

Bodman PLC

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### Common Questions and Concerns About OSHA's Workplace Vaccine Mandate – Part 2 of 2

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President Biden's ["Path Out of the Pandemic"](#) action plan has left many employers wondering – what will happen next? Although there is more unknown than known at this point, **Bodman's Workplace Law Group** has collected clients' most common questions and concerns about the Occupational Safety and Health Administration's ("OSHA") anticipated Emergency Temporary Standard ("ETS"). In an effort to alleviate uncertainty and aid in early preparation efforts, provided below are answers to many of the enforceability questions we have received:

#### 1. How will our company enforce a vaccine mandate or weekly testing requirement?

The Equal Employment Opportunity Commission ("EEOC") issued guidance on December 16, 2020, permitting employers to adopt mandatory COVID-19 vaccination policies, so long as such policies comply with state and federal laws, including the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII"). The ETS will likely require that employers provide reasonable accommodations to eligible employees, which may include weekly testing.

The EEOC also confirms that employers may ask employees to submit proof of vaccination and/or the results of a COVID-19 test.

#### 2. Will our company be required to pay employees for time spent undergoing weekly testing?

Under the Fair Labor Standards Act ("FLSA"), employers are required to pay employees for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours. Even if employers require that testing occur outside of working hours, the Department of Labor issued [guidance](#), stating that employers should compensate employees for their testing time if the testing is considered necessary for employees to perform their jobs safely and effectively during the pandemic.

**3. Who is responsible for paying for the test? What type of tests will be required?**

It is unclear who will be responsible for paying for the actual COVID-19 test.

President Biden's announcement suggested that top retailers will be required to provide at-home rapid test kits at cost for the next three months. It is possible that the President's actions to make at-home rapid tests more affordable will correspond with the weekly testing option under the anticipated ETS.

In general, employees cannot be asked to incur work-related expenses that reduce their earnings below the minimum wage.

**4. How will OSHA ensure our company mandates employee vaccination or requires weekly negative tests?**

The ETS is expected to incorporate fines for non-compliance on a "per violation" basis.

As with all OSHA standards and regulations, OSHA may conduct workplace investigations and issue citations and/or fines if violations are discovered. These investigations are oftentimes prompted by employee complaints.

Employers must always remember that OSHA's Whistleblower Protection Program and Michigan state law prohibit retaliation against employees who raise or report concerns about hazards or violations of various workplace safety and health laws.

**5. If employees refuse to adhere to our vaccine mandate or submit to weekly tests, will we be required to terminate them?**

Employers have the right to discipline employees who do not comply with the terms and conditions of employment, up to and including employment termination.

If an employee refuses vaccination and testing, and the employer permits the employee's onsite attendance, the employer risks significant fines, estimated to cost \$14,000 per violation. Employers may consider alternative arrangements for those unvaccinated employees who refuse testing (e.g., remote work, unpaid leave).

**6. Will the vaccine mandate and weekly test requirement apply to employees who are full-time remote?**

President Biden's announcement specifically stated that employees will need to comply with the ETS "before coming into work," suggesting that the ETS may not apply to employees who work remotely.

It will be difficult for OSHA to prove that fully remote employees are exposed to a "grave danger," as is required for application of an ETS.

**7. We already cannot find enough employees – what is the likely impact on our company if we are forced to meet OSHA’s ETS?**

Although 9 million people recently lost their federal unemployment benefits across the country, job availability in the labor market remains high. Whether employees will be encouraged or discouraged to return to work by a vaccine mandate is to be determined.

The answers provided here are necessarily speculative and designed to assist employers in the planning of policies and procedures that will become clearer upon publication of the ETS. **Bodman’s Workplace Law Group** continues to monitor for developments and can be contacted with any remaining questions. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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