Client Alert: OSHA Issues Emergency Temporary Standard Mandating Vaccination or Testing for Private Employers with 100 or More Employees

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On November 4, 2021, the Occupational Safety and Health Administration ("OSHA") issued its long-anticipated COVID-19 Vaccination and Testing Emergency Temporary Standard ("ETS"). Businesses have been impatiently awaiting this ETS since President Biden directed the agency to issue the rule in September (as detailed in our earlier September 10th client alert).

The 154-page ETS officially goes into effect today, November 5, 2021, and may remain in effect for up to six months. After six months, the ETS must be replaced by a permanent OSHA standard, which undergoes a formal rulemaking process and includes a public notice and comment period, or will otherwise expire.

At the crux of the ETS is the requirement for covered employers to adopt a policy that either (1) mandates COVID-19 vaccination for all employees or (2) allows employees to choose between COVID-19 vaccination or weekly COVID-19 testing and requiring the use of face coverings for employees that are not fully vaccinated.

An individual is deemed "fully vaccinated" under the ETS two weeks after completing primary vaccination with a COVID-19 vaccine, which includes obtaining a second dose of a two-dose vaccine series or one dose of a single-dose vaccine. The ETS does not offer an exemption to vaccination based on the presence of antibodies from a prior COVID-19 infection.

WHAT IF THE ETS CONFLICTS WITH STATE LAW?

According to OSHA, the ETS preempts any state or local laws that forbid or restrict an employer's authority to mandate COVID-19 vaccination, testing, and face coverings for its employees.

However, the ETS does not seek to preempt non-conflicting state and local health requirements of general applicability that regulate the conduct of employees and non-employees alike, such as face covering mandates or requirements that the public provide proof of COVID-19 vaccination or negative test results to enter certain places.

WHICH EMPLOYERS ARE COVERED?

All private employers with 100 or more employees are subject to the ETS requirements during all periods of time that it is in effect. Employers should make the determination as to whether they meet this 100-employee threshold as of November 5, 2021.[1]

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In assessing whether a business meets this 100-employee threshold, the ETS counts employees company-wide (i.e. all locations) across the United States and includes part-time employees, employees working from home, employees that work exclusively outdoors, employees who are minors, and temporary and seasonal employees (provided that they are employed while the ETS is in effect).

Independent contractors are not counted as employees in determining whether an employer meets the 100-employee threshold.

Where a given employer has 100 or more employees as of November 5th, the requirements of the ETS will apply to the business for the duration of the ETS, even if the employer's workforce drops below the threshold later. Further, if a business has less than 100 employees on November 5th, but thereafter hires additional employees, the ETS requirements will apply to the business once the 100-employee threshold is met for the remaining time the ETS is in effect, regardless of further workforce fluctuations.[2]

Notably, the following employers are excluded from the requirements of the ETS as they are already subject to similar, albeit not identical, vaccination mandates: (1) federal agencies, (2) federal contractors covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, and (3) healthcare services employers subject to the requirements of the Healthcare ETS. For additional information as to the compliance obligations of these employers, please see our November 5th, October 27th, September 27th, and September 10th client alerts.

ARE ALL EMPLOYEES COVERED?

No. The following employees are explicitly excluded from coverage by the ETS:

- Employees who do not report to a workplace where other individuals such as coworkers or customers are present
- Employees while they are working from home[3]
- Employees who work exclusively outdoors

Note, the above-listed employees are still counted when determining whether an *employer* meets the 100-empoloyee threshold and is therefore required to comply with the obligations set forth in the ETS.

WHAT SHOULD BE INCLUDED IN A MANDATORY VACCINATION POLICY?

A mandatory vaccination policy requires every employee to be fully vaccinated. The ETS requires employers to establish a mandatory COVID-19 vaccination policy, although it provides an exception for employers that alternatively choose to adopt a policy permitting employees to opt for weekly COVID-19 testing and wearing face coverings while at work.

Employers are also permitted to adopt a partial mandatory vaccination policy for particular groups or subsets of their workforce. For instance, employers may implement a policy that requires COVID-19 vaccination for public-facing employees but permits the non-public-facing employees to choose between COVID-19 vaccination or weekly COVID-19 testing and face covering requirements.

Any mandatory vaccination policy must permit exceptions to be made to the policy for the following employees:

- Employees for whom a vaccine is medically contraindicated
- Employees for whom medical necessity requires a delay in vaccination

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- Employees legally entitled to a reasonable accommodation due to a disability or sincerely held religious belief that conflicts with the COVID-19 vaccine requirement

In terms of content, employers should plan to include the following information in their mandatory COVID-19 vaccination policy:

- The effective date of the policy
- An explanation as to which employees the policy applies
- Whether the employer is mandating employee COVID-19 vaccine company-wide or only to specific groups or departments of employees
- Any deadline(s) with which employees must comply
- Any exceptions to the employer's COVID-19 vaccine mandate and the process by which employees subject to any such exceptions will submit to weekly COVID-19 testing and face covering requirements
- How the business will determine, verify, and maintain information regarding employee vaccination status
- The extent to which the employer intends to provide paid time off and paid sick leave in order for employees to get vaccinated
- The process by which employees must notify the business of a positive COVID-19 test result or diagnosis
- How the organization will remove employees from, and return employees to, the workplace in the event an employee receives a positive COVID-19 test result or diagnosis
- Penalties for an employee's failure to comply with the policy

For employers that already have implemented mandatory vaccination policies, they must review those policies to ensure compliance with the requirements of the ETS. If those pre-existing policies fall short in any way, the employer then must modify and update their policies to comply with the obligations set forth in the ETS.

In conjunction with the issuance of the ETS, OSHA also issued sample mandatory vaccination and vaccination or testing policies for employers to tailor to the needs of their business.

HOW SHOULD EMPLOYERS DETERMINE VACCINATION STATUS?

The ETS requires employers to determine the vaccination status of all of their employees, which will in turn aid an employer's ability to ensure that all vaccination, testing, and face covering requirements are met.

In addition, employers are required to obtain proof of vaccination from fully vaccinated employees and to maintain records regarding employee vaccination status as confidential employee medical information. The ETS also requires employers to maintain a roster listing all employees and each employee's vaccination status.

Businesses may accept the following forms of proof of vaccination under the ETS:

- The record of immunization from a health care provider or pharmacy
- A copy of the U.S. CDC 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

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- 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 clinic site(s) administering the vaccine(s)
- A signed and dated statement by the employee which attests to the employee's vaccination status, attests that the employee has lost or is otherwise unable to produce proof of vaccination, and certifies the accuracy of the statement

The ETS provides that any employee who fails to submit acceptable proof of vaccination to an employer should be treated as not fully vaccinated.

Where an employer already gathered proof of vaccination for fully vaccinated employees prior to the effective date of the ETS (that is, before November 5, 2021), the employer has satisfied the requirement to obtain and maintain vaccination status information for those employees under the ETS. In those instances, an employer is not required to obtain additional proof of vaccination from those fully vaccinated employees, even where an employer accepted proof of vaccination not explicitly deemed acceptable under the ETS.

Employers should note that the ETS does not require them to obtain or track information concerning whether employees have received booster shots or additional vaccination doses.

WHAT ARE THE COSTS?

Vaccination

An employer is required to provide up to four hours of paid time off for *each* primary vaccination dose, for employees to get vaccinated. To be clear, this is a new bucket of time to be granted to each employee.

The ETS also requires employers to provide a "reasonable" amount of paid sick leave to employees to the extent needed to recover from any side effects related to vaccination. While not specifically addressed in the text of the ETS, OSHA's ETS FAQs clarify that if an employer caps the amount of paid sick leave provided to recover from vaccination side effects to two days *per* primary vaccination dose, that amount of time is deemed "reasonable." Note that employers may require employees to use any accrued but unused paid sick leave available to them to cover this. However, if the employee has exhausted pre-existing paid sick leave offered by the organization, the employer must grant additional paid sick leave for this purpose in compliance with the ETS.

Even where employers allow employees the choice of between vaccination or weekly testing and wearing face coverings, employers are still required to provide the above-referenced paid time off and paid sick leave to employees who choose to be vaccinated.

The ETS does not require employers to reimburse employees for transportation costs relating to vaccination, though other state or local laws, or collective bargaining agreements, may require employers to do so.

Testing

The ETS does not require employers to pay for testing costs, though employers may be required to do so under other laws, regulations, or collective bargaining agreements. Employers should review, in particular, state and local laws relating to reimbursement of mandatory business expenses. Doing so, they should bear in mind that they may need to check the laws in multiple states if they have employees working remotely around the country. OSHA otherwise permits employers to decide whether employees should bear the costs of required testing. Testing costs may be reduced through the use of pool testing, as discussed below. Finally, employers should consider directing non-exempt employees to get tested during regular working hours to avoid adding compensable time to their payroll.

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WHICH EMPLOYEES ARE SUBJECT TO TESTING AND WHAT TYPES OF TESTS ARE ACCEPTABLE?

Under most circumstances, employees who are not fully vaccinated are required to be tested for COVID-19 on a weekly basis and to report those results to their employer. Employees who do not report to a workplace where other customers or employees are present, or those who work from home, are not required to submit to weekly testing. Before any such employees report to the office, however, they must be tested within seven days prior to their return and provide those results to their employer. Employees who have received a reasonable accommodation that exempts them from an employer's vaccination requirements are still subject to mandatory testing, unless COVID-19 testing conflicts with the employee's sincerely held religious belief, practice, or observance, in which case, the employee may be entitled to an reasonable accommodation vis-à-vis the testing requirement. Finally, the testing requirements set forth in the ETS do not apply to employees who have received a positive COVID-19 test or who have been diagnosed with COVID-19 in the previous 90 days.

Pursuant to the ETS, an acceptable COVID-19 test is one which has been approved or authorized by the FDA to detect a current infection, which is administered in accordance with the applicable instructions, and which is not self-administered and self-read, unless the employer or an authorized telehealth proctor observes the test administration and interpretation. The use of pool testing is acceptable under the ETS. Pool testing refers to the combination of test specimens from multiple people, which are then processed using one antigen test. In the event that a pool testing result is negative, all employees within that "pool" are presumed to be negative for COVID-19. If a pool testing result is positive, all employees must immediately be tested individually, so as to determine which employees are positive.

WHAT ARE EMPLOYEE AND EMPLOYER DISCLOSURE OBLIGATIONS WHEN AN EMPLOYEE TESTS POSITIVE OR IS DIAGNOSED WITH COVID-19?

Employees are required to promptly notify their employers of a positive COVID-19 test result or COVID-19 diagnosis. Regardless of vaccination status or testing, employers are required to immediately remove COVID-19 positive employees from the workplace. Employers may require those employees to work remotely, so long as remote work is available and the employee is not too ill to work. Employers are not required to conduct contact tracing or otherwise notify an employee's coworkers of the employee's positive COVID-19 test result or diagnosis.

WHEN DO FACE COVERINGS NEED TO BE WORN?

With limited exceptions, under the ETS, employees who are not fully vaccinated are required to wear face coverings while indoors or when traveling in a vehicle with other people for work purposes. Employers may not prohibit any employee, regardless of vaccination status, or any customer or visitor, from voluntarily wearing face coverings unless the employer is able to establish that doing so would create a hazard in the workplace.

WHAT NOTICES MUST EMPLOYERS PROVIDE TO EMPLOYEES?

Employers must inform their employees about the ETS' requirements, as well as any policies and procedures established by the employer in connection with the same. Such communications should be in an appropriate language and literacy level. The communication must address COVID-19 vaccine efficacy, safety, and benefits; the non-discrimination and non-retaliation provisions of the ETS; as well as the potential criminal penalties for knowingly supplying false statements or documentation.

WHAT ARE EMPLOYERS' REPORTING OBLIGATIONS REGARDING COVID-19 HOSPITALIZATIONS AND FATALITIES?

Pursuant to the ETS, employers are required to report *work-related* COVID-19 fatalities and in-patient hospitalizations to OSHA. In assessing whether a given fatality or in-patient hospitalization is work-related, employers are directed to OSHA's recordkeeping regulations, 29 CFR 1904.5. Employers must report work-related COVID-19 fatalities to OSHA

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within eight hours of the employer learning of the fatality; employers must report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning of the same. Such reports may be made by phone to the nearest OSHA Area Office, OSHA's toll-free central telephone number (800-321-OSHA), or electronically via OSHA's public website, www.osha.gov.

WHEN, AND TO WHOM, MUST EMPLOYERS MAKE COVID-19 RECORDS AND DATA AVAILABLE?

Employers must provide employees with access to their own, individual COVID-19 vaccine documentation and test results upon request by the end of the next business day. Employers are also obligated to provide the aggregated number of fully vaccinated employees and the total number of employees at a given workplace to employees and employee representatives upon request within the same timeframe. The ETS requires employers to provide to OSHA, within 4 business hours, the aggregated data referenced above as well as copies of the employer's written COVID-19 vaccination and/or testing policies. Upon OSHA's request, by the end of the following business day, employers are required to provide the agency with access to vaccine documentation, the roster of employee vaccination status, and each employee's test results.

WHAT ARE THE KEY DEADLINES AND HOW LONG WILL THE ETS REMAIN IN EFFECT?

The ETS is effective November 5, 2021. By December 5, 2021, employers are required to comply with all obligations, other than testing non-vaccinated employees. By January 4, 2022, employers must comply with all of the provisions of the ETS. OSHA expects that the ETS will remain in effect through May 5, 2022. The agency has indicated that it will continue to monitor and update the ETS as circumstances warrant.

HOW WILL LEGAL CHALLENGES TO THE ETS IMPACT ITS ENFORCEABILITY?

OSHA acknowledges that the ETS may be subject to legal challenges. In anticipation of such lawsuits, the ETS includes a severability provision which provides that if any requirement set forth in the ETS is found to be invalid or otherwise unenforceable, the remaining provisions will remain in effect.

WHAT IF A BUSINESS FAILS TO COMPLY?

Failure to comply with the ETS could subject employers to fines and penalties of up to almost $14,000 *per violation*.

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[1] *For states that have their own OSHA-approved plan ("State Plan"), those states must, within 30 days, adopt the ETS or otherwise show that they have an existing standard in place that is "at least as effective" as the ETS. In those instances, state and local governments with 100 or more employees will also be subject to the ETS or the state's alternative, "at least as effective" occupational safety and health requirements.*

[2] *Note that for employers who meet the threshold sometime after November 5th, the ETS simply advises that those employers must come into compliance with the ETS. It does not provide a specific time period within which to do so.*

[3] *The ETS does not address a hybrid work model. Therefore, if an employee works remotely only part of the time, employers should treat them as covered by the ETS.*

This alert aims to provide an overview of the key points contained in the extensive COVID-19 Vaccination and Testing ETS. For more information on the requirements of the ETS, please also see OSHA's ETS Fact Sheet and OSHA's ETS Summary. Employers with questions about how to comply with these requirements, and how they apply to your organization, should consult with their Bowditch Employment & Labor attorneys.

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