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What employers need to think about with new vaccine/testing mandate

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While there have been more than a dozen challenges to Thursday's federal regulations regarding mandatory Covid-19 vaccinations or regular testing that would cover just about every employer with 100 or more workers, a nationally known employment attorney for a Pittsburgh firm said he wouldn't count on a temporary court order blocking the regulation before it takes effect Jan. 4.



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Leah Sell, employment attorney at Leech Tishman.

There have been at least 10 states and five businesses that have challenged the Emergency Temporary Standard imposed Thursday by the U.S. Occupational Health and Safety Administration, part of the Biden administration's push to vaccinate more Americans and putting the workplace at the center of those efforts. There are lawsuits pending in at least three circuit courts.

"The litigation scene is going to be very active," said Philip Toomey, chair of the labor and employment practice of Pittsburgh-based Leech Tichman.

But in a conference call with businesses Friday afternoon going over some of the new regulations, about 24 hours after they were announced, Toomey warned the companies that wanted to wait and see how the courts dealt with the requests for a temporary stay that they should have second thoughts. Especially since the penalty for each violation would be \$14,000.

"It's probably a 50-50 bet at best that courts are going to stay enforcement before there's full litigation, so I think you need to be guided accordingly," Toomey said.

Two recent rulings, one from the U.S. Supreme Court and the other from the Second Circuit Court of Appeals, support this opinion: The high court refused to hear a temporary stay pending litigation in *Doe vs. Mills* about Maine's vaccine requirement not including a religious exemption. The Second Circuit also reversed an earlier stay about religious exemptions for New York City health care workers.

"I think what we're seeing is a reluctance of courts to jump in early on these types of actions," Toomey said.

That gives all private employers with 100 or more employees one of two approaches to comply with the OSHA vaccine ruling: Either mandatory vaccination or mandatory testing for those who have not been vaccinated. Both have their nuances, said Toomey. The mandatory vaccination policy, which has been the choice of some employers even before the OSHA regulations became official, would require vaccinations but also requires testing for those employees who have exemptions for the Americans with Disabilities Act or for religious purposes. And some employers are able to choose a policy that would require mandatory vaccines for some employees (say customer-facing workers at a retail store) but voluntary vaccination and mandatory testing for others (in that example, back office or stocking employees).

Going the second route, a choice whether to be vaccinated, would require mandatory weekly testing of employees for Covid-19.

Unvaccinated employees would have to wear face coverings and be tested. While the regulations don't require employers to have to pay for the cost of testing, there are state laws and ADA/religious exemption regulations that may override that. Pennsylvania, for example, has regulations that say that workers can't be required to pay for tests that are required for work, said Leech Tishman lawyer [Leah Sell](#). There are also other cases, including accommodations for the ADA and religious exemptions, that would also require the employer to pay for testing, Sell said.

Then there's the time that it takes to test. The U.S. Department of Labor has ruled that employers will likely have to pay for the time that it takes to get the tests done, that it's considered hours worked while on the clock.

"It may be compensable because testing is necessary for them to perform jobs safely and effectively," Sell said.

Employees who go to get vaccinated will have to be paid for it, and the rules require "a reasonable amount of paid leave to recover from side effects," up to two days, Sell said. The latter can only be sick leave and not vacation time.

The rules also require employers to keep strict and detailed records, not just on vaccinations, testing and Covid exposures, but also an up-to-date employee roster with vaccination status.

The clock is already ticking, Sell said: The emergency temporary standard, which can be in place for six months without a move to make it more permanent, took effect Friday. On Dec. 5, all employers will be required to meet the ETS standards except for testing. That includes providing policies and communications to employees, data collection and recordkeeping, and face coverings for the people who aren't fully vaccinated.

And on Jan. 4, 2022, testing for the people who aren't fully vaccinated will be required for those employers who have chosen the testing and voluntary vaccination route.

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