

COVID-19 VACCINATION AND MASKING IN WISCONSIN (12/8/21)

By: The Previant Law Firm Labor Practice Group

The Occupational Safety and Health Act (OSHA)'s general duty clause requires employers to provide a safe workplace for employees. Most state and local Departments of Health recommend that employees comply with CDC and state masking/distancing guidelines and encourage vaccination. The federal government has issued vaccination mandates and other covid-safety protocols including:

- A requirement that all federal employees be fully vaccinated (9/9/21);
- Executive Order (EO) 14042 which requires federal contractors' employees to be fully vaccinated by January 4, 2022 (9/9/21);
- Large Employer COVID-19 Vaccination and Testing OSHA ETS (11/5/2021);
- Centers for Medicare/Medicaid (CMS) rule requiring employees be fully vaccinated by January 4, 2022; first dose by December 5, 2021 (11/5/2021);

There are dozens of lawsuits challenging each mandate. A single court's decision can enjoin a mandate nationwide, so for consistency, all cases on a mandate are consolidated and sent to a single court which can reconsider. *As of noon on December 7, 2021*, all mandates are temporarily stayed. *The stays and are expected to be resolved before January 4, 2022. Employees who wait to begin vaccination already will not be able to meet the deadlines if the mandate is reinstated as-is.*

- A Louisiana court stayed implementation of the OSHA ETS on November 5, 2021. ETS cases were transferred to the 6th Circuit Court of Appeals. Lawyers have until December 10, 2021, to submit arguments on reconsideration.
- On Nov. 30, 2021, a Kentucky court issued a stay in a Federal Contractor mandate case for Ohio, Kentucky and Tennessee. On December 7, 2021, a court in Georgia issued a nationwide stay. The Georgia ruling was conditionally supported by ABC but its official position is that it supports vaccination.

On November 10, 2021, the NLRB General Counsel issued an Operations Memorandum GC 22-03 noting that covered employers have an obligation to engage in decisional bargaining over the non-mandatory aspects and effects of the ETS and other mandates.

This covid-related guidance continues to evolve as new mandates and requirements are announced. OSHA and the Task Force are constantly updating their guidance. Guidance and answers to federal contractor mandate FAQs were updated within the last two weeks and are at <https://www.saferfederalworkforce.gov/faq/contractors/>. The OSHA guidance and FAQs are at <https://www.osha.gov/coronavirus/ets2/faqs>.

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Part I. VACCINATION REQUIREMENTS

Q1: Under the new federal standards, what does it mean to be “fully vaccinated”?

A: Under the ETS and the Federal Contractor Executive Order, “fully vaccinated” means two weeks after the employee has received two appropriately timed doses of either the Pfizer or Moderna vaccine, or two weeks after the single dose Johnson & Johnson vaccine. Covered employees must be *fully vaccinated* by *January 4, 2022*; employees taking a 2-shot vaccine must plan accordingly. **However, it is expected (but not certain) that there will be a grace period for enforcement so that “fully vaccinated” includes all employees who receive their final, primary dose of the vaccine by January 4, 2022, or have their second dose by January 18, 2022, BUT this is NOT official. The official statement is that if the mandates are reinstated, they will go into effect January 4, 2022.**

Employees exempt due to a disability- or religious-based accommodation are considered in compliance with the vaccination requirement.

“Vaccinated” does not include a past covid diagnosis and/or positive antibody test, or Aaron Rodgers’ homeopathic treatment.

Q2: What are the Federal Contractor COVID-19 EO requirements?

The EO requires all employees of covered federal contractors (and subcontractors of all tiers *except* those providing only products) be fully vaccinated against COVID-19 by January 18, 2022, and that those contractors implement other COVID safety measures.

Specifically, it covers employees of “covered contractors” at “covered contractor workplaces” working under or in connection with all federal contracts or contract-like instruments (awards, notices, job orders, options or modifications, etc.).

“Federal contracts or contract-like instruments” are those under the Service Contract Act and Davis-Bacon or in connection with/on Federal property, but excludes contracts for manufacturing or less than \$250,000 minimum threshold.

The requirement is to be written into all contracts from the prime contractor to the lower tier subcontractors at all tiers.

1. What is a “covered contractor employee”? Any full- or part-time employee of a covered contractor
 - working on the covered contract;
 - working in connection with a covered contract (ex/HR, billing, legal...), *or*
 - working at a covered contractor workplace (i.e. in the same building with people working on/in connection with the contract).

2. What is a “covered contractor workplace”? It is any facility, building, or job site controlled by a covered contractor at which any employee working on or in connection with its covered contract is likely to be present during the performance of the contract. The EO, by default, applies to ALL employees of an employer *unless* employees not working on/connection with the federal contract are fully isolated and will not cross paths with the “covered employees” at all, for the duration of the covered contract. This is discussed further at the next question.
3. Masking/Distancing. In addition, in areas of high transmission, all individuals regardless of vaccination status must wear masks indoors and employers must comply with all CDC and OSHA recommendations. Unvaccinated personnel must physically distance, mask while indoors, and may be required to wear a mask in crowded outdoor settings.
4. Proof of Vaccination. Employees (and employees of subcontractors on DB projects) must provide the contractor with proof of vaccination, such as a copy of the record of immunization from a health care provider or pharmacy; the COVID-19 Vaccination Record Card; or any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.
5. Exemptions. An employee who cannot be vaccinated for COVID-19 because of disability or sincerely held religious belief, practice or observance must ask for and obtain the exemption from their covered contractor-employer, who decides whether and which accommodation is appropriate.
6. What are the penalties? Monetary fines, work stoppage or termination of the contract, or possible liability under the False Claims Act.

Q3: The employer has multiple locations and only a few employees work on federal contracts. Do the EO’s requirements apply to its entire workforce?

A: The EO covers a covered employer’s employees if any of the following three conditions apply: 1) they work on the covered contract; 2) they work in connection with a covered contract (e.g. human resources, billing, and legal), or 3) they work at a covered contractor workplace (i.e. in the same building with people who work on or in connection with the contract) even though they do not work on or in connection with the project.

Because of this definition, all employees at a location will generally be covered if any person who works at or out of that location (even if it is occasional staff meetings or running for materials, etc.) unless the employer determines and can

prove that two “covered employees” and another group of employees do not cross paths or use the same common spaces. This means that there is no interaction (at all) between the two employee groups during the course of the project including within common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garage.

Q4: What does the OSHA Emergency Temporary Standard (ETS) require?

A: The OSHA ETS requires that employers with 100+ employees implement a mandatory vaccination policy for company- or firm-wide. Unlike the federal contractor E.O.s, though, it permits a testing option in lieu of vaccination, as described below. Its key components include:

1. Mandatory Vaccination or Vaccination + Testing. Establish, implement, and enforce a mandatory COVID-19 vaccination policy (subject to disability- or religious-based exemptions) or a policy that requires employees not fully vaccinated to undergo covid testing at least weekly.
2. Documentation of Vaccination Status. Determine each employee’s vaccine status, obtain & maintain proof of vaccination, and maintain a roster of employees’ vaccination status.
3. Paid time off to comply, recover. Employers must provide employees “reasonable time” – up to 4 hours – to receive each dose, and reasonable time and paid sick leave to recover from side effects following vaccination.
4. Removal of Employees Upon Positive Test. Any employee who tests positive for or is diagnosed with COVID-19 must be removed from the workplace and kept from work until they return to work criteria.
5. Safety Precautions for Unvaccinated Employees. Unvaccinated employees must wear appropriate face coverings at all times while indoors or, for work purposes, is in a vehicle with another person, and should distance.
6. No “No Mask” Policies. Employers must permit any vaccinated employee to wear a mask at their own choosing unless it creates a safety hazard.
7. Testing costs. Unvaccinated employees must receive an appropriate COVID-19 test at least every 7 days. The ETS does not require employers to pay the costs of testing or for the time off to test, unless required by state law or a collective bargaining agreement.
8. What is a “covered employer”? The ETS covers all employers covered by OSHA with 100+ employees. This includes public sector employees (state and local government workers) in states with OSHA-approved State Plans, including Iowa, Michigan, and Minnesota. MNOSHA announced that it

expects to adopt the ETS as written, and that Minnesota employers are required to comply with most provisions beginning December 6, 2021.

9. How are employees counted? For purposes of the ETS, an employer's total number of employees includes all full time and part time employees at all the employer's locations, including those who work from home, and any temporary or seasonal employees employed by the employer while the ETS is in effect (through June 2022). Employees who work from home, however, are exempt from the vaccination/testing requirements as long as they do not report to work.

10. What does the ETS require if an employee tests positive? Any employee who tests positive, regardless of vaccination status, must immediately be removed from the workplace and should not return until they receive a negative test, meet the CDC's return to work criteria, or are advised by a health care provider that it is okay to return to work. The ETS *does not require* contract tracing or quarantine of close contact, but employers are required to comply with local health guidance regarding contact tracing and "encourages" employers to implement more cautious programs.

Q5: What kind of tests does the ETS require?

A: To comply with the OSHA regulation, employers opting for a vaccinate-and-testing program must require that non-vaccinated employees must utilize diagnostic (not antibody) COVID-19 tests authorized by the U.S. Food and Drug Administration (FDA), which are administered in accordance with the authorized instructions; and are not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Over-the-counter tests that are self-administered and self-read by an employee are permissible as long as those tests are "proctored" – that means that a licensed health care provider or point of care test provider or the employer observes the test and observes/sees the test results.

Point of care tests given by an employer at places of employment are permissible where they comply with CLIA standards or where the employer has obtained a waiver.

Q6: How does the paid time off work?

Paid time off for vaccination is treated differently than paid time off for recovery from side effects.

Vaccination. Employers are required to provide employees with up to four hours of paid time at the employee's regular rate of pay (which would include benefits) for vaccination. The employer must provide the employee with reasonable time to

get their primary (not booster) vaccination doses during work hours. While the regulation provides for up to four hours, OSHA has demonstrated that due to widespread availability of vaccination sites in most communities, an employee can leave work, get vaccinated and return to work in 1.5 hours or less.

Paid time off to recover from side effects. OSHA doesn't specify what is reasonable time to recover but statements imply that two days of paid sick leave per primary vaccine dose meets this requirement. Employers who do not have a paid sick leave or PTO policy must provide sufficient paid sick time.

Employers who already offer employees paid sick leave or PTO can require employees to use their already-earned, unused hours for recovery from any side effects from a primary dose of the covid vaccine. It cannot force employees to use time specifically set aside for vacation and cannot require employees to use more leave than they have available (i.e., employees can't be forced to take sick leave/PTO/end up with a negative sick time/PTO hours balance.)

Q7: Are there penalties for employer non-compliance with the ETS?

A: OSHA will forgo programmed inspections for employers who make a "good faith" effort to implement a mandatory vaccination policy and 95% of its employees are fully vaccinated (or "almost" fully vaccinated). This will increase OSHA's enforcement resources. Employers who fail to comply are subject to steep financial penalties for each violation.

Q8: What is the new vaccination rule for health care facilities?

A: On November 5, 2021, the Centers for Medicare & Medicaid (CMS) issued a rule requiring that employees of healthcare providers and suppliers who are required to comply with the certain CMS rules¹ or Medicare/Medicaid reimbursement be fully vaccinated unless they are entitled to and receive a disability- or religion-based exemption. This includes hospitals, nursing homes, inpatient and outpatient care and rehabilitation facilities and some home health care agencies, among others. The rule applies to all employees whether or not they provide patient care and requires that they obtain their first (or only if J&J) dose of the vaccine by December 5, 2021.

Q9: What if the project owner requires that all employees be vaccinated?

A: If a project owner or general contractor requires that all job site employees be vaccinated, as long as the policy is not discriminatory, the employer is obligated to abide by the job owner/contractors' requirements.

¹ The new rule applies to employers who must comply with the Medicare and Medicaid Conditions of Participation (CoP), Conditions for Coverage (CfC), or Requirements for Participation (RFP).

Q10: What if an employee refuses to be vaccinated?

A: An employee who refuses to comply with the employer's vaccine policy (or, if applicable, vaccine/testing protocol) and does not qualify for an exemption is subject to disciplinary action up to and including termination. Employers cannot permit employees who do not comply with the requirements to work.

It is unclear whether unemployment insurance benefits will be available. Employees are not eligible for unemployment if their loss of employment is due to the employee's action (or inaction) – in this case, not getting vaccinated. It's unclear how the Unemployment Insurance division will handle this.

PART II. DUTY TO BARGAIN VACCINATION POLICIES

Q11: What is the scope of the Duty to Bargain the ETS and Executive Orders?

A: CBAs cannot supersede federal law thus unionized employers must still implement policies that comply with the applicable law, however, the ETS and mandates do leave open some elements of an employer's policy. Unions may – and employers are required to – bargain over the policy design elements (i.e. for the ETS, whether its mandatory vax or vax & test) things such as the timing of testing, paid leave, the costs of the tests, absences/attendance issues, covid-screening policies, and the ability to accommodate exempt employees or those who choose to not be vaccinated, etc.

The NLRB's GC 22-03 memo confirmed that employers have an obligation to bargain decisional aspects of the discretionary components of the ETS, which presumably applies also to the Executive Orders or any other mandate. Subjects of bargaining with respect to the ETS may include:

- Testing
 - Timing (which day per week, # tests per week although tests must not be more than 7 days apart, during the work day, paid time to test)
 - Cost (who pays, does the CBA permit the employer to shift the cost to the employee)
 - Type and manner of testing (rapid tests, where, when)
- Treatment of unvaccinated people
- How they will determine the vaccination status of each employee/obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee's vaccination status;

- What is “reasonable” paid time off to recover from vaccine side effects;
- Notice process for employees who test positive for COVID-19 (who do they call, when, etc.)
- Any modifications to return to work until they meet required criteria;
- Any other discretionary components or matters you’d like to see in place that are in addition to the minimum standards set by the applicable mandate

For employers covered by the EO, subjects of bargaining will depend on an organization’s structure and may include the availability of accommodations for those entitled to a religious or disability-based exemption; paid time off for vaccination and recovery from side effects, if any; other COVID-19 related safety measures; and other matters.

Q12: What if we bargain but do not reach an agreement? What if we refuse to bargain?

A: Labor and management have a duty to bargain over any proposed COVID-19 vaccination policy. Where the policy is required by federal law (the EO or ETS), a policy complying with the relevant laws must be implemented notwithstanding the lack of agreement by a union. If the Union refuses to bargain the implementation or discretionary aspects of a required program, the employer’s subsequent unilateral implementation of a program will likely be excused (at least to some degree) and the Union risks a failure to bargain charge, itself, in some circumstances.

Q13: Can an employer (voluntarily) implement a mandatory vaccination policy? Does it have to bargain?

A: The EO and ETS encourage all employers, regardless of coverage, to require employee vaccination. Employers may implement a vaccinate mandate unless the CBA prohibits it. Any mandate must permit employees to seek an exemption or accommodation because of disability or sincerely-held religious belief.

Where the ETS or EO do not apply, the duty to bargain is determined by a CBA’s language and the National Labor Relations Act. Some CBAs may contain language waiving the right to bargain over the employer’s decision to implement such a policy, however, decisions about what constitutes this “waiver” are tilting back in favor of labor – thus making it less likely CBAs truly waive this right even though most CBAs do not have language on mandatory vaccination (although this is still a case-by-case determination). Even if the duty to bargain the implementation of such a policy is waived, an employer still has an obligation to bargain the effects and implementation of the policy.

In light of the NLRB’s November 10th Operations Memo, unions should insist on bargaining both the implementation of the policy and the effects.

PART III. EXEMPTIONS AND PROOF OF VACCINATION

Q14: Can my employer require me to show proof of vaccination?

A: Yes. An employer does not violate Title VII, the ADA, or HIPAA if it asks employees about vaccination status or requires proof of vaccination. Employees are also obligated to respond to these questions but should ensure their response or proof does not provide information about other medical conditions or disability. The CDC's Covid-19 vaccination record/card is appropriate proof as it does not contain other confidential medical information. The federal contractor EO requires employers to verify vaccination status and compliance.

Q15: What if an employee cannot get the vaccine because of a disability or refuses as the result of a closely held religious beliefs?²

A: Under some circumstances, employees may request an exemption from an employer's COVID-19 vaccine mandate as part of a reasonable accommodation under Equal Employment Opportunity laws. Employers are not required to make accommodations if granting an accommodation creates an undue hardship.

If an employee subject to a vaccination mandate has a bona fide disability that causes a health provider to advise that person against receiving the vaccine, the employee must notify the employer and ask for an accommodation – presumably, an exemption from the vaccine requirement.

An employee who asserts that his or her sincerely-held religious belief, practice or observance conflicts with the employer's COVID-19 vaccine requirement may also request an accommodation. Employers may ask for an explanation as to how the belief conflicts with the vaccination requirement and prior inconsistent conduct by the employee is relevant to the resolution of the employee's accommodation request.

The interactive accommodation process does not require accommodation (i.e. does not require that an exemption be granted), only that the employer and employee discuss the availability of a reasonable accommodation that minimizes the health/safety risk to all employees. An employee is only entitled to a reasonable accommodation - not the accommodation they want – which may include reassignment, working in isolation, or a long-term layoff, among other possibilities. If accommodating the employee causes the employer an undue hardship and no reasonable accommodation is available, the employee may be terminated.

² The EEOC issued new guidance on exemptions at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L> (10/25/2021).

Q16: What is a sincerely held religious belief, practice, or observance?

A: A strongly held social, economic, political, or philosophical belief is not the same thing as a sincerely-held religious belief, practice, or observance for purposes of a request for vaccine exemption. Distrust of the government, Dr. Fauci, or the vaccine, or concerns about potential side effects are not sincerely held religious beliefs.

Q17: What if I (or a member) create my own vaccination card or COVID-19 vaccination certification?

A: Falsifying a CDC Covid-19 vaccination card is a criminal offense punishable under Title 18 U.S.C. §1017, and other applicable laws. In some instances, prosecutors have tacked mail and wire fraud charges related to the distribution of vaccination cards or the use of email/digital systems to obtain cards onto charges of falsification of federal documents. Charges involving mail/wire fraud or conspiracy related to fraud are subject to significant penalties such as 20+ years in prison and \$250,000+ in fines.

Some federal and state agencies may also require people entering buildings to complete a form certifying vaccination status. As these are state or federal forms, lying or falsifying information may be subject to criminal or civil penalties.

Q18: Can an employee be terminated for lying about getting the vaccine or an exemption?

A: Yes. The employer can discipline a dishonest employee as permitted by the CBA.

PART IV. LEAVE FOR COVID INFECTION, QUARANTINE & VACCINATION

Q19: Is there paid leave available for employees who contract Covid-19 or are required to quarantine due to exposure?

A: Paid leave may be available through an employer's vacation, sick or PTO policies or, for some Minnesota employees, municipal paid sick leave policies. To fill the gap where employees do not qualify for unemployment and exhaust an employer's voluntarily provided leave. Some union health plans have modified their plans to provide some benefits to members for recovery from COVID-19. Additionally, depending on the plan, COVID-19 may qualify as a short-term disability.

The federal paid leave programs available to workers unable to work because of covid or quarantine requirements ended but employees may be eligible for *unpaid* FMLA leave, which protects the employee's job.

Q20: Can an employee receive unemployment if he/she has COVID-19 or is required to quarantine due to exposure to COVID-19?

A: It depends. Employees cannot receive unemployment if they receive any kind of paid leave (PTO, vacation, sick days, short term disability, etc.). In addition, unemployment benefits are subject to a 1-week waiting period, so if an employee is only sick for one work week, benefits are not available.

Employees who are required to quarantine by the health department or their employer because of exposure to COVID-19 are eligible for unemployment.

Wisconsin employees who are unable to work because they have contracted COVID-19 *and are too sick to work* are not usually entitled to unemployment benefits. Minnesota employees *may* still be eligible even if they are too sick to work.

An employee who is diagnosed with COVID-19 but could *physically* work if they were not required to quarantine *is* eligible for unemployment (subject to the waiting week).

Q21: Are employees who quit/are fired because they refuse to be vaccinated in accordance with an employer mandate entitled to unemployment?

A: It is not clear. The answer to this question is not yet clear. Unemployment provides benefits to employees who lose their job through no fault of their own. In Wisconsin, employees are not eligible for unemployment if they quit or voluntarily resign without good cause attributable to the employer or are terminated for “misconduct” or “substantial fault” such as refusing to comply with employer’s rules. Employers may require vaccination, therefore, refusing to comply with a vaccination requirement (and no EEO exemption applies) technically disqualifies an employee from receiving benefits. However, it is not clear if this will ultimately be the case.

A Republican proposal to change Wisconsin UI law so that employees who quit/are fired for refusing to comply with a vaccine mandate are eligible for unemployment has seen limited activity. It would presumably increase costs to employers who, in many cases, have little choice but to implement mandates, and pay into the unemployment system.

Wisconsin’s UI division addresses this via a FAQ in the attached document noting that the circumstances of the separation will determine employee eligibility but that the presumption is that benefits are not available unless an exception outlined in state law applies.³

³ <https://dwd.wisconsin.gov/covid19/public/covid-19-workplace-faq.htm>

Q22: Can an employer require only unvaccinated employees to wear masks if it allows vaccinated employees to work without masks?

A: Yes. An employer can require unvaccinated employees to take extra precautions, such as continued mask wearing, distancing, or reassignment in accordance with current CDC and OSHA guidance and the ETS requires that covered employees require unvaccinated employees to mask.

Q23: What if an employer mandates vaccination and an employee has a negative reaction to the vaccine?

A: Generally, an illness/injury that arises out of and in the course and scope of employment *may* have a claim against the employer's worker's compensation insurance policy. An employee who believes they contracted covid at work and seeks WC benefits as a result will face an uphill battle because the virus is now widely prevalent within communities so proving where a person contracted the virus will often be difficult to impossible. However, if an employer mandates its employees to be vaccinated at work or on work time, and an employee has an adverse reaction that results in injury or illness, that employee may have a worker's compensation claim against their employer.

These FAQs are based on the best available information as of December 7, 2021, and should not be construed as legal advice. We will make every effort to update this document as new information becomes available or the information changes. As with any question, the answer or end result may vary based on the specific circumstances of a particular situation.