

# Vaccine Mandates

**Legal and Practical Considerations for Employers**

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# Topics

- Current Status
- Determining which Policy to Use
- Implementing the Policy
- Handling Accommodation Requests
- Takeaways

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# Current Status

# What We Know

## OSHA to Issue Emergency Temporary Standard

- Will apply to all employers with 100 or more employees.
  - Yet to be determined is how to calculate the number of employees.
- Requires covered employers to either:
  - ensure their workers are vaccinated or
  - require unvaccinated employees to produce a weekly negative test result before coming to work.
- Employers will have to give employees paid time off to get vaccinated and to recover from any vaccine side effects.

# What We Know

- Authority for ETS:
  - Emergency Temporary Standard (ETS) allows OSHA to enact regulations it can enforce immediately if a “**grave danger**” to worker safety is present.
- Penalty:
  - Covered employers who ignore the standard could face OSHA citations and penalties of up to \$14,000 per violation.
- Timing:
  - ETS expected to be issued in next few weeks
  - Once ETS issued, OSHA will likely allow some time for employer to implement policies for complying with ETS
    - Anticipated that OSHA will wait 75 days before enforcing ETS.

# How Long Will ETS Be in Place and Legal Challenges

- How Long Will the ETS Last?
  - The ETS can remain in place for six months.
  - After that time, it must be replaced by a permanent OSHA standard, which must undergo a formal rulemaking process involving a typical notice-and-comment period.
- Anticipated Legal Challenges:
  - Governors of 24 states have threatened lawsuits (including Texas)
  - Potential for courts to block enforcement of the emergency rule until the legal challenges are resolved

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# Current Guidance on Vaccine Mandates

# Equal Employment Opportunity Commission

- The EEOC has provided guidance on the ADA and Covid-19 in a publication entitled [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act](#).
- The EEOC then issued the following publication: [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (updated September 9, 2021).
- The EEOC has been regularly updating this guidance addressing vaccines in December 2020.
  - Clarified Guidance again on May 28, 2021.
  - Updated Guidance addressed EEOC's position that:
    - employers requiring employees to get the vaccine must reasonably accommodate employees who are unable or unwilling to get the vaccine because of a disability or sincerely held religious belief.

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# Vaccine-only or weekly testing? Determining which policy is right for you.

# The Options

1. Weekly Testing Option: Policy allows unvaccinated employees to undergo at least weekly testing instead of requiring vaccination.
2. Vaccination-Only Option: Policy requires employees to be fully-vaccinated and allows testing alternative only as a religious or disability accommodation.

# Considerations for Weekly Testing Option

## I. Logistics

- How often will you require employees to test?
- Which test will be required?
- When will employees test?
- Where will employees test?

## II. Costs

- Who will bear the cost of weekly testing?

## III. Wage and Hour Issues

- What testing time is considered compensable?

## IV. Record-keeping Requirements

- How will you maintain employee testing records?
- How will you ensure consistency?

# Weekly Testing: Logistics

Category	Options
<b>Frequency of Test</b>	<ul style="list-style-type: none"><li>▪ Must be at least once a week.</li><li>▪ More frequent testing will mean higher costs and possibly more record-keeping.</li><li>▪ Overall policy should be uniform but can allow more frequent testing if employee has symptoms or exposure.</li></ul>
<b>Which Test</b>	<ul style="list-style-type: none"><li>▪ <u>Rapid Test</u>: Faster/same day results but less accurate.</li><li>▪ <u>PCR Test</u>: Slower results (2-4 days) but more accurate.</li><li>▪ <u>Home Testing Kits</u>: FDA has authorized several brands for home use, and Walmart, Amazon, and Kroger sell the kits at cost. Both Rapid Test and PCR Test options.</li></ul>

# Weekly Testing: Logistics

Category	Options
<b>When</b>	<ul style="list-style-type: none"><li>▪ Determine which day of the week a negative test must be presented (<i>i.e.</i>, every Monday prior to start of workday).</li><li>▪ Determine how far in advance the employee can be tested prior to presenting test result.</li></ul>
<b>Where</b>	<ul style="list-style-type: none"><li>▪ Are there testing centers with locations and hours that will be available for your employees?</li><li>▪ Determine if using a vendor for on-site testing is more convenient.</li><li>▪ Determine if employee-administered home testing kits will be allowed.</li></ul> <p><i>*Note: Testing labs subject to HIPAA cannot disclose test results to the employer without a HIPAA-compliant authorization executed by the employee.</i></p>

# Weekly Testing: Costs

- Insurance
  - Currently, the law does not **require** free testing for general employment purposes.
  - Meaning, while free COVID-19 testing is available under the FCRA/CARES Act when determined medically necessary by a health care professional, there is no such requirement for employment purposes.
  - Check with your insurance carrier to determine whether it covers the cost of testing and under which circumstances.
  
- So, who bears the cost – the employer or the employee?
  - Hopefully, the Emergency Temporary Standard will clarify.
  - In the meantime, look to pre-pandemic ADA guidance regarding an employer's ability to require an employee that poses a "direct threat" be examined by a health care professional:
    - “If an employer requires an employee to go to a health care professional of the employer's choice, the employer must pay all costs associated with the visit(s).”
    - Per CDC and EECO, COVID-19 meets the “direct threat” standard.*

# Weekly Testing: Costs

- So, who bears the cost – the employer or the employee (cont.)?
  - Even if COVID-19 stops being considered a “direct threat,” or if the Emergency Temporary Standard allows the employer to require the employee to pay for testing costs, you still must consider the following:
    1. Must look to the state law of where the employee is performing his/her work.
      - *Does the state's law require the employer to reimburse the employee for necessary business-incurred expenses?*
      - *Does the state's law require employers to pay for mandatory medical tests?*
    2. Must look at whether the cost of testing would bring the employee's weekly pay below minimum wage.
- What “costs” are we talking about?
  - The cost of the test itself.
  - Plus, reimbursement for mileage to and from the testing sites.
  - Plus, potentially, hourly pay for time spent testing (see next section on wage and hour issues).
- Evaluate the projected cost of weekly-testing on an on-going basis.

# Weekly Testing: Wage and Hour Issues

- Under the FLSA, employers must pay employees for all hours worked.
  - Hours worked includes time spent fulfilling employer-imposed requirements or conditions that the employee must meet before commencing or continuing his/her work.
- Absent guidance from the Emergency Temporary Standard, look to FLSA guidance on employer-mandated drug testing and physical exams:

“Attendance by an employee at a meeting during or outside of working hours for the purpose of submitting to a mandatory drug test imposed by the employer would constitute hours worked for FLSA purposes, as would attendance at a licensing physical examination during or outside of normal working hours.”
- Per the DOL, compensable time for a mandatory drug/physical test includes:
  - Time spent undergoing the test
  - Time spent traveling to and from the test
  - Time spent waiting to take the test
- Must also look to the state law of where the employee is performing his/her work for even more specific requirements.

# Weekly Testing: Recordkeeping Requirements

- It is unclear whether record-keeping of test results will be required under the Emergency Temporary Standard.
- If an employer maintains the test records:
  - Test results constitute employee medical information, and the employer must handle the test results in compliance with the ADA.
  - The ADA requires that employers protect the confidentiality of the test results.
  - The test results must be maintained in a confidential medical file that is separate from the employee's general personnel file.
  - The test results cannot be shared except to those employees who need to know the test result in order to protect the workplace from infection (e.g., a small designated group of HR professionals that are tasked with COVID-19 protocol compliance).
  - The ADA requires that the record be maintained for 1 year after it is created.
- If an employee tests positive, employer *may* be required to record case on OSHA 300 log. For criteria, see <https://www.osha.gov/coronavirus/safework>

# Weekly Testing: Recordkeeping Requirements

- If an employee tests positive, employer may be required to record case on OSHA 300 log.
- Employers are required to record work-related cases of COVID-19 on OSHA's Form 300 logs if the following requirements are met:
  1. The case is a confirmed case of COVID-19;
  2. The case is work-related (as defined by 29 CFR 1904.5), meaning that an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness ; and
  3. The case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7), meaning the case results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or the case otherwise involves a significant injury or illness diagnosed by a physician or other licensed health care professional.

For additional information, see <https://www.osha.gov/coronavirus/safework>

# Considerations for Vaccine-Only Option

## I. Logistics

- How much time will you permit for employees to comply/become fully vaccinated?
- Will you provide on-site vaccinations?

## II. Costs

- Vaccinations are currently free.

## III. Wage and Hour Issues

- Required Paid Time Off for getting vaccinated and recovery.
  - Consider creating a new paid leave bank for this purpose.

## IV. Record-keeping Requirements

- Proof of vaccination is considered medical information and must be kept confidential (see ADA requirements in weekly-testing section).

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# How to Implement the Policy

# Draft a Clear Written Policy

Include the following information:

1. Reference to the Emergency Temporary Standard
2. The Timeline
  - Clearly state the effective date of the policy.
  - Clearly state the date when full compliance (e.g., full vaccination status) must be met, including dates for current employees and new hires.
3. The Required Documentation
  - Clearly state the documentation that is required (e.g., a copy of the vaccination card, or the type of negative test result).
4. The Process for Submitting Required Documentation
  - Clearly state how employees should submit their documentation – who, what, when, where.
  - Clearly state how the documentation will be confidentiality stored and retained.
5. The Process for Requesting Religious or Disability Accommodation Requests
6. The Availability of Paid Time Off for Vaccination and Recovery
7. Consequences for Failure to Comply

# Communicate Early and Implement Consistently

- Even if you do not intend on implementing the vaccine and/or testing policy until after the Emergency Temporary Standard goes into effect, notify employees now of what to expect.
- Provide a convenient, easily-accessible resource for employees to find vaccine locations and information.
- Implement all aspects of your policy consistently among employees, with exceptions for religious and disability accommodations.

*Note: the Emergency Temporary Standard will hopefully provide guidance on whether it applies to remote-only employees.*

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# Handling Accommodation Requests

# Preparing for Accommodation Requests

- Confirm subject to ADA and Title VII
- Develop policy or process for handling accommodation request
  - Make sure to specify to whom to send accommodation requests
  - Develop consistent procedures for reviewing and evaluating requests
- Review Job Descriptions
  - Confirm they cover all aspects of the job (e.g. essential functions)
  - Address vaccine requirement

# Initial Review of Request

- Determine whether requests governed by ADA or Title VII.
- Under both the ADA and Title VII, the reasonable accommodation is intended to be:
  - an individualized,
  - Fact-based, and
  - interactive process between the employer and the employee.
- Make sure managers and supervisors understand how to recognize a request for accommodation and who to relay the information to within the company.
- Be careful being too strict or too rigid on the process.
  - Accommodation request does not have to be in writing.
  - Do not automatically reject the request if the employee does not follow your Company's procedure.
- Begin the Interactive Process

# Steps for Interactive Process

- Step 1: Recognizing an Accommodation Request

While an employee has an obligation to inform the employer of the need for accommodation-

- Knowledge derived from the circumstances.
- The request could come from a family member, friends, doctor...
- It does not have to be in writing.
- Employee must use plain language.
- Employee doesn't need to actually say:  
"I need an accommodation for \_\_\_\_\_."

# Steps for Interactive Process

- Step 2: Gathering Information
- Step 3: Exploring Accommodation Options
- Step 4: Choosing an Accommodation
- Step 5: Implementing the Accommodation
- Step 6: Monitoring the Accommodation

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# ADA Considerations

# Gathering Information

- The employer **can request** appropriate documentation from employee's health care provider regarding:
  - the nature of any impairment(s),
  - the duration of the need for accommodation and
  - the extent to which the impairment(s) conflict with the employer's vaccination requirement.
- Employee **must** cooperate in the “**interactive process**” and cannot unreasonably refuse requests for information or accommodations offered.

*Note: If an employer needs to consult with the employee's health care provider, the employer must obtain a written medical release or permission from the employee.*

# Exploring and Choosing Accommodation Options

- Accommodations available under ETS:
  - Teleworking
  - Weekly Testing
  - Leave
- Employers don't have to accommodate if undue hardship, meaning a significant difficulty or expense.
- Employers need to consider “all the options” before denying an accommodation request for an employee seeking an exemption for a protected reason.
- Employers may rely on recommendations from the Centers for Disease Control and Prevention (“CDC”) when deciding whether an effective accommodation is available that would not pose an undue hardship.

# Denying Accommodation: Direct Threat

- Employers can deny an accommodation of employee if the employee imposes a direct threat to the health or safety of the employee or others in the workplace.
- A “direct threat” is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r).
- This determination can be broken down into two steps:
  1. determining if there is a direct threat and, if there is,
  2. assessing whether a reasonable accommodation would reduce or eliminate the threat.

## Other Considerations: Direct Threat

- EEOC advises that employers must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job, examining the following factors:
  - (1) the duration of the risk;
  - (2) the nature and severity of the potential harm;
  - (3) the likelihood that the potential harm will occur; and
  - (4) the imminence of the potential harm.
- The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.

# Assessment of Direct Threat

- Assessment of direct threat includes evaluating:
  - type of work environment,
  - the available ventilation;
  - the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees;
  - the number of partially or fully vaccinated individuals already in the workplace;
  - whether other employees are wearing masks or undergoing routine screening testing; and
  - the space available for social distancing.

# Assessment of Direct Threat

- EEOC's updated guidance notes that under the ADA an employer must make efforts to accommodate a worker who cannot obtain a vaccination due to a disability, where such an accommodation does not present an undue hardship.
- Examples include:
  - requiring an employee to continue to wear a mask and social distance while in the workplace,
  - limiting contact with other employees and non-employees,
  - providing a modified shift,
  - permitting continued telework if feasible,
  - conducting periodic COVID-19 testing, or
  - reassigning the employee to a vacant position in a different workplace.

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# Accommodation for Sincerely Held Religious Beliefs

# EEOC Guidance on Religious Accommodations

- The EEOC's updated guidance advises that in most instances, an employer should presume that a request for an accommodation based on religion is based on a sincerely held religious belief, practice, or observance.

## **BUT**

- An employer can request documentation supporting an exemption request on the basis of a sincerely held religious belief if the employer is **aware of facts that provide an objective basis for questioning** either the religious nature or the sincerity of a particular belief, practice or observance without violating Title VII. See *29 C.F.R. 1605*.

# Gathering Information: Questions about Beliefs

- Ask the employee to identify the religion on which the religious exemption is based.
- The duration of adherence may provide sufficient information to analyze the exemption.
- Explanation of belief.
- If necessary ask for documentation.

# Gathering Information: Supporting Documentation

- Statements and explanations from the employee that discuss the nature and tenets of his or her asserted beliefs and information about when, where, and how they follow the practice or belief.
- Written religious materials describing the religious belief or practice.
- Written statements or other documents from third parties, such as religious leaders, practitioners, or others with whom the employee has discussed his or her beliefs, or who have observed the employee's past adherence.

# Factors that May Cause An Employer to Question Employee's Sincerely Held Belief

- Whether employee has behaved in a manner markedly inconsistent with the professed belief
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; or
- The timing of the request renders it suspect
  - Example: The religious accommodation requests followed an earlier request by the employee for the same benefit for secular reasons.
- The employer otherwise has reason to believe the accommodation is not sought for religious reasons

# Exploring and Choosing Accommodation Options

- Consider whether teleworking or weekly testing is an option.
- Under Title VII, courts define “undue hardship” as having more than minimal cost or burden on the employer.
- Considerations relevant to undue hardship can include:
  - the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and
  - the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.

## Case Study: *Chenzira v. Cincinnati Children's Hospital Medical Center*

- Employee was denied accommodation and terminated after refusing the flu vaccine because it would violate her vegan practice of refraining from all animal products and by-products.
- The employer discounted her veganism as a dietary preference or philosophical notion, but the court disagreed.
- The court pointed out that the plaintiff cited religious passages in her request for accommodation.
- The court held that it was plausible that the employee “could subscribe to veganism with a sincerity equating that of traditional religious views,” particularly since she is not alone in holding to that belief.

## Another Case Study: *Fallon v. Mercy Catholic Medical Center*

- Employer fired an employee who justified his refusal to be vaccinated with an ethical rationale that the employer did not consider religious.
  - Employee's stated belief: "that one should not harm their [sic] own body" and that "the flu vaccine may do more harm than good."
  - He argued that if he acquiesced to his hospital employer's policy and received the inoculation, "he would violate his conscience as to what is right and what is wrong."
- Court agreed with the employer and affirmed dismissal of employee's claim

# Fallon Court's Rationale

- The Third Circuit found that his views were not “religious” within the meaning of Title VII because they:
  - (1) did not address “fundamental and ultimate questions having to do with deep and imponderable matters”;
  - (2) were not, as delineated, part of a comprehensive belief system; and
  - (3) were not “manifested in formal and external signs,” such as services, structure, or other such “manifestations associated with traditional religions.”
- Note: The *Fallon* court acknowledged, however, that anti-vaccination beliefs could be protected were associated with religious adherence.

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# Best Practices for Handling Accommodation Requests

# Responding to an Accommodation Request

- Begin interactive process upon notice of an issue.
- Update job descriptions to ensure that elements of the job listed as essential functions are truly job-related and consistent with business necessity.
- Document everything
  - Conversation with the employee about the accommodation
  - all efforts to accommodate including every option offered; and
  - legitimate, non-discriminatory reasons for your action and the interactive steps taken to arrive at the decision.
- Maintain employee confidentiality...especially with medical information.

# Responding to an Accommodation Request

- Develop a procedure/policy for requesting an accommodation.
- Be consistent but leave room for exceptions and individual treatment.
- Educate supervisors and managers about the importance of engaging in interactive discussions with employees.
- Designate a company representative who is knowledgeable about the ADA and Title VII to respond to requests for accommodation.
  - Watch out for phrases: “we can’t do that,” “we can’t afford that,” or “we don’t make exceptions.”
  - Confirm before making such statements.

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# Takeaways

# Takeaways

- Prepare now for the forthcoming Emergency Temporary Standard (“ETS”)
  - Start communicating now with employees about upcoming ETS
  - Survey Current Employees on Vaccine Status
- Determine a compliance approach and create a written policy.
- Decide how you will handle employees who may refuse to comply with the requirements of the ETS.
- Make sure you have a process in place to address accommodation requests

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[Full Online Biography](#)

Laura Alaniz is an experienced litigator and advisor focusing on representation of management in all aspects of labor and employment law matters. As a litigator, Laura utilizes her experience to provide guidance to her clients on how to avoid litigation and minimize their risk of claims. Laura is Board Certified in Labor and Employment by the Texas Board of Legal Specialization.

Laura regularly represents employers and their leadership in all types of employment disputes including suits for wrongful termination, retaliation, harassment and discrimination, wage and hour disputes, disability accommodation, breach of contract, and suits for violation of state and federal statutes, such as the FLSA, FMLA, WARN, and the Texas workers' compensation retaliation statute. She has successfully resolved hundreds of demand letters, EEOC charges of discrimination, and lawsuits alleging various forms of discrimination, harassment, retaliation, and other employment claims.

On the counseling side, Laura's practice focuses on compliance issues relating to employment law and prevention of claims including counseling clients regarding hiring and terminating employees, leaves of absence, layoffs, unemployment compensation, employment handbooks and policies, and conducting employee and management training. Her practice also includes drafting employment contracts, non-disclosure agreements, and anti-competition-hiring-solicitation agreements.

Laura was recognized as one of the "Top 50 Women Lawyers" in Houston by the Texas Diversity Council in 2017.

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Kelly Ferrell consults with and represents clients in commercial litigation, including employment issues, in both state and federal courts and domestic arbitrations. She represents clients in cases involving FLSA allegations, discrimination claims, misappropriation of trade secrets, and noncompete agreements. Her commercial litigation experience also includes oil and gas contract disputes, financial litigation, and construction defect cases. She has assisted with several trials and appeals.

Kelly clerked for the Honorable Judge David Hittner, United States District Court for the Southern District of Texas. Before practicing law, she was an English teacher for Klein ISD.