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Vaccine Mandates: Considerations for Illinois Employers in Manufacturing

Hannah Griffin

Novack and Macey LLP

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On November 4, the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) announced an Emergency Temporary Standard (ETS) which requires all employers with 100 or more employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy, unless they adopt a policy requiring employees to choose to either be vaccinated or undergo regular COVID-19 testing and wear a face covering at work. OSHA estimates that the ETS applies to 1.9 million private-sector employers employing 84.2 million workers.

How Employee Totals Are Tallied

The ETS has a sweeping effect, in part, because (for the purpose of counting whether an employer has 100 or more employees) OSHA defines “Employee” broadly to include: remote employees, employees who work off-site, part-time employees, employees who work outdoors, and employees who are minors. And, an employer who has 100 or more employees total across more than one location will likely be subject to the ETS, even if they do not have more than 100 employees working in one place. Accordingly, Illinois employers should seek legal advice before deciding the ETS does not apply to them.

Implementing a Vaccination Policy

President Biden announced that his administration will not begin enforcing compliance with the ETS until January 4, 2022. For employers in the manufacturing industry facing a busy holiday season and labor shortages, this may be a welcome reprieve. Implementing a mandatory vaccination or testing policy may necessitate employers to put new infrastructure in place, as the ETS also requires employers to do the following:

- 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.
- Provide up to four hours paid time to receive each vaccination dose. Employers cannot require employees to get vaccinated on their own time or to use other paid leave such as sick leave or vacation time.
- Remove employees from the workplace, regardless of vaccination status, if they test positive for COVID-19 or receive a COVID-19 diagnosis and not allow them to return to work until they meet required criteria.
- Ensure each worker who is not fully vaccinated is tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within seven days before returning to work (if the worker is away from the workplace for a week or longer), and maintain testing records while the ETS remains in effect.
- Ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes.

Should You Offer a Testing Option?

Employers to whom the ETS applies may consider adopting a mandatory vaccination policy rather than a “soft mandate” of regular testing and face coverings simply because of the administrative headache such testing might cause. Employers implementing a testing policy will have to ensure that testing is happening weekly, ensure that the tests being used are an approved version, and that they are maintaining the testing records in a confidential and secure manner. Although the ETS does not require employers to pay for testing, Illinois employers may have to incur costs for testing under other federal or state laws.

Limited Exceptions to the Mandates

The ETS also recognizes the contours of federal law and does not require employers to enforce a mandatory vaccination policy for those employees for whom a vaccine is medically contraindicated, for whom medical necessity requires a delay in vaccination, or those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

What About Smaller Employers?

Smaller employers who are not subject to the ETS should still consider implementing vaccine mandates in their workplaces. On-the-job exposures to COVID-19 could potentially expose employers to workers' compensation claims. Having a documented mandatory vaccination (or testing plus face covering) policy in place will go a long way in helping employers to defend against these claims. Indeed, Illinois employers who institute a vaccine mandate would have additional protection in this area if the proposed Illinois House Bill 3654 were to pass. The bill proposes to amend the Illinois Workers' Compensation Act and provide that "no compensation shall be awarded to a claimant for death or disability arising out of an exposure to COVID-19 if the employee has refused a vaccination."

Moreover, with worker shortages continuing to plague the manufacturing industry, keeping existing employees healthy and working is of paramount importance. Employers in the manufacturing industry need not be too concerned about turning off potential employees with a mandatory vaccination policy. The latest data shows that attitudes toward vaccinations are improving. Indeed, about 70 percent of U.S. adults have been fully vaccinated and 80 percent have received at least one shot.

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