

Labor & Employment Law Alert: OSHA Issues Its Long-Awaited Emergency Temporary Standard

Employers in the private sector have been waiting months for the much-anticipated rule from the Occupational Health and Safety Administration (“OSHA”) concerning COVID-19 vaccine and testing requirements. On November 4, 2021, OSHA issued its Emergency Temporary Standard (“ETS”) concerning COVID-19 vaccine and testing requirements. The ETS applies to **private sector** employers with 100 or more employees. It does not apply to public sector employers, because state and local government employees are exempt from coverage under the Occupational Safety and Health Act. The ETS, which took effect on November 5, 2021 and is expected to remain in place for six months, serves as a proposal for a permanent standard.

The ETS requires private sector employers with 100 or more employees to either impose a COVID-19 vaccine mandate or require unvaccinated employees to undergo weekly COVID-19.

It also establishes deadlines that covered employers must know. It requires covered employers to take the below steps by **December 5, 2021**:

1. adopt “a mandatory vaccination policy unless they adopt a policy in which employees may either be fully vaccinated or regularly tested for COVID-19 and wear a face covering in most situations when they work near other individuals”;
2. determine the COVID-19 vaccination status of each employee, obtain proof of vaccination, establish a roster of each employee’s vaccination status and maintain supporting records;
3. provide employees with information about the ETS (either electronically or in print), workplace policies and procedures implemented to comply with the ETS, the efficacy of the COVID-19 vaccine and its safety and benefits, protections against retaliation and discrimination, and criminal penalties for supplying false information or documentation to an employer;
4. report a work-related COVID-19 fatality to OSHA within eight hours of learning about the fatality; and
5. report work-related COVID-19 hospitalizations within twenty-four hours of the employer learning of the hospitalization.

To comply with the employee notice requirements described above, employers must provide employees with guidance issued by the Centers for Disease Control and Prevention titled “Key Things to Know About COVID-19 Vaccines,” which is available [here](#).

If employers are not already adhering to the following practices, the ETS further requires that by **December 5, 2021** employers ensure that employees promptly provide notice of a positive COVID-19 test result, and that employees who are not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another employee for work purposes.

By **January 4, 2022**, employers who do not implement a mandatory COVID-19 vaccine policy must ensure that employees who are not fully vaccinated wear face coverings and are tested for COVID-19 every week.

In determining whether an employer is subject to the ETS, OSHA requires an employer to count all employees (including part-time employees) across all workplaces located in the United States, including employees who work remotely. Independent contractors do not need to be counted by an employer in determining its total number of employees. However, seasonal and temporary employees must be counted **if** they are employed at any point while the ETS is in effect. Finally, OSHA expressly advised that an employer should not consider an employee's vaccination status when counting the number of employees. In other words, if an employer has 150 employees who are all fully vaccinated against COVID-19, the ETS still applies to that employer.

The ETS does not apply to employers who are covered by OSHA Healthcare ETS or are subject to the COVID-19 vaccine requirements of the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance.

Employees who work from home and are not fully vaccinated against COVID-19 are not subject to the weekly testing requirements. Further, if an unvaccinated employee reports to work infrequently (such as once a month), the employee is not required to undergo weekly testing. Instead, the employer must ensure that the employee is tested for COVID-19 at least seven days before reporting to the worksite and provides the employer with proof of the test results.

Employers must ensure that unvaccinated employees who report to work provide COVID-19 test results. Even if an unvaccinated employee reports to work, wears a face covering and is isolated from others, the unvaccinated employee still must present the employer with proof of COVID-19 test results.

Not all forms of COVID-19 testing are acceptable under the ETS. To pass muster, a COVID-19 test must: (1) be approved or authorized by the FDA (including tests approved by an Emergency Use Authorization); (2) be administered in accordance with the authorized instructions; and (3) **not** be both self-administered and self-read, "unless observed by the employer or an authorized telehealth proctor." Tests that satisfy the ETS requirements include COVID-19 tests processed by a laboratory, proctored over-the-counter tests, point-of-care tests or tests conducted by or observed by an employer.

Employers **must** maintain records of each test that must be conducted by the ETS for each employee. The records must be treated as medical records, and should therefore be kept separate from employees' personnel files. Further, employers must retain the testing records for as long as the ETS is in effect.

Significantly, and in a departure from past guidance from the federal government, the ETS permits covered employers to pass the costs associated with the weekly COVID-19 testing of unvaccinated employees **onto those employees**. The ETS notes that other laws, regulations, or collective bargaining agreements may require the employer to pay for the testing. Employers should consult with legal counsel before deciding whether to charge employees for this cost.

The ETS further provides guidance concerning employees who cannot receive the COVID-19 vaccine due to a disability or sincerely held religious belief. If an employee cannot receive the COVID-19 vaccine due

to a disability or sincerely held religious belief, the employee still must be tested on a weekly basis. The ETS advises that if an employee claims that COVID-19 testing conflicts with their sincerely held religious belief, the employee may be entitled to a reasonable accommodation. Employers should consult guidance from the Equal Employment Opportunity Commission and legal counsel when assessing such accommodation requests.

As some employers who already have COVID-19 testing requirements in place have experienced, an employee subject to the testing requirement who tests positive for COVID-19, but then recovers and returns to work, may continue to test positive. The ETS advises that if an unvaccinated employee tests positive for COVID-19, the employer should not require the employee to undergo weekly COVID-19 testing for 90 days following the date of the employee's positive test result.

The ETS further requires employers to provide up to four hours of paid time off for employees to get vaccinated, which includes paid time off for multiple doses if the vaccine selected by the employee requires two doses. This is not a new requirement for employers in New York State. New York State employers have been subject to paid time off requirements for employees to receive the COVID-19 vaccine since March 2021. Employers must also offer "reasonable time and paid sick leave" to an employee experiencing negative side effects from the vaccine. The ETS does not define what is reasonable.

Finally, covered employers who refuse to comply with OSHA's ETS face serious penalties. An employer that fails to comply with the ETS may be cited by OSHA up to \$13,653 for each violation of the ETS.

Likewise, if OSHA determines that an employer "willfully" violated the ETS, it can fine the employer up to \$136,532 for **each violation**.

Employers with questions about the content of this legal alert or any other legal issues are encouraged to contact a member of our Firm's Labor & Employment Practice Group.
