



Frequently Asked Vaccine Mandate Questions

September 14, 2021

President Biden announced on September 8, 2021, that he has 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 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 rule promulgated by OSHA will allow employees to request exemptions based on good faith religious or medical reasons.

In the same speech, 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.

He issued a second [Executive Order](#) that requires all federal contractors to follow the guidelines promulgated by the Task Force. The Task Force has been directed to issue guidelines for federal contractors by September 24, 2021. Included in this Executive Order are requirements regarding terms to ensure that these guidelines flow down to subcontractors in any federal contract.

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 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 responded to questions on Friday 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 companies with 100+ workers to either be vaccinated or receive weekly COVID testing. Federal contractors and federal employees will likely have to be vaccinated or be exempt because of a sincerely held religious belief against vaccinations or a medical condition that does not allow them to be vaccinated. 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.

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 appear to 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 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 been instructed to issue guidelines for federal contractors by September 24, 2021. OSHA has stated that it will release its rule “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.

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.

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. 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 specific rule has yet to be issued, so it is impossible to evaluate the language until that happens. 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 will be enacted by the federal executive branch through requested 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](#).