government or federal contractors to be vaccinated or have an exemption based on a sincerely held religious belief or a medical condition. The instructions to OSHA appear to allow employees of private employers with 100+ employees to either become vaccinated or receive weekly testing. A private employer may elect to require mandatory vaccinations, in which case the employer would have to allow an exemption based on a sincerely held religious belief or a medical condition.

**How long do I have to come up with a policy about vaccinations and exemption requests?**

The Task Force has instructed that federal contractors and subcontractors must confirm full COVID-19 vaccination for all covered full-time and part-time employees, except in limited circumstances where an employee is legally entitled to an accommodation based upon legitimate religious belief or disability by December 8, 2021. OSHA has stated that it will release its rule for private employers "in the coming weeks." It is expected that the guidelines and the rule will give employers some time to implement policies, but it may be a matter of weeks, not months. OSHA has encouraged employers to begin to consider implementing vaccine policies as soon as possible.

**Who pays for weekly testing for employees?**

OSHA has said that is not decided yet.

**Do I have to pay employees for time off to get vaccinated or if they get sick in response to the vaccination?**

OSHA has said that the employees are likely going to be entitled to paid time off to receive their vaccination. OSHA has also said that employees are likely going to be entitled to paid sick time for any time off due to vaccine side effects.

**Do I need a written policy on vaccinations?**

OSHA has stated that it may require employers to have a written policy in place.

### **Should I start requiring my employees to be vaccinated now or should I wait?**

OSHA has encouraged employers to start implementing vaccination policies now. The Equal Employment Opportunity Commission confirmed earlier this year that employers are allowed to require employees to be vaccinated, subject to exemptions for sincerely held religious beliefs or medical conditions. If your company wants to proceed to require vaccinations now, there is no legal reason to wait. If your company is hesitant to implement a vaccination policy at this time, prior to the official OSHA rule or the outcome of likely legal challenges, there is no penalty **at this time** for not requiring employees to be vaccinated or be tested. If you are a federal contractor or subcontractor, you should not wait as full vaccination status can take upwards of 6 weeks and the December 8<sup>th</sup> deadline is fast approaching.

### **I don't know much about medicine or world religions. How do I figure out if the exemption request is valid?**

There is little helpful guidance on this. As to a medical exemption request, it is appropriate for an employer to ask for a note from a medical provider. If the employee obtains a note from what appears to be a qualified medical provider, it is probably not advisable to reject the exemption request, regardless of whether the medical decision not to vaccinate seems like the best medical advice.

However, religious beliefs are trickier to consider, in part because it is not even clear what constitutes a "religious belief." Religious beliefs do not have to be mainstream or even based on the teachings of a religious group. The EEOC states that:

Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information.

Many commentators have expressed that this lack of definition or guideline allows employees to game the system simply by expressing that their religious beliefs prohibit them from being vaccinated. It will be a difficult decision to terminate an employee that expresses a sincerely held religious belief, but which seems to be based more on personal or political preferences. Employers, however, can investigate the legitimacy of the belief and determine if an exemption is merited. If an employer grants an exemption, the unvaccinated employee will likely be required under the new rule to be tested weekly, wear a mask and engage in social distancing.

### **If my company falls under one of these rules requiring mandatory vaccinations, will I have to fire employees who won't get vaccinated and don't have an exemption?**

OSHA has not directly answered that question. It does appear that to have any impact on employers, the employees who fit in this category will have to be terminated or resign, or you will be subject to fines. The Task Force did not directly address this issue either, but employees

who fit in this category and are not vaccinated and are not exempt will have to be terminated or resign, or you could be found in violation of the terms of the covered federal contract.

**If I have to terminate an employee who refuses to get vaccinated, will they be entitled to unemployment?**

This would likely be largely governed by state law as OSHA has not directly answered that question and stated that it falls under a state's law on unemployment compensation. The Task Force has not addressed this issue. Texas will almost certainly be among the states challenging the implementation of these Executive Orders and OSHA rules.

**Will there be a constitutional challenge to the OSHA Rule?**

An immediate challenge is all but certain. Republican members of Congress, governors and state attorneys general have already vowed to challenge the anticipated rule, and litigation will be filed in various federal courts seeking to declare any vaccine requirement unconstitutional and seeking an order enjoining any rule until the challenge is heard on its merits. Any litigation will likely be fast-tracked on appeal.

**Can the government legally mandate vaccines?**

Yes, generally. A 1905 Supreme Court case, *Jacobsen v. Massachusetts*, upheld the authority of states, through their legislative "police power," to make smallpox vaccination compulsory. Other cases since *Jacobsen* have upheld a school district's authority to require that students be vaccinated before enrollment. However, the *Jacobsen* decision was based on specific circumstances and should not be read as *carte blanche* approval for all governmental vaccine mandates.

**Is this action different than past vaccination mandates which have been upheld?**

It is executive action, not legislative. The process here is different than in *Jacobsen* and other past decisions on vaccine mandates. This rule is not an enactment of law through a local legislative branch as an act of police power but rather has been enacted by the federal executive branch through agency regulation, specifically OSHA, as part of the Department of Labor.

**How likely is this Rule to be upheld?** There will unquestionably be legal challenges to this, and the plaintiffs will seek an injunction to prevent OSHA's rule from taking effect. Legal experts disagree on the likelihood of success. As an agency rule, it will be subject to challenge under the Administrative Procedures Act, and cannot stand if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Notwithstanding the compelling arguments for action, courts are less receptive to edicts imposed through executive agencies rather than the lawmaking process. The conservative-leaning Supreme Court's recent decision overruling President Biden's eviction executive order is an indication that the highest Court is willing to closely securitize execution action.

**For more information, please contact [Elaine Howard](#), [Chuck Jeremiah](#) or [Tony Stergio](#).**