

COVID-19 and the Workplace: An Overview of Federal Guidance on Employer Responsibilities and Employee Rights

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There is no doubt that the workplace has evolved tremendously over the past few decades, shaped largely by the advent of personal computing devices and the expansion of the internet. Unexpectedly, the COVID-19 pandemic made its own imprint on the workplace that will require us to adapt and implement the necessary steps to ensure a vibrant and productive workplace for the future.

In the past year, multiple federal agencies, including the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) have issued guidance that address requirements and best practices in the workplace. These guidance documents are updated on a regular basis and incorporate a science-based approach in conjunction with existing federal laws and regulations. An overview of the key guidance documents regarding employer responsibilities and employee rights in relation to COVID-19 is provided below.

PATH OUT OF THE PANDEMIC: PRESIDENT BIDEN'S COVID-19 ACTION PLAN

On September 9, 2021, President Biden announced a COVID-19 Action Plan – the Path out of the Pandemic. The Plan is a comprehensive, six-pronged, national strategy to combat COVID-19 and includes protections for the economy. The six prongs are:

- Vaccinating the Unvaccinated;
- Further Protecting the Vaccinated;
- Keeping Schools Safely Open;
- Increasing Testing & Requiring Masking;
- Protecting Our Economic Recovery; and
- Improving Care for those with COVID-19.

On the same date, the President signed Executive Orders that addressed vaccinations for federal workers and contractors and directed OSHA to draft an Emergency Temporary Standard (ETS) directed at private-sector businesses with 100 or more employees to:

- Mandate vaccination or weekly proof of negative test results; and,
- Provide paid time off for workers to get vaccinated or to recover if they suffer post-vaccination effects.

On October 12, 2021, OSHA advanced the ETS for final White House review. Following a swift review by the White House's regulatory office, the ETS was recently filed in the Office of the Federal Register on November 4, 2021, and requires employers with 100 or more employees to:

- Require vaccinated employees to provide proof of vaccination by January 4, 2022;
- Ensure unvaccinated employees wear a mask by December 5, 2021, and produce weekly negative test results by January 4, 2022, and,

- Provide paid time off to employees to receive the COVID-19 vaccine, including sick leave to recover from any side effects by December 5, 2021.

The ETS provides additional requirements and guidance, including requirements related to payment for testing and penalties for noncompliance.

WORKPLACE SAFETY: GUIDANCE FOR FEDERAL CONTRACTOR AND SUBCONTRACTORS

On September 24, 2021, following the President's announcement of the COVID-19 Action Plan and the Executive Order on Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, the Safer Federal Workforce Task Force issued COVID-19 Workplace Safety Guidance (the "Guidance") for covered federal contractors and subcontractors. The Guidance is intended to ensure compliance with specified COVID-19 workplace safeguards at work sites with individuals working on or in connection with a Federal Government contract or contract-like instrument. The requirements apply to new contracts awarded on and after October 15, 2021 and to contracts before that date with options to extend.

The Guidance sets forth workplace safety protocols, including:

- COVID-19 vaccination of covered contractor employees, except for employees that are entitled to an accommodation;
- Compliance by covered contractor employees and visitors with masking and physical distancing; and,
- Designation by covered contractors of a person to coordinate COVID-19 workplace safety efforts.

The Guidance also includes Frequently Asked Questions addressing vaccination policies, scope of the requirements, and compliance with the requirements.

WHAT YOU SHOULD KNOW ABOUT COVID-19 AND EQUAL EMPLOYMENT OPPORTUNITY LAWS

On October 13, 2021, the EEOC issued updates to its Technical Assistance Questions and Answers Guidance (EEOC Guidance). The EEOC Guidance addresses the following key areas:

- Disability-Related Inquiries and Medical Exams in the employment context;
- Confidentiality of Medical Information;
- Hiring and Onboarding;
- Reasonable Accommodation;
- Pandemic Related Harassment Due to a Protected Category;
- Furloughs and Layoffs;
- Return to Work;
- Age, Caregiver, Pregnancy; and,

Courts generally defer to the EEOC in deciding a claim, such as a claim that an employer failed to provide an accommodation to an employee. On that basis, employers are encouraged to be familiar with and implement the EEOC standards. Key provisions include:

- Keeping confidential any medical information related to COVID-19;
- Engaging in a dialogue with an employee that requests a COVID-19 related accommodation including requests based on medical or religious reasons; and,
- Responding to pandemic-related harassment.

The EEOC Guidance also provides that federal equal employment opportunity laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA.

On October 25, 2021, the EEOC added a new section concerning vaccine mandates to its Technical Assistance Questions and Answers Guidance and noted that “objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as “religious beliefs” under Title VII.” If an employee requests a religious exemption to a vaccine mandate in the workplace, the employer may make a limited factual inquiry to verify the religious belief on an objective basis.

PROTECTING WORKERS: GUIDANCE ON MITIGATING AND PREVENTING THE SPREAD OF COVID-19 IN THE WORKPLACE

OSHA has also issued its own set of guidance addressing safety practices and standards, including updates to its Protecting Workers guidance. Under OSHA, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. OSHA standards related to COVID-19 include employers being responsible to:

- Facilitate employees getting vaccinated;
- Instruct workers who are infected or who have close contact with someone who tested positive and all workers with COVID-19 symptoms to stay home from work;
- Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers;
- Provide workers with face coverings or masks; and,
- Train workers on COVID-19 policies.

The OSHA standards also include best practices for workplace ventilation systems, cleaning/disinfecting and record keeping. Under OSHA, employees are protected from retaliation for raising workplace health and safety concerns related to COVID-19 and employers are encouraged to provide an anonymous process for workers to voice safety-related concerns and to implement anti-retaliation policies.

At the time of print, a federal appeals court has granted an emergency stay prohibiting enforcement of the ETS and several other lawsuits have been filed. Nevertheless, employers should begin preparing policies and procedures that comply with existing and forthcoming guidance from the various agencies addressed above. Employers should also prepare for employees who refuse to comply with legal requirements and prepare an appropriate response, which may include discipline, up to and including termination.

White and Williams’ team of employment attorneys are closely monitoring these developments. If you have questions about how to ensure that your policies comply with workplace and other applicable laws, please contact the authors.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.