

# Coalition of Franchisee Associations

## What Franchisees Need to Know About President Biden's Planned Workplace Vaccine Mandates

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# Path out of the Pandemic

- President Biden's six-pronged strategy to combat COVID-19
  - Includes vaccine mandates for federal contractors and many healthcare workers;
  - Requiring all employers with 100+ employees to ensure their employees are vaccinated or tested weekly;
  - Requiring employers to provide paid time off to get vaccinated.

# Vaccine Mandate

- Biden's plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees.
- Estimated to impact 80 million workers, or two-thirds of the country's workforce.

# Vaccine Mandate

- Rule will take the form of an Emergency Temporary Standard.
  - Allows the agency to enact regulations it can enforce immediately if a “grave danger” to worker safety is present.
- Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation.

# Which employers will be covered?

- ALL employers covered by the OSH Act must comply with the forthcoming ETS.
- Includes franchisees, management companies and owner-operators.
- Many employers who do not regularly interact with OSHA.

# When will the ETS likely be issued?

- OSHA officials have indicated that the ETS will be released in a “matter of weeks.”
- OSHA officials have also urged businesses to voluntarily begin the process of adopting vaccination mandates, without waiting for the agency to release the ETS.
- Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction.
- The ETS can remain in place for six months before it must be replaced by a permanent OSHA standard.



# State-Plan States

- In states where the federal government does not have jurisdiction over workplaces safety, the state agencies will have to adopt the ETS or “just-as-effective measures” within 15 to 30 days.
- Governors of some state-plan states have already come out against the ETS, which could set up a battle between state-plan agencies and federal OSHA.

# Unanswered Questions

- **Will remote employees be covered?**
  - According to comments from OSHA on September 10<sup>th</sup>:
    - The ETS will not apply to employees who “never” come to work.
    - But, if the employee ever comes to work, or works outside of the office with others, they will be covered.

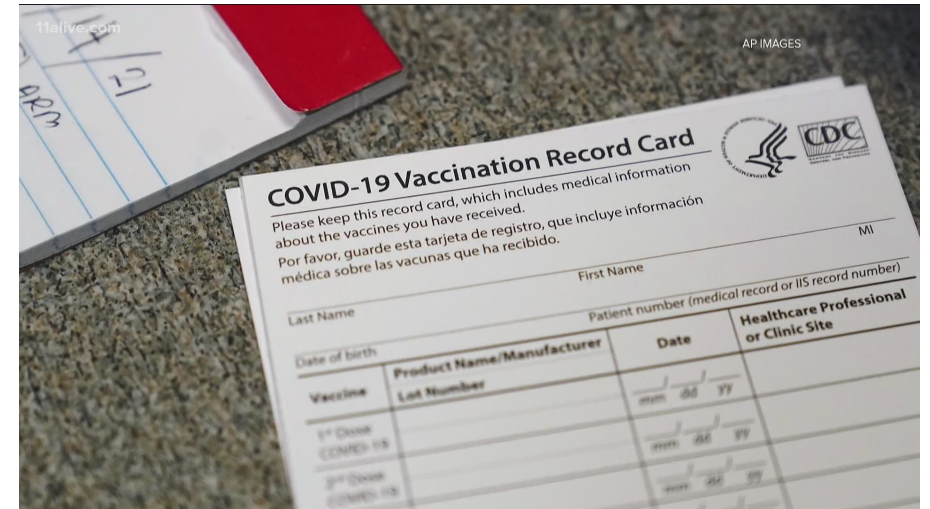


# Unanswered Questions

- **How will the 100-employee threshold be counted?**
  - While not clear in President Biden's announcement, on Friday, OSHA officials suggested the threshold will likely be *total* number of employees, rather than employees at each worksite.
  - This will be a major issue for multi-unit operators.
  - Also unclear how the joint employer analysis will factor in.

# Unanswered Questions

- **Will employers be required to collect proof of vaccination from employees?**
  - Unclear at this time.
  - Consider record retention requirements: OSHA requires record retention for length of employment + 30 years.
  - Could have huge recordkeeping implications if required.



# Unanswered Questions

- **What type of testing will be required?**
  - Unclear at this time.
  - While the PCR test is more accurate, it takes longer to receive the results and is more expensive.



# Unanswered Questions

- **Who pays for testing?**
  - Unclear at this time.
  - Insurance may cover the cost of tests, and several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.



# Unanswered Questions

- **Must franchisees pay employees for time spent getting tested?**
  - No clear answer for all employees – safest to pay for the time.
  - OSHA commented Friday that employer will be required to provide paid time off or use of existing PTO.
  - Generally, time spent by employees receiving employer-required tests should be treated as compensable
    - If the testing is required during the workday or
    - If necessary to perform the job safely and effectively.





# Unanswered Questions

- **Will unionized employers be required to bargain over the decision of how to comply with the ETS?**
  - Unclear to what extent unionized employers will be compelled to bargain over the decision on how to comply with the ETS (or at least the discretionary aspects with respect to vaccines vs. weekly testing).
  - At a minimum, be prepared to bargain over the effects of compliance with the ETS.
  - Non-union employers should consider the practical implications of compliance from a labor relations perspective.



# Unanswered Questions

- **Will the ETS face legal challenges?**
  - Most likely.
  - Governors of many states have already indicated they intend to challenge the ETS.
  - Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
  - OSHA will have to prove that there is a “grave danger” to workers.
  - But franchisees should not count on being relieved of all obligations and should prepare now.



# What Should You Do?

- **Adopt Procedures for Determining Employees' Vaccination Status**
  - Maintain confidential records of employee vaccination status.
  - EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
  - ETS may require that you collect proof of vaccination.
  - Otherwise, create a confidential list of vaccinated workers.
  - Review state laws regarding confidentiality and privacy of medical records.

# What Should You Do?

- **Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.**
  - For some franchisees, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
  - OSHA officials stated that employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations)
  - If planning for weekly testing, think through the logistics:
    - Onsite or through designated vendors?
    - Payment for testing
    - Payment of time for testing

# What Should You Do?

- **Have a plan for tracking test results.**
  - You should have a plan in place for collecting and tracking test results.
  - Who is going to collect the results?
  - When will the test results need to be collected?
  - How will you track the results?

# What Should You Do?

- **Have a plan for addressing noncompliance by employees.**
  - What happens to an employee who does not get tested?
  - What happens to an employee who refuses to get vaccinated?

# What Should You Do?

- **Develop a plan for handling accommodation requests.**
  - Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
  - Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
  - Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
  - Be prepared for employees to request an accommodation from the weekly testing requirement.

# What Should You Do?

- **Prepare for OSHA Complaints and Inspections**

- The vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation.
- OSHA will likely ask for your COVID-19 response plan and training records.
- Develop a COVID-19 policy and communicate its requirements to your employees.
- Train managers and supervisors on what to do and say if OSHA arrives for an inspection.

# DOL Comments

- OSHA and the DOL held virtual meetings on Friday, September 10th.
- OSHA indicated that it will not conduct any further listening sessions with outside groups, citing the severe time crunch they are under to complete the ETS.
- Businesses, unions, etc. will be allowed to submit comments after the standard takes effect.
- DOL indicated they have not decided whether employers will be required to cover the cost of COVID-19 testing.



# Other Mandate Considerations

- Federal Contractors
  - New EO goes beyond those working on federal property
  - Effective with contracts with pending solicitations , extensions, renewals, or new contracts entered on or after October 15
  - More details expected by September 24
- Recipients of Medicare and Medicaid
  - CMS will issue temporary regulations
  - Scope is broad
  - Many healthcare providers will also be covered by the OSHA ETS

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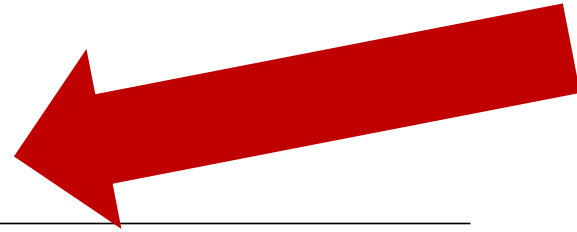
Fisher Phillips continues to prepare resources to aid employers with issues related to the COVID-19 vaccines, including sample policies, how to promote vaccination, employee relations, and guidance on relevant, ever-evolving federal, state, and local laws.

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# Vaccines

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# Questions?

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# Thank You!

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