

# How Employers Should Prepare for the Federal Vaccine Mandate

*By Raymond Kim, Regional Vice President, Account Management and Daniel Kuperstein, Senior Vice President, Compliance  
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If you're a large or mid-sized private business, chances are you've been following the updates on the [federal vaccine mandate](#), originally announced by the Biden administration earlier this year. Despite the recent legal challenges to the rule, employers may still want to prepare to comply with the federal vaccine mandate pending the final outcome or implement their own vaccination or testing policies.

As background, the Occupational Safety and Health Administration (OSHA) released its vaccine mandate rule as an Emergency Temporary Standard (ETS) regulation that would have required employees of large employers with 100 or more employees to either get vaccinated or to test negative on a weekly basis no later than January 4, 2022. However, this measure was quickly challenged in court, leading the U.S. 5th Circuit Court of Appeals to prohibit OSHA from enforcing and implementing the ETS "pending adequate judicial review." OSHA has temporarily suspended enforcement of its ETS pending further litigation.

While the U.S. 6th Circuit Court of Appeals is now slated to review the 5th Circuit's decision, the fate of the ETS may be ultimately decided by the U.S. Supreme Court. In light of the possibility that the 5th Circuit court's stay is modified or removed, prudent employers and plan sponsors should still be prepared to implement their vaccination and testing policies in compliance with the requirements of the ETS.

Here are some considerations as you get started.

## **Understand the Scope**

While the OSHA ETS rule doesn't require that employers pay for testing, they may still be responsible to cover the costs for workers under existing collective bargaining agreements or other state/local regulations. Additionally, employers are still required to pay for this cost if the testing is a requirement of a reasonable accommodation granted to an employee with a disability-based reason for not being vaccinated. Employers may also choose to cover this cost.

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*Clearly, this could be a daunting—and costly—program.*

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To adequately prepare, consider an anonymous employee survey on vaccination status and interest in future vaccination. Using this survey, you should be able to estimate the cost of regular testing and budget accordingly.

This might also be a good time to revisit a vaccination incentive program—more on that in a minute.

## **Develop a Strategy for Reducing or Recouping Costs**

For some employers, the cost of tracking technologies and/or weekly COVID-19 screenings may be manageable without additional legwork. For others, developing a strategy for reducing or recouping testing costs will be vital.

### ***Consider Implementing a Premium Surcharge on Unvaccinated Employees***

A premium surcharge for unvaccinated employees is one way to cover these costs and encourage employees to get vaccinated. The DOL, Treasury and Health and Human Services recently issued FAQ guidance confirming employers may [implement COVID-19 vaccination surcharges](#) under employer-provided group health plans.

Considered “activity-only” health-contingent wellness programs, any vaccine premium incentive must comply with HIPAA wellness program regulations. Employers should also ensure ACA affordability standards are met to avoid penalties for not offering affordable coverage. A vaccine surcharge can increase the employee’s share of the cost of coverage for affordability purposes under these rules.

### ***Consider a More Restrictive Vaccination Policy with No Test-out Alternative***

Another way to avoid potential testing costs is to eliminate the test-out alternative altogether. The federal vaccine mandate is meant to act as the minimum requirement across employers—private companies are within their rights to create more restrictive programs, as long as they offer reasonable accommodations for employees who cannot get vaccinated due to disabilities or sincerely held religious beliefs compliant with [guidance](#) issued by the EEOC in May 2021. Vaccine policies must also comply with a growing number of state laws and restrictions.

While implementing a stricter vaccine mandate policy than what the federal rules require can lead to cost savings, not offering a test-out alternative may lead to increased employee dissatisfaction or turnover. Organizations should consider the results of their vaccination status survey and their specific circumstances in evaluating this option.

### **Build Your Team**

Once you know the scope of impact and you create an appropriate strategy for reducing or recouping costs, the next step is to decide whether the administration of these rules will be handled in-house or require an outside solution.

For example, employers with multiple locations or many remote employees might benefit from a third-party vendor that makes these complex administrative processes easier.

Among other considerations, employers should ensure that the vendors they’re considering have a successful core business with a proven track record. As the need for this type of administration grows, we may see many unproven startup—or even opportunistic—companies emerge. Employers should be cautious and ensure they are working with reputable partners. Relying on your trusted employee benefits consultant to recommend or review vendor solutions can make this easier. ■

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