November 9, 2021

UPDATED: OSHA Issues COVID-19 Emergency Temporary Standard Requiring Vaccination or Testing

UPDATE (11/16/2021): On November 12, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the initial stay of OSHA's ETS on mandatory COVID-19 vaccination/testing after expedited briefing and judicial review. In the opinion, the court provided several reasons why the ETS should be stayed pending further judicial review of petitioners' request for a permanent injunction, including that the ETS exceeds OSHA's statutory authority and raises other constitutional concerns. OSHA is currently precluded from both enforcing the ETS and taking any steps to implement the ETS. The legal challenges to the ETS will be consolidated and assigned to a federal appeals court for ultimate decision as a multidistrict litigation.

In the meantime, we recommend that employers continue to prepare for the ETS to be implemented and monitor the upcoming deadlines. The ETS requires that covered businesses develop plans to have all employees fully vaccinated by January 4 or be subjected to COVID-19 testing at least weekly. If the ETS survives the federal appeals court review, employers will be required to ensure compliance with other sections of the ETS by December 5, including providing paid time for vaccinations, requiring unvaccinated employees to wear masks and establishing a vaccination/testing policy.

Almost two months after President Biden announced his COVID-19 Action Plan, Path Out of the Pandemic, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued its long-awaited emergency temporary standard (ETS) requiring all employers with 100 or more employees to adopt either a mandatory COVID-19 vaccination policy or a policy requiring regular COVID-19 testing and face coverings for unvaccinated employees.

Effective Dates

The ETS took effect upon its publication in the *Federal Register* on November 5. However, employers have until December 5, 2021 (30 days), to comply with a majority of the ETS requirements and until January 4, 2022 (60 days), to comply with the testing requirements.

Legal Challenges

As was widely anticipated, several legal challenges to the ETS have already been filed. Only a day after official publication of the ETS, its requirements have been halted pending review by the Fifth Circuit Court of Appeals, which cited "grave statutory and constitutional issues with the Mandate." We expect further developments in the coming days. Despite the Fifth Circuit's stay, it would be prudent for employers to continue to prepare to be in compliance with the ETS' requirements if and when they take effect.

Employers Covered

The ETS applies to all employers with 100 or more employees, including temporary and seasonal workers, firm- or corporate-wide, at any time the ETS is in effect.

However, the ETS does not apply to:

- Workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and subcontractors; or
- Settings where any employee provides healthcare services or healthcare support services when subject to the emergency temporary standard for employers in the healthcare industry.

The requirements also do not apply to the employees of covered employers:

- Who do not report to a workplace where other individuals such as coworkers or customers are present;
- While working from home; or
- Who work exclusively outdoors.

Required Policy

Employers covered under the ETS are required to establish, implement and enforce a mandatory vaccination policy, with an exception for employers that adopt a policy allowing "any employee not subject to a mandatory vaccination policy" to choose either to be fully vaccinated or to provide proof of regular testing and wear a face covering.

Vaccination Policy

An employer's vaccination policy must require all employees, including new hires, to be "fully vaccinated" against COVID-19. "Fully vaccinated" is defined as meaning two weeks after a person has received all doses of a primary vaccine (e.g., one dose of Johnson & Johnson's vaccine or two doses of Pfizer's or Moderna's vaccine) approved or authorized by the Food and Drug Administration (FDA) or listed for emergency use by the World Health Organization (WHO). Employees may be exempt from the requirements of the mandatory vaccination policy under certain circumstances, including when (1) receipt of the vaccine is medically contraindicated, (2) medical necessity requires a delay in vaccination or (3) an employee is entitled to a reasonable accommodation due to disability or sincerely held religious beliefs.

Determining Vaccination Status: Employers are required to determine the vaccination status of each of their employees. The ETS specifies acceptable types of proof employees may provide to confirm they have been vaccinated, including:

- A record of immunization from a health care provider or pharmacy;
- A copy of the COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- A copy of immunization records from a public health, state, or tribal immunization information system; or
- A copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or site(s) administering the vaccine.

If an employee is unable to produce one of the acceptable methods of proof of vaccination status, an attestation signed and dated by the employee may be acceptable. The employee must (1) attest to his or her vaccination status, (2) attest that he or she has lost or is otherwise unable to produce proof, and (3) include a certification statement acknowledging that providing false information regarding vaccination status may subject the employee to criminal penalties.

Employers must maintain a record of each employee's vaccination status and proof of vaccination and a roster of all employees' vaccination status. These documents must be maintained as confidential medical records under 29 CFR § 1910.1020 for only as long as the ETS remains in effect (not for 30 years as OSHA regulations typically require for such records).

Importantly, employers that have already determined the vaccination status of employees prior to the effective date of the ETS (November 5, 2021) through another form of proof are not required to redetermine the vaccination status of such employees.

Testing Policy

As an alternative to a mandatory vaccination policy, employers may implement a policy allowing employees to choose either to be fully vaccinated or to provide proof of regular testing and wear a face covering. The policy must require an employee who is not fully vaccinated and reports to a workplace where other individuals are present to be tested for COVID-19 at least once weekly and to provide documentation of that test result to the employer. If an employee does not report to the workplace at least once a week, then the employee must be tested within seven days of returning to the workplace and must provide documentation of that test result to the employer. Unvaccinated employees who do not provide proof of a COVID-19 test result must be removed from the workplace until proof is provided.

Acceptable COVID-19 Tests: The ETS defines COVID-19 tests to include those cleared, approved or authorized by the FDA to detect current infection (e.g., a viral test). Self-administered and self-read tests are not acceptable unless observed by the employer or an authorized telehealth proctor.

Costs of Testing: The ETS does not require employers to cover the costs associated with COVID-19 testing, but it also does not prohibit employers from doing so. However, employers should be aware that payment for the cost of testing may be required by other laws, regulations or collective bargaining agreements.

Testing Records: As with vaccine records, employers must maintain all testing records as confidential medical records while the ETS is in effect.

Face Coverings: All unvaccinated employees must wear a face covering that fully covers the employee's nose and mouth when indoors and when occupying a vehicle with another person for work purposes. There are a few exceptions to the ETS' masking requirements, including:

- When an employee is alone in a room with floor-to-ceiling walls and a closed door.
- For a limited time while the employee is eating or drinking at the workplace.
- For a limited time for identification purposes in compliance with safety and security requirements.
- When an employee is wearing a respirator or face mask.
- Where use of face coverings is infeasible or creates a greater hazard.

Employers must not prevent any employee from voluntarily wearing a face covering or face mask unless they can demonstrate that doing so would create a hazard or serious injury. Employers may not prohibit customers or visitors from wearing face coverings.

Paid Time Off to Get Vaccinated and to Recover from Side Effects

The ETS also requires employers to provide employees with paid time off to encourage them to receive a COVID-19 vaccination. Employers must provide employees with a "reasonable amount of time," including up to four hours of paid time off at the employee's regular rate, for each primary vaccination dose. Employers also are required to provide employees with "reasonable time and paid sick leave" to recover from any side effects they experience following each primary vaccination dose. While the ETS itself does not define "reasonable time," the accompanying FAQs indicate that OSHA's position is that two days of paid sick leave per primary vaccination dose would be reasonable.

Positive COVID-19 Tests or Diagnosis

Notification: Employees of covered employers must be required, regardless of vaccination status, to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19.

Removal: Employers must remove employees who test positive or are diagnosed with COVID-19 from the workplace immediately. The employee may not return to the workplace until the employee (1) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT), (2) meets the return-to-work criteria in the Centers for Disease Control and Prevention (CDC)'s "Isolation Guidance" or (3) receives a recommendation to return to work from a licensed healthcare provider. While

the ETS itself does not require employers to provide paid leave to employees who are prohibited from entering the workplace, such employees may be eligible for paid leave under other laws, regulations or collective bargaining agreements.

The ETS does not require employers to perform contact tracing or to notify and remove close contacts from the workplace. However, employers should continue to follow applicable CDC and state law guidance.

Reporting: Employers covered under the ETS must report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA within certain time frames (eight hours from learning of any fatality and 24 hours from learning of a hospitalization). OSHA also published a fact sheet about the ETS' reporting obligations that provides additional information for employers faced with the often challenging task of determining whether a case of COVID-19 among their workforce is work-related.

Information to Employees

The ETS requires employers to provide certain information to employees, including information on the requirements of the ETS, a specific CDC fact sheet on vaccination, anti-retaliation and anti-discrimination policies, and criminal laws regarding knowingly providing false information or documents.

State Preemption

The ETS purports to preempt inconsistent state and local requirements, including "requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees."

Next Steps

Given the complexity of the ETS' vaccination, testing and recordkeeping obligations, employers should consult with counsel to develop a compliance strategy. Employers are encouraged to begin this process as soon as possible to meet the upcoming deadlines.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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