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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

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November 5, 2021

TO: All Local Unions

RE: Federal COVID-19 Vaccination Mandates (Updated)

Greetings:

This memorandum updates my earlier communication to you dated September 27, 2021. On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its new COVID-19 vaccination mandate covering employers with 100 or more employees. Also on November 4, 2021, the Centers for Medicare and Medicaid Services (CMS) issued a separate mandate for certain types of Medicare/Medicaid-certified healthcare providers. These mandates are in addition to an earlier-announced mandate covering federal contractors and subcontractors. Information about the coverage for each mandate, and appropriate bargaining demands, are discussed below.

I. The OSHA Mandate

OSHA's emergency temporary standard (ETS) requires that private sector employers with 100 or more employees develop and implement a written mandatory COVID-19 vaccination policy that either: (a) requires all employees to be fully vaccinated; or (b) requires employees who are not vaccinated to undergo weekly COVID-19 testing and wear a face covering while working indoors or when occupying a vehicle with another person.

Key details of the ETS are:

- The 100-employee threshold is measured based on the employer's entire U.S. business/workforce, not the number of workers at any individual location.
- Employers must determine each worker's vaccination status, obtain proof of vaccination from vaccinated workers, and maintain records and a roster of each worker's vaccination status.
- Employers are required to provide up to four hours of paid time off to obtain the vaccine. They may also choose to offer the vaccine at the worksite, but still have to provide paid time to obtain the vaccine. However, if a worker chooses to get the vaccine at a time when they would not be scheduled to work, they are not entitled to paid time.

- Employers are also required to provide a reasonable amount of paid time off to workers who experience side effects following vaccination. If workers already have available accrued paid sick leave, the employer can make them utilize that time, but it cannot force employees to borrow against future leave time.
- Employers are not required to pay for the costs associated with testing if they offer workers a testing in lieu of vaccination option.
- Employers have the option of creating a hybrid policy that requires vaccination for workers provide services directly to the public, but allows for vaccination or weekly testing for other workers.
- Those working remotely who have no contact with co-workers, customers, etc., do not need to comply with the vaccine or testing requirements. Nor do workers that exclusively work outdoors. However, these workers do count towards the 100-employee threshold used for determining whether an employer is covered by the ETS.
- Workers that come into the workplace infrequently – for example, once per month – are not required to be vaccinated or tested weekly, but must be tested a maximum of seven days prior to entering the workplace.
- Workers that have previously had COVID-19 and claim natural immunity are not exempt from vaccination or testing requirements, except that an employee who previously tested positive is exempt from testing for 90 days from the date of their positive test, due to the high likelihood of false positives. However, such workers are required to wear a face covering in the workplace if unvaccinated.
- Workers are required to promptly notify their employer if they receive a positive COVID-19 test or are diagnosed with COVID-19, and the employer is required to immediately remove such workers from the workplace until they meet criteria for safely returning to work.
- Employers cannot prevent any worker, regardless of whether or not they are vaccinated, from choosing to wear a mask at work unless it creates a serious workplace hazard, such as interfering with the safe operation of a vehicle.
- Employers are required to report work-related COVID-19 fatalities to OSHA within 8 hours, and work-related COVID-19 hospitalizations to OSHA within 24 hours of the employer learning of the death or hospitalization.
- If an employer is also covered by the federal contractor mandate or the CMS mandate, then it must comply with that mandate rather than the OSHA ETS.
- Fully vaccinated means the worker has received the one-shot J&J or two-shot Pfizer or Moderna vaccine and is two weeks out from their last dose. It does not include or require boosters.
- Workers with medical conditions or disabilities, or sincerely held religious beliefs, observances or practices, that conflict with vaccination are entitled to a reasonable accommodation from any vaccination requirement. However, these workers must comply with weekly testing requirements if unvaccinated, unless they separately qualify for a religious accommodation to the testing requirement.
- Acceptable tests are those cleared, approved or authorized by the FDA; administered in accordance with authorized instructions; and not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.

Employers with unionized workers must comply with the ETS. However, OSHA has made it clear that the ETS is a floor, not a ceiling. Nothing in the ETS prevents employers and unions from bargaining additional protections for workers. In addition, the ETS does not relieve the employer of its obligation to bargain over the effects of the mandate, and it does not displace provisions in collective bargaining agreements that offer greater protections on things like leave, PTO, or safety precautions. Because the ETS offers employers a choice of whether to adopt a mandatory vaccination policy, or a vaccination and testing/masking policy, we should demand to bargain over which option a covered employer will implement. Further, although the ETS does not require employers to pay for the costs associated with testing, that is a topic that we can bargain over. Please refer to my September 27, 2021, communication on this subject for additional effects bargaining topics. Please also note that any deviations from the collective bargaining agreement, or any supplemental agreement setting forth new terms and conditions of employment, is subject to ratification under Article 19 of the UAW Constitution.

Finally, approximately half of the country is covered by state plans, under which the state rather than the federal government administers workplace safety and health laws and regulations. State plans must be at least as effective as the federal OSHA, and state plan states are required to adopt an equivalent ETS within 30 days. In addition, although the federal ETS only covers private employers, state plan states also cover public employers, and an additional five federal OSHA states have state plans that solely apply to the public sector. Accordingly, if you live in a state plan jurisdiction,¹ the ETS will also apply to public employers in your state that otherwise meet the threshold requirements.

II. The Federal Contractor Mandate

The Federal Contractor mandate applies to certain employers that do business with the federal government through contracts or subcontracts for goods and services. This mandate is broader than the OSHA ETS in that it requires full vaccination of all individuals at the worksite, with no testing-in-lieu-of-vaccination option. Like the OSHA ETS, there is an exception for workers with medical issues or sincerely held religious beliefs, observances or practices that conflict with vaccination. This mandate was set to take effect in December, but the government has pushed the effective date back to January 4, 2022, to be consistent with the OSHA ETS and CMS mandate.

The Federal Contractor mandate applies to all workers at the worksite where the federal contract is performed, whether or not those workers are performing directly on the contract. For example, if an employer builds engines for military jets under a federal contract in one half of its plant and builds engines for commercial customers in the other half, the entire plant is covered by the mandate, and everyone who works in the plant must be fully vaccinated by January 4, 2022. Likewise, if the employer has workers that perform services for the federal government on one floor of an office tower, everyone who works in the tower must comply with the

¹ Alaska, Arizona, California, Hawaii, Iowa, Indiana, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Virginia, Vermont, Washington, Wyoming and the US Virgin Islands have state plans that cover both the private and public sectors. In addition, Connecticut, Illinois, Maine, New Jersey, and New York have state plans covering the public sector.

vaccination mandate regardless of whether they work on a different floor. However, the mandate does not apply to other facilities where no work on the federal contract is performed, so long as the workforce at the other facilities are completely separate (e.g., workers at the federal contract facility do not travel to, or perform work or duties at, the other facilities).

In many cases, it is obvious or clear that an employer is a federal contractor covered by this mandate. However, some employers may assert that they are covered, or attempt to argue that coverage extends to non-contract facilities. If there is any doubt about whether an employer or a particular facility is covered by this mandate, you should request that the employer substantiate its assertion by providing a copy of the contract or contract language that it believes subjects it to the mandate.

If you are satisfied that the employer or facility is covered by the contractor mandate, it will not be possible to bargain over whether or not the employer will comply with the mandate. However, you should still demand to bargain over the effects of the employer's implementation of the mandate. Of particular note, because there is no testing option under this mandate, employers may assert that employees must be terminated after January 4, 2022, if they are not fully vaccinated. However, the mandate only requires vaccination to enter the workplace after that date; it does not require that employers immediately terminate unvaccinated workers, and you can bargain for options such as leave, layoff, non-disciplinary separation, etc. for these workers. Furthermore, existing provisions of the collective bargaining agreement may be applicable. Please refer to my September 27, 2021, communication for a list of effects bargaining topics.

III. The CMS Mandate

The CMS mandate applies to specified categories of healthcare providers² that are Medicare or Medicaid-certified and otherwise subject to CMS health and safety regulations. It applies to all staff working at the covered facility, regardless of whether they have patient contact or clinical responsibilities. It does not apply to staff that spend 100% of their time working remotely. Where the mandate applies, it requires full vaccination by January 4, 2022, with no testing-in-lieu-of-vaccination option. Like the other mandates, it does provide exceptions for employees with medical or religious accommodations. Covered facilities are required to develop additional precautions for individuals who cannot be vaccinated due to medical or religious accommodations.

As with the federal contractor mandate, if there is any doubt as to whether a healthcare employer is covered by the CMS mandate, you should request information from the employer to substantiate its coverage. If there is no doubt that the employer is covered, then, as with the

² The mandate specifically applies to: Ambulatory Surgical Centers, Community Mental Health Centers, Comprehensive Outpatient Rehabilitation Facilities, Critical Access Hospitals, End-Stage Renal Disease Facilities, Home Health Agencies, Home Infusion Therapy Suppliers, Hospices, Hospitals, Intermediate Care Facilities for Individuals with Intellectual Disabilities, Clinics, Rehabilitation Agencies, and Public Health Agencies that provide outpatient physical therapy, speech-language pathology services, psychiatric residential treatment facilities, programs for all-inclusive care for the elderly organizations, rural health clinics, federally qualified health centers, and long-term care facilities.

other mandates, you should demand to bargain over the effects of the employer's implementation. Once again, please refer to my September 27, 2021, communication for more information about effects bargaining.

IV. Conclusion

If you need help with effects bargaining or other issues related to vaccine mandates, or with other workplace safety issues related to COVID-19, please contact your Servicing Representative or Regional Director to obtain appropriate assistance from the Legal and/or Health and Safety Departments.

In solidarity,

A handwritten signature in black ink that reads "Ray Curry". The signature is written in a cursive, flowing style.

Ray Curry
President

RC:bw
opeiu494

cc: International Executive Board
Assistant Regional Directors
Top Administrative Assistants
Tim Bressler
Todd Brien
Steve Zimmerla