Client Alert: Updates Relating to OSHA's Emergency Vaccination/Testing Requirements for Employers with 100 or More Employees and the CDC's New Isolation and Quarantine Guidelines

BY TRACY THOMAS BOLAND • JANUARY 4, 2022

UNITED STATES SUPREME COURT HEARING SCHEDULED FOR JANUARY 7, 2022

As detailed in our prior alert, following the revival of the Biden Administration's COVID-19 vaccination and testing and masking requirement for employers with 100 or more employees (the "ETS") by the United States Court of Appeals for the Sixth Circuit, several states and organizations asked the United States Supreme Court to stay the ETS or, alternatively, immediately review and issue an opinion about the enforceability of the ETS. The Supreme Court has scheduled oral argument for Friday, January 7, 2022. The timing on any subsequent ruling is unknown, though hopefully the Supreme Court will act quickly given the time-sensitive nature of the issues before it. Until the Supreme Court rules on the challengers' emergency petitions, employers are encouraged to continue to take steps to implement mandatory COVID-19 vaccination policies or, alternatively, test-and-mask policies, to come into compliance with the ETS. A reminder that, at present, the deadline for compliance with the policy and related requirements is January 10, 2022, and the deadline for compliance with testing requirements is February 9, 2022.

OSHA'S UPDATED ETS FAQS

OSHA recently updated its Frequently Asked Questions ("FAQs") on the implementation of the ETS. The following summarizes some of the key aspects of the new guidance:

- **"Good Faith" Compliance and OSHA's Discretion to Forgo Inspections**
  OSHA has indicated that where an employer has acted in good faith to implement the vaccine mandate and where the "vast majority" of a workforce has been vaccinated (leaving only a "small number" of unvaccinated employees), OSHA will exercise its discretion to forgo programmed inspections of such workplaces. In assessing an employer's good faith efforts to vaccinate its entire workforce, OSHA has indicated that it will consider the extent to which a workforce has been vaccinated, as well as the steps an employer has taken to protect its unvaccinated workers.

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- **Acceptability of Over-The-Counter Tests With Digital Reporting**
  When the ETS was first issued, OSHA indicated that over-the-counter ("OTC") COVID-19 tests were acceptable for use in complying with a testing alternative to mandated vaccination. However, such tests had to be performed in front of, and read by, appropriate personnel of the employer. OSHA has updated that guidance and now takes the position that OTC tests that feature "digital reporting of date and time stamped results" do not require observation by the employer or an authorized telehealth proctor in order to satisfy the OSHA ETS.OSHA noted that, because such tests are digitally read, the potential for falsified results is reduced. OSHA has indicated that while such tests are self-*administered*, they will not be considered self-*read*.

- **Real-Time Observation of Self-Administered and Self-Read OTC Tests**
  - **Employees' Photos of Self-Administered and Self-Read Tests Not Acceptable**
    OSHA has reiterated that self-administered and self-read tests are only acceptable if such tests are observed by the employer or an authorized telehealth proctor; an employee's photograph of test results is not an acceptable substitute for observation by the employer or a telehealth proctor.

  - **Observation of Multiple Employees**
    As noted in the FAQs, employers are permitted to observe the administration of more than one employee's test at a time; however, employers, "must not observe more OTC tests at a time than they are able to validate with confidence." Authorized telehealth proctors can observe more than one employee if permissible under the test's FDA emergency use authorization.

  - **Retroactive Review of Videos of Self-Administered and Self-Read Tests Not Acceptable**
    Per the FAQs, an employer's or authorized telehealth provider's observation of self-administered and self-read tests must be done in real-time; a post-test review of a videotaped test is not acceptable.

  - **Employer Remote Observation**
    OSHA has noted that employers are permitted to proctor OTC tests themselves, in person or via live streaming (such as via Zoom, Skype, or Microsoft Teams).

  - **Documentation of Employer Observed/Conducted Tests**
    As provided in the FAQs, in order to satisfy the ETS' documentation requirements, employers who observe or conduct OTC tests must document the results in writing or, alternatively, document test results by retaining a photo or video of the test result (so long as the test itself was observed in real time).

- **Flexibility of Testing Options**
  In the FAQs, OSHA has noted that the ETS provides employers with flexibility regarding the type of testing scenario that works best for their workplace and workforce. Under the ETS, tests may be conducted by health care providers (in, for example, a medical office or pharmacy), tests may be self-administered and self-read (so long as the testing is observed in real time by the employer or an authorized telehealth proctor), and employees may use OTC tests that feature digital reporting of date and time stamped results.

- **A Single OTC Test Satisfies the Weekly Testing Requirement**
  As OSHA notes in the FAQs, even though certain OTC test kits are sold in units of two and even if such tests require the completion of more than one test under the Emergency Use Authorization, the ETS only requires non-vaccinated employees to be tested once every seven days or within seven days of returning to their workplace.

- **Timing of Vaccine Doses**
  The updated FAQs note that in order for an employee to be fully vaccinated before the testing requirement goes into effect on February 9, 2022, the employee must receive their Janssen (Johnson & Johnson) dose on or before February 9, 2022. If the employee receives the Pfizer vaccine, the employee must receive their first dose on or before January 19, 2022, with their second dose 21 days later. If the employee receives the Moderna vaccine, they must receive their first dose on or before January 12, 2022, with their second dose 28 days thereafter.

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THE CDC'S SHORTENED ISOLATION AND QUARANTINE PERIODS; STATES' ADOPTION OF SAME

On December 27, 2021, the CDC released updated guidance regarding COVID-19 isolation and quarantine periods.

- **Individuals Who Test Positive for COVID-19**
  Regardless of vaccination status, the CDC recommends that individuals who test positive for COVID-19 stay home and isolate for five days. Individuals can leave isolation and return to their normal activities (including return to work) after five days with no symptoms or once their symptoms have ended. The CDC recommends that individuals stay home until they are fever-free. Additionally, as noted in the updated guidance, individuals should continue to wear a mask for five days after leaving isolation. On January 2, 2022, President Biden's chief medical advisor, Dr. Anthony Fauci, noted that there was "some concern" that the CDC's updated guidance did not include a recommendation that asymptomatic individuals receive a negative COVID-19 test before leaving isolation; stay tuned for future developments on this front.

- **Individuals Who Were Exposed to Someone With COVID-19**
  As to individuals who were exposed to someone who has tested positive for COVID-19 (that is, individuals who were within six feet of someone who has tested positive for COVID-19 for 15 minutes or longer), the CDC's revised quarantine recommendations are as follows:

  - **For those who are fully vaccinated (i.e. received the J&J vaccine in the past two months, received a second shot of Pfizer or Moderna in the last six months, or received a booster):** The CDC recommends that these individuals wear a mask around others for ten days (no need to quarantine). If symptoms develop, individuals should get tested and stay home, pending their test results.

  - **For those who are unvaccinated or who are due for their booster:** As recommended by the CDC, these individuals should quarantine for five days and continue to wear a mask around others for another five days after exposure. If a five-day quarantine is not feasible, the CDC recommends that, for a period of ten days, the individual wear a well-fitting mask at all times when around others. If symptoms develop, individuals should get tested and stay home, pending their test results.

As noted in the CDC's revised guidance, "[f]or all those exposed [regardless of vaccination status], best practice would also include a test for SARS-CoV-2 at day 5 after exposure. If symptoms occur, individuals should immediately quarantine until a negative test confirms symptoms are not attributable to COVID-19."

The Massachusetts Department of Public Health, the Connecticut Department of Public Health, and the Rhode Island Department of Health have all adopted the CDC's updated guidance.

This alert aims to provide an overview of the key points contained in the extensive COVID-19 Vaccination and Testing ETS and the CDC's updated isolation and quarantine guidance. 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 Labor & Employment attorneys.

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