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Attorneys look for clues to help employers get ready for vaccine mandate

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The Biden administration's upcoming emergency regulations on Covid-19 vaccinations in the workplace may not be out yet, but legal experts say one thing is for certain: It's going to be a heavy lift for employers.

While some Pittsburgh-region employers — Highmark Health, WVU University Health System and Allegheny County among them — have already imposed vaccine mandates ahead of the federal regulations, many others have not. And it's somewhat difficult to figure out the details of the pending regulations, which the White House has tapped the Occupational Health and Safety Administration for regulating in the form of an Emergency Temporary Standard, or ETS, that employers will have to follow. All that are known are the broadest of outlines: That the vaccine-or-regular-test of employees for the virus will be for companies with



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Leah Sell, employment attorney at Leech Tishman.

100 or more employees or ones that either receive federal Medicare/Medicaid funding or have federal contracts.

Even though the announcement was made in early September, there still haven't been any details released, although it's likely that they will be soon.

Leah Sell, an employment attorney at Pittsburgh-based Leech Tishman, said there are some clues in executive orders done in June on Covid-19 vaccine mandates for federal employees and contractors.

"We can look to that as a framework as to what might be included in this framework or how at least it might be set up," Sell said.

Sell and Philip Toomey, who chairs its Employment & Labor Practice Group, said they've been told to expect broad definitions of what type of employee will come under the regulations and only limited exceptions.

That means that remote workers, for instance, won't likely be exempted strictly on the basis of being remote. The federal contractor rules imposed in last June's executive order said that remote workers would have to be certified as never coming into contact or ever working in an office.

"The only exception is if the employer can show with some level of certainty that a remote worker will never have any contact with the workplace or workers who are going to be in the workplace," Sell said. And even if only a handful of employees are engaged in federal contracts, the executive order requires all employees in that office to be vaccinated.

Again, it's not clear whether this would carry over to the OSHA emergency rule, but given the Biden administration's stated position to get as many people as possible vaccinated, it's likely. That's because, said Ben Patton, partner at Reed Smith, the pending vaccination/testing regulations are more of a policy extension than a workplace safety rule.

"The rule intends to maximize the number of individuals reached," Patton said.

Toomey agreed.

"This is probably less about a hazard being present in the workplace and more along the lines of reducing the number of Americans that are currently unvaccinated," Toomey said. All companies, with either one employee or thousands, are also covered by OSHA's general-duty clause that requires a safe workplace. That means they have a responsibility to mitigate Covid exposure in their workplace.

Another big issue is the question of regular testing. It could be once a week for the unvaccinated, or it could be even more often. Toomey said employers who choose not to implement a mandatory vaccination policy will have to incur the substantial cost of compliance, including the cost of the test, implementing record keeping and doing the tests as well.

"You are going to have to incur all the costs associated with vaccination or testing out," Toomey said.

And the cost of noncompliance — failing to have a nonvaccinated employee complete the test — \$14,000 per employee per failed test.

"It could be a significant amount of money even for a handful of employees," Sell said.

Patton said employers, who have been frustrated by the process, may soon be struggling to find sources for vaccines or tests to comply. And there's more than just the cost of compliance. Patton said that companies will be looking to their bottom line if they don't want to risk losing a federal contract opportunity.

"You can see how this really affects a very large number of workers through what is essentially a very short and straightforward requirement not straightforward in terms of how companies can implement these rules," Patton said.

Paul J. Gough

Reporter

Pittsburgh Business Times

