

Could The DOL Workplace Vax Rule Complicate Wage Claims?

By Jon Steingart

Law360 (November 4, 2021, 7:01 PM EDT) -- The U.S. Department of Labor's workplace coronavirus vaccination mandate nudges employees to get the jab but leaves open questions about whether they'll be able to make a wage and hour claim that their employer should cover weekly testing if they don't.

The emergency temporary standard, or ETS, announced Thursday by the DOL's Occupational Safety and Health Administration, would require private sector employers with more than 100 or more employees to set up a plan by Dec. 5 that would give each employee four hours of paid time off to get vaccinated. Anybody who does not show proof of vaccination by Jan. 4 would have to submit to weekly testing, at the employee's expense.

The rule excludes federal contractors and health care employers, which are subject to separate vaccine mandates.

It has already drawn challengers, including a pledge of "immediate legal action" from Republican Iowa Gov. Kim Reynolds. The state is one of several that sued to block the contractor mandate. Conservative website the Daily Wire also filed a petition for review in the Sixth Circuit.

FLSA May Require Pay for Testing Time

The rule assumes that employers will provide the time off during work hours. It covers travel time to get to and from a vaccination provider, in addition to the time an employee is on site.

"The million-dollar question is what happens if the employee goes after hours," said Mike Jones, a member of Eckert Seamans who counsels employers in labor and employment matters.

Jones said it's important to question why the employee got vaccinated outside of work hours. If the employer offered paid time off during the workday and the employee chose to go off the clock, it would be hard to argue that the worker must be paid.

"That's really not compensable time because that's for the employee's convenience, not the employer's," Jones said.

The trickier situation is whether an employee who declines to get vaccinated should be paid for the time they spend on weekly testing, as well as for the test itself, Jones said.

"Just because OSHA's saying the cost can be shifted to the employees isn't really the end of the story," he said.

OSHA said its ETS doesn't call for an employer to cover the cost but left open the possibility that wage and hour law may require it.

"OSHA notes, for instance, that in certain circumstances, the employer may be required, under the Fair Labor Standards Act, to pay for the time it takes an employee to be tested," the agency said.

Jones said employees may be able to present a credible claim that they should be paid for testing time and reimbursed for its cost because it's mandated by their employer.

Employers, in turn, would defend by pointing out it's the government's requirement, not theirs, he said.

"That's going to be the argument," he said. "This is a government mandate, not an employer mandate."

The government mandate defense has already begun to appear in cases where employees claim they should be paid for time spent undergoing COVID-19 screening before a shift. COVID-19 is the respiratory ailment caused by the coronavirus.

In one, internet giant Amazon.com is presenting the defense in a suit contending that it should pay California distribution center workers for COVID screening time.

"Amazon is compelled — and previously was at the very least strongly encouraged — by state authorities to engage in COVID-19 screening," the company wrote in a June 3 motion to dismiss the workers' claims.

It adopted the screening requirements in response to emergency regulations adopted in November 2020 by the state Division of Occupational Safety and Health, better known as Cal/OSHA. Doug Parker, who was chief of Cal/OSHA when it adopted the regulations, now leads the federal OSHA.

The judge overseeing the Amazon case has not yet ruled on the company's argument.

OSHA Prefers Vaccination Over Testing

Debbie Berkowitz, a worker safety and health policy fellow at Georgetown University's Kalmanovitz Initiative for Labor and the Working Poor, said OSHA's rule is an effort to present vaccination as employees' easiest path for moving forward.

"If they decide they don't want to do this, then it does put the burden on the worker to find a test," said Berkowitz, who was OSHA's chief of staff under former President Barack Obama.

Requiring paid time off so employees can get vaccinated and recover from any side effects will be especially helpful in industries where sick leave is not offered. They tend to pay wages so low that workers can't afford to take unpaid time away from work, she said.

One-quarter of the private sector workforce did not have access to paid sick leave in 2020, the most recent U.S. Bureau of Labor Statistics data set shows.

Alana Genderson, a Morgan Lewis & Bockius LLP associate who advises employers on labor and employment matters and specializes in occupational safety and health, said it's unusual for OSHA to place compliance costs on employees, rather than employers.

"They're creating financial incentives for employees to be vaccinated," she said, noting that OSHA doesn't prohibit employers from covering the cost of testing for unvaccinated employees.

But, she added, OSHA makes clear that it sees vaccination as the best way to protect employees from contracting COVID-19 at work.

"If you talk to anyone at OSHA, that is really their true north: protecting workers," she said. "OSHA's position is vaccination is the best way to do that."

--Editing by Neil Cohen.