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OSHA Issues COVID-19 Vaccine Mandate for Employers of 100 or More Employees

On Thursday, November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its Emergency Temporary Standard (ETS) applicable to employers of 100 or more employees. The ETS requires employers to adopt a soft vaccine mandate obligating employees to either get vaccinated or to undergo regular COVID-19 testing and to wear a face covering at work. OSHA expressly states that the ETS pre-empts all state or local laws that are contrary to the ETS requirements. The ETS will be effective on the date of publication in the Federal Register (November 5, 2021); however, employees who work for covered employers will have until January 4, 2022 to get vaccinated or otherwise comply with the testing/masking requirements. To assist with compliance, OSHA published a chart of the ETS requirements and compliance dates.

The ETS places the compliance and recordkeeping burden squarely on employers, and it leaves employers to decide whether employees may opt for testing instead of vaccination. Under the ETS, employers may: (1) require all employees to be vaccinated (except those exempted for religious or medical reasons); or (2) require employees to be either vaccinated (except those exempted for religious or medical reasons) or wear a mask and be tested regularly. The ETS also leaves it up to employers to decide whether the costs of testing and masks will be covered by the employer or by the employees who opt for testing/masking instead of vaccination.

The ETS does not apply to the following workplaces:

1. Workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. OSHA notes that all covered contractor employees must be fully vaccinated by

January 4, 2022; follow CDC guidelines for masks and physical distancing, including masking and distancing requirements based on the employee's vaccination status and level of community transmission of COVID-19 where the workplace is located; and designate a person to coordinate COVID-19 safety efforts. OSHA notes that federal contractors can provide exemptions for medical contraindications, disability or a sincerely held religious belief.

2. Federal agency workplaces that comply with Executive Order 14043 and the related Safer Federal Workforce Task Force Guidance issued under section 4(e) of Executive Order 13991 and section 2 of Executive Order 14043.
3. Healthcare settings in which any employee provides healthcare services or healthcare support services while they are covered by the requirements of the June 2021 OSHA COVID-19 Healthcare ETS at 29 CFR 1910.502.

Note: The ETS may apply to healthcare providers with employees who are not covered by the Healthcare ETS. For example, the Healthcare ETS does not apply to employees of a healthcare provider working non-ambulatory care settings where all non-employees are screened. If the healthcare employer has more than 100 employees, the new ETS may apply to those employees. In other words, a healthcare provider may be required to comply with the June ETS and the new ETS.

4. Employers who have fewer than 100 employees at all times while the ETS is in effect.
5. Public employers in states without OSHA approved State Plans.

Employers of 100 employees or more

The 100-employee threshold is determined by counting all employees in all U.S. locations regardless of employees' vaccination status or where they perform their work, *at any time the ETS is in effect*. Part-time employees and seasonal employees are included in the 100-employee threshold. Employees of independent contractors are not included.

Staffing agencies: Only staffing agencies count the jointly-employed employees.

Franchisor-franchisee: If a franchisee is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes with the franchisor counting only corporate employees and the franchisee counting the employees of the individual franchisee.

Employers located in states with OSHA approved state plans:

Private employers of 100 or more employees and state and local-government employers are covered by state occupational safety and health requirements.

Employees not subject to the ETS:

Workers who do not report to a workplace where other individuals are present;

Employees who work **exclusively** from home (if those employees do enter the office, they either must be vaccinated or be masked and tested); and

Employees who work **exclusively** outdoors.

ETS requirements applicable to covered employers:

Develop, implement and enforce a soft vaccine mandate.

Employers must develop, implement and enforce a written *mandatory vaccine policy* **or** a written policy allowing employees to elect either to be fully vaccinated or to undergo weekly COVID-19 testing and to wear a face covering at the workplace.

A mandatory vaccine policy requires each employee to be fully vaccinated, including new employees as soon as practical, other than employees 1) for whom a vaccine is medically contraindicated; 2) for whom medical necessity requires a delay in vaccination; or 3) who are legally entitled to a reasonable accommodation under federal civil rights laws due to a disability or a sincerely held religious belief, practice or observance that conflict with the vaccination requirement.

Determine the vaccination status of each employee:

Employers must determine the vaccination status of each employee, obtain acceptable proof of the vaccination status from each employee, maintain a record of each employee's vaccination status, and maintain a roster of each employee's vaccination status. Acceptable proof of vaccination status is:

The record of immunization from a healthcare provider or pharmacy;

A copy of the 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; or

A copy of other official documentation that contains the type of vaccine administered, dates(s) of administration, and the name of the healthcare professional(s) or clinic sites administering the vaccines;

If an employee is unable to produce acceptable proof of vaccination, a signed and dated statement by the employee 1) attesting to their vaccination status (fully or partially vaccinated); 2) attesting that they have lost and are otherwise unable to produce proof required by the ETS, and 3) a declaration that their statement about their vaccination status is true and accurate, including other information specified in the ETS.

Employers must consider employees who do not provide an acceptable form to be unvaccinated.

Employee records and rosters are confidential medical records. For each employee whose fully vaccinated status has been documented prior to the effective date of the standard and the employer has retained records of that ascertainment, the employer is exempt from the requirements to determine the vaccine status of such employees in paragraphs (e)(1)-(e)3 of the ETS.

Paid leave to receive vaccination:

Employers must provide employees reasonable time, including up to four hours of paid time to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects experienced following each primary dose.

Periodic testing:

Employers must ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly. Employers are not required to pay for any costs associated with the testing, but other laws, regulations or collective bargaining agreements may impose such a requirement.

To qualify as a “COVID-19 Test” under the ETS, the test must be: (1) cleared, approved or authorized by the FDA to detect a current COVID-19 infection; (2) administered as instructed by the manufacturer; **and** (3) **not both** self-administered and self-read unless observed by the employer or authorized telehealth proctor. **Antibody tests do not qualify under the ETS as COVID-19 tests.** Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory, proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.

If an employee does not provide documentation of a COVID-19 test result as required by the ETS, the employer must not allow the employee to return to the workplace until the test result is provided.

Testing of an employee is prohibited for 90 days following the date of a positive test or diagnosis of COVID-19 by a licensed healthcare provider.

Positive test or diagnosis:

Employers must require employees to provide prompt notice of a positive COVID-19 test or diagnosis.

Removal of employees from the workplace:

Employers must remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider until return-to-work criteria are satisfied.

Face-covering:

Employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in limited circumstances. Employers are not required to pay for face coverings for employees who choose not to be vaccinated.

Information to provide to employees:

Employers must provide each employee with educational information in a language and at a literacy level the employee understands covering the following topics: the requirements of the ETS and related workplace policies and procedures to implement the ETS, vaccine efficacy, safety, and the benefits of being vaccinated; protections against retaliation and discrimination, and laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Reporting requirements:

Employers must report work-related—occupational—COVID-19 fatalities to OSHA within 8 hours of learning about the fatality. Employers must report work-related COVID-19 patient hospitalizations to OSHA within 24 hours of the employer receipt of information.

Record availability:

Employers must make vaccination or testing records available for examination and copying to an employee or the employee's representative. Employers must also maintain records and ETS related policies available for inspection by OSHA.

Contact us

If you have questions about compliance issues related to the new OSHA ETS, contact Donna Pryor, Barb Grandjean, Brian Hendrix or your Husch Blackwell attorney.

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