CLIENT ALERTS & INSIGHTS

OSHA's Emergency Temporary Standard is here: Private Employers with at least 100 employees now subject to vaccine or testing requirements

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As President Biden previewed in a September speech, many employers with 100 or more employees will be required to mandate COVID-19 vaccines or regular testing and masking for employees. Key details of the Emergency Temporary Standard (ETS) are below:

When does this start? OSHA will begin enforcement of most requirements on **January 10, 2022**. But testing requirements are delayed until **February 9, 2022**. These dates are delayed from dates originally set forth in the ETS in light of a 41-day court-ordered say.

Which employers are covered? Any employer with a total of 100 or more employees at all US locations, regardless of work location-including fully remote employees.

- For a company with multiple locations (regardless of size), the total employee count-full-time and part-time-must be considered.

- Independent contractors are not included in this employee count.

- If an employer has or exceeds 100 employees at any time the ETS is in effect, the requirements remain-even if that employer later falls below 100 employees. Similarly, if an employer does not have 100 employees when the ETS takes effect, but later does, the ETS begins to apply once that 100-employee threshold is met.

- If two distinct corporate entities are integrated in their safety operations, they are considered one employer.

- For employers who contract with staffing agencies to provide temporary employees on-site, those employees should be counted by the staffing agency and not the contracting employer.

Which worksites are excluded? (1) Worksites subject to the Executive Order requiring vaccinations for employees of federal contractors; and (2) Settings where any employee provides healthcare services or support services and is subject to OSHA's previously-published healthcare ETS-both on the theory that these workplaces, and the vaccination status of the employees who work there, are addressed elsewhere.

Does this apply to all employees of a covered employer? No. Certain employees are exempt: (a) employees who do not report to a workplace where other individuals (e.g., employees, customers) are present; (b) employees who work from home; and (c) employees who work exclusively outdoors. For the last group, if an employee works the duration of each workday outdoors except for "

de minimis" use of indoor spaces (e.g., an example specifically mentioned by OSHA is a multi-stall restroom), that employee would still be exempt from the ETS's requirements.

Does an employer have to have 100 covered employees to be subject to the ETS? No. To determine if an employer is covered by the ETS, all employees are counted, regardless of whether not individual employees are exempt from its requirements. If an employer has 100 or more employees, that employer is subject to the ETS. It may be that 95 of an employer's employees work remotely, and only 5 of the employer's employees work in an office; the ETS would still apply to the employer, albeit limited to the 5 in-office employees.

What does OSHA recommend? The ETS highly recommends that employers put a mandatory vaccine policy in place.

What does OSHA require?

1. An employer must implement a written policy consistent with the ETS's requirements. And employers must provide to all employees (in print or electronic copy): "Key Things to Know About COVID-19 Vaccines," available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html (CDC, October 7, 2021).

2. An employer must determine the vaccination status of each covered employee. The employer must require employees to provide proof of vaccination (generally a medical record or vaccination card, but potentially an employee attestation if all other proof is unavailable). Any employee not providing proof will be considered unvaccinated. The employer must keep records of this proof-though only while the ETS is in effect. These records must be maintained as confidential medical records. If an employer already has a copy of written proof of vaccination status prior to the ETS (so not just a verbal confirmation from the employee with notation of same), that written proof fulfills this obligation.

3. An employer must provide (a) paid time off for vaccination (up to 4 hours for each dose, with longer time needed as unpaid but protected); and (b) "reasonable" paid time off to recover for any symptoms or side-effects resulting from the vaccines. The 4 hours of paid time off to receive the vaccine must be in addition to any accrued paid leave. However, with respect to time off to recover from side-effects resulting from the vaccines, an employer can require an employee to use accrued paid sick leave. Further, if an employer does not specify between types of leave (i.e., only maintains a single accrual of paid time off), the employer may require employees to use that accrued leave to recover from side effects. If an employer specifies between different types of leave, only accrued sick leave may be required to be used. But an employer cannot require an employee to borrow or "go negative" on sick/PTO time for this leave. "Reasonable" is not defined, but OSHA states that two days (per dose) generally would comply.

4. Generally, the following testing and masking requirements begin on **February 9, 2022** for all employees who are not "fully vaccinated." Employees are "fully vaccinated" 2 weeks after completing the primary doses for their chosen COVID-19 vaccine (i.e., 2 doses for the Pfizer and Moderna vaccines and 1 dose for the J&J vaccine). There is, however, an important exception: if employees have received their primary doses by February 9, 2022-even if the 2-week post-dose waiting period has not expired-they are not subject to these requirements:

(a) Each must take and provide results of a specified COVID test every seven days, or before returning to the workplace (if they do not report to work regularly and do not have a test within the last 7 days). The tests cannot be home tests only administered by the employee-a health professional or even the employer has to observe the testing as it occurs. The employer must keep records of these tests-though only while the ETS is in effect. These records must be maintained as confidential medical records.

(b) Each must wear a mask at all times while in the workplace, except: (i) when alone in a closed office with the door closed and walls to the ceiling; (ii) briefly when eating or drinking; or (iii) when needed to be removed for purposes of identification.

5. Any employee-vaccinated or not-who tests positive for or is diagnosed with COVID must "promptly" inform the employer and the employer must remove him/her from the worksite until that employee either meets the CDC's isolation guidelines or has medical clearance to return from a licensed healthcare professional. "Promptly" means before an employee returns if he/she gets the test result while not at work, or as soon as safely possible if at work.

Does an employer have to pay for testing or masks (or the time to take tests)? Not under the ETS. But the commentary makes clear that other pay requirements could apply, e.g., state laws regarding reimbursement for expenses; and, for non-exempt employees, payment for time spent testing if done during a workday.

What about accommodations? The ETS does not require any employer to mandate vaccines. For those employers who do mandate, the same accommodation analysis applies (i.e., disability (ADA) and religious reasons (Title VII). For other employers, these individuals would be treated as all other unvaccinated employees. The ETS also provides that requests for disability and religious accommodations from masking and testing requirements must also be considered pursuant to the ADA and Title VII.

What about state and local laws? To the extent they conflict, OSHA's position is that the ETS governs. In other words, employers who are covered by the ETS must follow it-regardless of state or local law to the contrary, unless the state or local law provides more extensive protections than in the ETS.

When does the ETS expire? Per the OSH Act, emergency temporary standards are effective 6 months from publication in the Federal Register, unless and until a permanent standard is promulgated. As of this writing, OSHA has not indicated its intentions regarding the issuance of a permanent standard.

What is OSHA's purported justification for implementing the ETS? OSHA states that COVID-19 is a "grave danger", and that vaccination is the most effective way to prevent the spread. And, per OSHA, while COVID-19 is not just an occupational disease, there is ample evidence that it is spread at work. Also, in OSHA's view, mandates work.

Will the ETS be challenged? We expect challenges, including but not limited to OSHA's view that the ETS preempts contrary state and local laws, and will provide further updates as more information becomes available.

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