

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) – Temporarily Blocked

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As part of President Biden's "Path Out of the Pandemic" COVID-19 plan, the Biden Administration instructed the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") to promulgate an Emergency Temporary Standard (the "ETS") regarding mandatory vaccinations or weekly testing for large employers.

On November 5, 2021, the ETS on vaccinations and testing was officially published in the Office of the Federal Register. During this past weekend, the Fifth Circuit Court of Appeals suspended the ETS, opining that the rule presents constitutional issues. However, there is ongoing litigation in that regard, and the ETS may still be upheld by the courts and go into effect soon. Therefore, while that litigation is pending, employers are well advised to take steps to prepare for the ETS' implementation so they are ready to comply with it immediately if/when the rule is upheld by the courts. We will continue to monitor the progress of that litigation and publish further updates, as needed.

The new ETS ([Federal Register :: Public Inspection: COVID-19 Vaccination and Testing; Emergency Temporary Standard](#)) establishes requirements for vaccinations, vaccination verification, face coverings, and weekly testing to address the grave danger of COVID-19 in the workplace.

Who is Covered by the ETS?

The ETS applies to employers in all workplaces under OSHA's authority

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and jurisdiction that have a total of **at least 100 employees**, at any time while the ETS is in effect, regardless of fluctuation in size. The 100-employee threshold factors in the number of **total** employees working for the organization, including employees working in separate locations.

Employees who do not report to a workplace where other individuals (e.g., co-workers or customers) are present, employees working remotely, and employees working entirely outdoors are **not** covered by the ETS. Additionally, the ETS does not apply to workplaces covered under (a) the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or (b) settings subject to the Emergency Temporary Standard for healthcare employers (Subpart U – 29 CFR §1910.502).

Since federal OSHA does not have jurisdiction over public employees in states without OSHA-approved State Plans, and Massachusetts does not have such a State Plan, the ETS does not currently cover public employers in Massachusetts. However, given Governor Baker's Administration's position on mandatory vaccinations for state employees, the ETS could be adopted in Massachusetts at a later time and subject to enforcement by the Massachusetts Department of Labor.

What Does the ETS Require?

Employer Policy on Vaccination, Testing, and Face coverings. Under the ETS, covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy **OR** enforce weekly COVID-19 testing and facemask requirements for unvaccinated employees. The ETS does not require employers to pay for any costs associated with testing. However, employers may be required to pay for testing under other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. In addition, the ETS does not prohibit employers from *voluntarily* assuming the costs associated with testing if they wish to do so.

Determination of employee vaccination status. Employers also must determine each employee's vaccination status, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

Employer support for employee vaccination. Covered employers are required to provide paid time off (up to four (4) hours for each dose) for

their employees to receive vaccinations. Employers are required to provide reasonable time and paid sick leave to employees to recover from side effects experienced following each primary vaccination dose (i.e., not including booster doses), but the ETS does not specify the amount of paid sick leave that the employer is required to provide for that purpose. Employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable. Massachusetts employees could use any available COVID-19 sick pay for time off needed to recover from vaccine side effects.

Information provided to employees and reporting requirements. The ETS further requires covered employers to provide employees: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document [“Key Things to Know About COVID-19 Vaccines \(cdc.gov\)”](https://www.cdc.gov/media/releases/2020/s0916-covid-vaccines-know.html); (3) information about OSHA prohibitions against retaliation and discrimination for reporting workplace illnesses or injuries and OSHA Whistleblower protections; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation. Lastly, covered employers must report work-related COVID-19 fatalities to OSHA within eight hours of their learning about them. Such employers must also report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer’s learning about the hospitalization.

It is noteworthy that nothing in the ETS prevents employers from implementing vaccination policies that are more stringent than those provided by the ETS, subject to legitimate medical and religious exemptions. Likewise, employers with fewer than 100 employees are free to mandate vaccinations and mask wearing requirements.

When Do Employers Need to Comply?

As discussed above, while the ETS has been put on hold, employers should still be aware of the compliance dates if/when the ETS goes into effect. Thus, assuming that the courts clear the way for implementation of the rule and do not extend the deadlines, covered employers must begin providing paid-time off for employees to get vaccinated and ensure that unvaccinated employees are properly wearing facemasks by **December 5, 2021**, and all such employers must ensure that their employees are fully

vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – by **January 4, 2022**. After that date, covered employers must ensure that any employees who have not received a vaccine begin producing verified negative tests to their employers on at least a weekly basis. Employers must remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider.

Assuming that the ETS goes into effect, covered employers will be well advised to strictly adhere to its requirements. Failure to do so could result in employers receiving citations from OSHA and facing fines of up to \$13,653 for each violation. Furthermore, any employer who *deliberately* disregards the mandate, could face a fine as high as \$136,532.

If you have any questions about the ETS or any other COVID-19 or vaccination related issues, please do not hesitate to contact any member of our Firm's Labor, Employment and Employee Benefits Group.