

# With a stay in place, what should you do about vaccine mandates?



We're not finished with OSHA's vaccine mandate standard simply because the 5th Circuit slapped a stay on it. The 6th Circuit Court, which has been chosen to hear the challenges to the shot mandate, can uphold all of it, some of it or none of it. And then OSHA can try again. That's why it's best for most businesses to continue efforts to comply with the mandate to avoid having to scramble to catch up later.

The information presented here comes from a recent webinar—Vaccines, Mandates & Masks: Legal and Practical Solutions for Your Workplace—presented by Helen Holden, a partner at the law firm of Spenser Fane, who specializes in employment law.

## The lay of the legal landscape

While the fate of OSHA's vaccine mandate remains up in the air, it's well within the realm of possibility that the mandate, or an altered version of the mandate, will make it through eventually. Whether it be altered by the courts, or whether OSHA attempts an altered version of the mandate to circumvent the court's reasons for shutting it down. With that in mind, compliance shouldn't wait.

### These are the preliminary steps you need to take now:

- Collect employees' vax status.
- Obtain proof of vaccination from employees.
- Develop and maintain the roster of employees' vax status.
- Decide whether to have a mandatory vaccine policy or a vax-and-test-and-mask policy and notify

employees of your decision.

Holden also noted you don't have to wait for any court to uphold the validity of OSHA's mandate. You can impose your own mandate as courts are upholding private mandates. While many companies have avoided doing so, the mandate, even though it's caught up in the court system, may provide the protection some companies need to feel comfortable moving forward with their own mandates.

### **Counting 100+ employees**

OSHA's emergency temporary standard covers employers with 100 or more employees on the payroll. OSHA set the 100-employee cut off, according to Holden, because it thought employers of that size are robust enough to handle the mandate's requirements.

All employees working at all locations must be counted when determining the 100+ employee limit, which seems easy enough. Not so easy, however, is determining whether related companies need to combine their payrolls. According to Holden, related companies need to combine their payrolls if matters of workplace safety are jointly administered. It's similar, she pointed out, to how FMLA matters are handled by related companies.

When do you count? Holden stressed counting is on a rolling basis, which means you'll need to plan to count on a recurring basis. She gave this example:

- On Dec. 1, an employer has 90 employees. *Result:* The employer isn't covered
- On Jan. 4, the same employer has 95 employees. *Result:* The employer still isn't covered
- On Jan. 15, the same employer has 105 employees. *Result:* The employer is covered and must now comply, even though as originally written, the shot mandate requires employees to receive shots by Jan. 4.

### **Employee relations**

The shot mandate is contentious. Dealing with resistant employees presents its own difficulties.

Holden said you can ask job applicants if they're vaccinated and you can request applicants to present proof. If you have a shot mandate, you can reject an applicant who isn't vaccinated. You should inform applicants why they've been rejected, she added, while at the same time, making sure they don't need an accommodation, she stressed.



It's also OK to ask employees about their vax status and if they intend to get shots. But, she warned, it's not OK to ask why they're not vaccinated; doing so raises issues under the Americans with Disabilities Act.

You can discipline employees who refuse to get shots and who also don't ask for an accommodation. Discipline should be determined based on the ordinary course for violating company policy, she said, and could include unpaid leave or termination. But the key, Holden emphasized, is that you must have a policy mandating shots.

If you have a vax-and-test-and-mask policy and an employee doesn't want to get tested or wear a mask, Holden advises you and the employee to engage in the ADA interactive process to arrive at a mutually acceptable accommodation, such as working from home.

## **Enforcement**

Will OSHA really enforce the mandate? Holden said yes, even though it's short-staffed. Even if OSHA can't get around to dealing with every violator, there's another enforcement tool: employee complaints, which is where most OSHA enforcement activities originate. Employees and unions have rights to get information from employers by the next business day, so expect whistle-blowers, she added.