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What You Need to Know About Vaccine Mandates

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Presented by:

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OVERVIEW

- Who is covered under the mandates
- What is required under the mandates
- Other legal obligations implicated the vaccine mandates

WHERE ARE WE NOW?

There are three potential vaccine mandates to be aware of: OSHA Emergency Temporary Standard, CMS Rule, and Federal Vaccine Mandate

- This presentation focuses on the OSHA ETS

Implementation Dates:

- *By December 5, 2021:* All requirements other than testing for unvaccinated employees must be implemented
- *By January 4, 2022:* Testing for unvaccinated employees must commence

Current Court Dates:

- November 12: 5th Circuit granted a stay on the ETS
- November 16: 6th Circuit was chosen via lottery to decide whether the stay on the ETS should be lifted
- December 10: Final legal brief responses due to 6th circuit
 - On December 15, the 6th Circuit decided a 3 judge panel will review the ETS



**WHO IS COVERED –
HOW TO COUNT TO 100**

WHO IS COVERED

COVERED: Employers with 100 or more employees

NOT COVERED:

- Employers already subject to the Federal Contractor Mandate or CMS Rule

EMPLOYEES NOT SUBJECT TO THE MANDATE:

- Employees who work 100% remote
- Employees who work exclusively outdoors
- Employees who report to worksites where other individuals are not present



HOW TO COUNT YOUR EMPLOYEES

- This is an employer level count
- Part-time employees should be included
- Remote work employees should be included
- Minor employees should be included



COMMON CLIENT QUESTIONS/CONCERNS

Staffing Agencies

- How to count employees of staffing agencies?
- Conflicts/overlap with other federal mandates

Related Entities

- How to count employees at entities owned by the same individuals?



WHAT IS REQUIRED

WHAT IS REQUIRED OF EMPLOYERS?

- Obtain proof of vaccination status
- Create mandatory/test-out policies
- Provide “Key Things to Know about COVID-19 Vaccine” publication
- Communicate testing requirements
- Establish accommodation process
- Create procedure for positive tests and removal of positive case from workplace
- Provide paid time/sick leave for vaccination and recovery
- Impose disciplinary action for failure to comply
- Integrate into policy applicable anti-discrimination and prohibition against retaliation laws, along with warning of criminal penalties for providing false information



ACCEPTABLE PROOF OF VACCINATION STATUS

- Record of immunization from healthcare provider or pharmacy
- Copy of COVID-19 Vaccination Record Card
- Copy of medical records documenting the vaccination
- Copy of immunization records from public health, state, or tribal immunization information system
- Copy of other official documentation

*if an employee is unable to produce acceptable proof, a signed and dated statement may also suffice for OSHA requirements



RECORD RETENTION

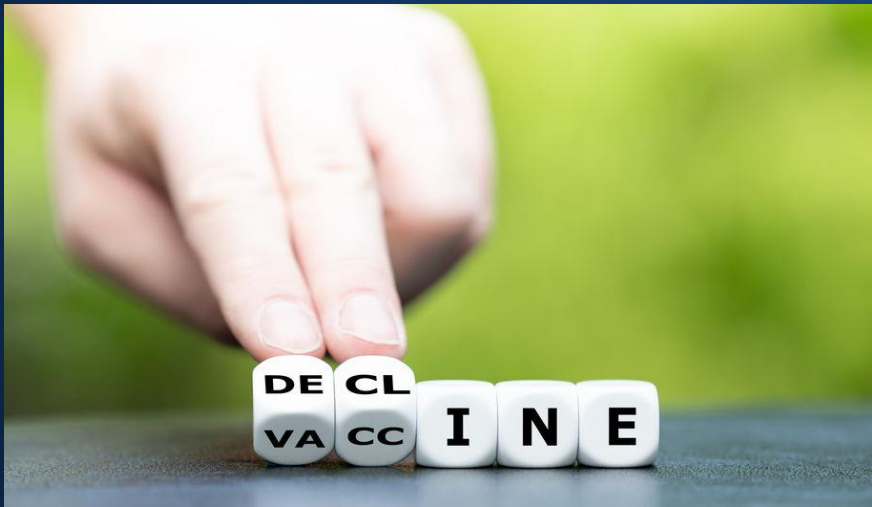
Employers must retain:

- A roster of employee vaccination status
- All testing results
- Accommodation Request Forms



CHOOSING A POLICY

- Mandatory Vaccination Policy
- Test-Out Policy
- Partial Mandatory Vaccination Policy

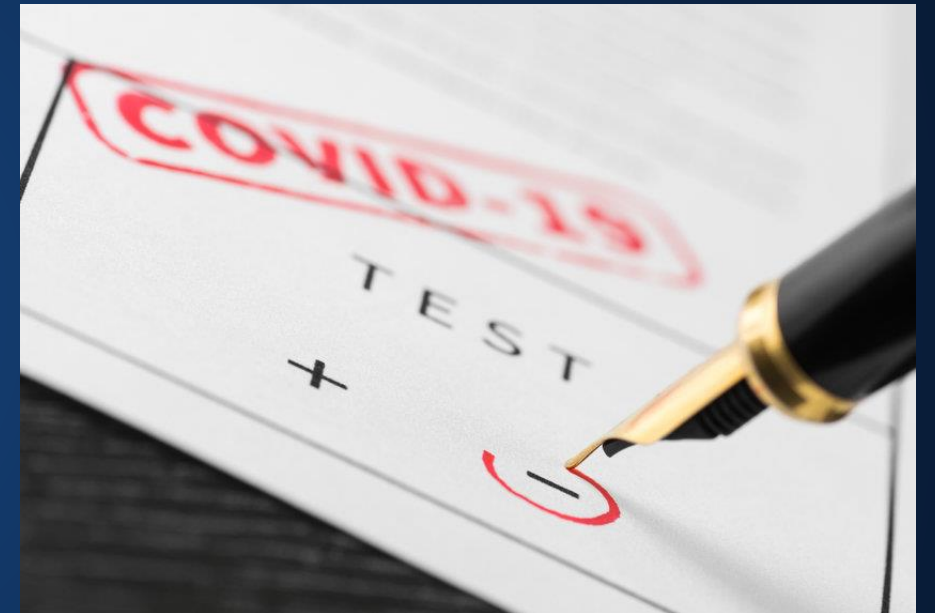


TESTING REQUIREMENTS

Testing is required for 2 categories of employees:

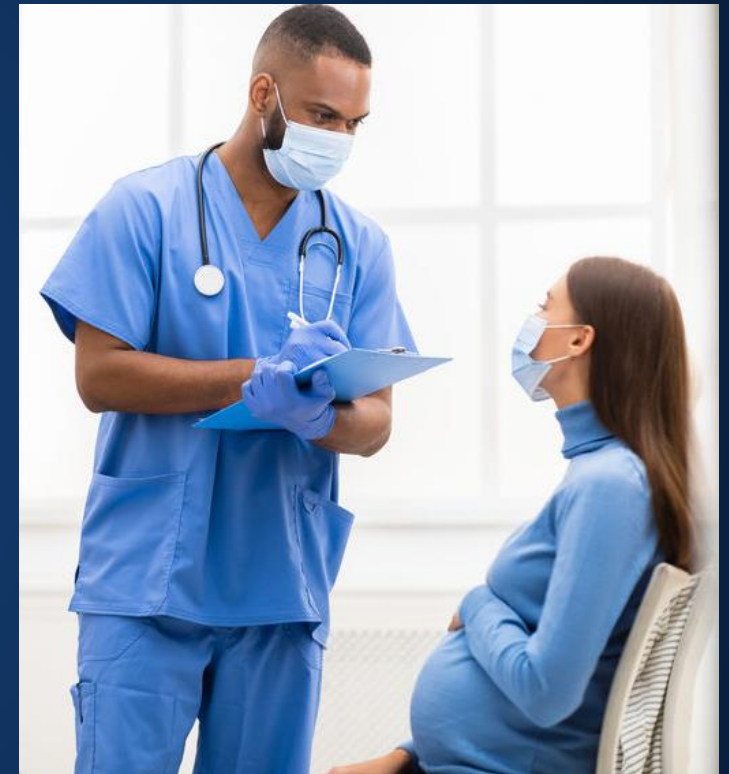
- Employees who report at least once every seven days to the workplace
- Employees who do not report to the workplace during a period of 7 or more days

Employers must maintain a record of each test result provided by each employee



WHAT KIND OF TESTING IS PERMISSIBLE?

- A valid COVID-19 test under the ETS may not be both self-administered and self-read unless observed by the employer or an authorized health proctor
- Employers can choose the test that works best for their workplace
- Whatever type is chosen, employers **must** communicate the type of test and where to provide the results



ACCOMMODATIONS

Accommodation v. Exemption

- Accommodation = adjustment or modification provided by an employer to enable persons to enjoy equal employment opportunities
- Exemption = a type of accommodation



EXEMPT

EVALUATING AN ACCOMMODATION REQUEST

- Accommodations may be granted where they do not pose an “undue hardship” on the company
- 2 types of requests, by law:
 - Medical Accommodation Request
 - Religious Accommodation Request



POSITIVE TESTS IN THE WORKPLACE

- Employees must “promptly notify” employers when the employee receives a positive test
- Employer must:
 - Remove the employee
 - Keep the employee removed
 - Report any work-related hospitalizations or deaths



PAID TIME OFF – VACCINATION AND SIDE EFFECTS

- Employers must provide reasonable time off, including up to 4 hours of paid leave to receive each dose of the vaccination (8 hours total)
- Employers must provide “reasonable time” (including sick leave) to recover from vaccine side effects





LEGAL OBLIGATIONS, CHALLENGES, AND SOLUTIONS

INTERPLAY WITH OTHER LAWS

- CMS Rule
- Federal Contractor Mandate
- OSHA General Safety Guidelines*
- State Specific Paid Leave Laws*
- Americans with Disabilities Act/Title VII*



*denotes laws that remain in effect regardless of whether any stay is lifted

CENTERS FOR MEDICARE AND MEDICAID – OMNIBUS COVID-19 HEALTH CARE STAFF VACCINATION RULE

- Requires employers to implement a Mandatory Vaccination Policy
- Employees who work in facilities covered by this Rule must comply with this rule
- Currently stayed in 14 states (not including Michigan)



FEDERAL CONTRACTOR MANDATE – SAFER FEDERAL WORKFORCE GUIDELINES

- Requires federal contractors to comply with the Safer Federal Workforce Guidelines – effectively requires Mandatory Vaccination Policy
- Employees who work in a facility covered by this Mandate must comply
- **Currently stayed nationwide**



OSHA GENERAL SAFETY REQUIREMENTS DURING COVID-19*

- The Occupational Safety and Health Act requires employers to provide a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm
- Employers must continue to implement multi-layered interventions to protect their employees



STATE SPECIFIC PAID LEAVE LAWS

Paid Time Off

- Basic rule: employers are not required by Michigan law to provide any vacation time or personal paid time off

Paid Medical Leave Act:

- Eligible employees are entitled to 40 hours of paid medical leave



FLSA – COMPENSABLE TIME

The OSHA ETS does not require employers to pay employees for time spent getting tested; however, the ETS specifically states that employers may be subject to other laws that mandate compensation

- Family Labor Standards Act
 - Employers must pay employees for time spent “waiting for and receiving medical attention” at the employer’s direction on the premises during normal working hours.
 - The DOL has said employers must pay employees for all hours worked. This may include “employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic.”

AMERICANS WITH DISABILITIES ACT (ADA)/TITLE VII*

- ADA requires an employer to provide reasonable accommodations to qualified individuals with a disability unless doing so would cause undue hardship
- Title VII requires employers to accommodate “sincerely held” religious beliefs unless doing so would cause undue hardship
- Accommodations may include unpaid leave or exemptions from the mandate





QUESTIONS?



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THANK YOU



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