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## OSHA's Emergency Temporary Standard Vaccination & Testing Policies

(November 5, 2021)

OSHA has released its “Emergency Temporary Standard” (ETS) in response to President Biden’s employer vaccination mandate on November 4, 2021. The details of the new ETS may be found [here](#). OSHA has also issued a [Fact Sheet](#) and a [Summary](#) of the ETS.

Highlights of the ETS include:

1. The ETS applies to all employers with at least 100 employees firm-wide or corporate-wide at any time the ETS is in effect (independent contractors are not included in this count).
2. The ETS will not apply to employees who work from home, work exclusively outside, or report to a workplace where other individuals are not present (but they do count towards the 100-employee threshold).
3. Employers must implement a mandatory vaccination policy (or policy requiring vaccination or weekly testing) by January 4, 2021, but all unvaccinated employees must wear masks as of December 5, 2021.
4. Employers must provide reasonable time, including up to 4 hours of paid time, to receive each vaccination dose and reasonable time and paid sick leave to recover from side effects.
5. Employers must determine the vaccination status of each employee by obtaining acceptable proof of vaccination, and they must maintain a “roster” of each employee’s vaccination status. Currently, booster shots are not included in the definition of “fully vaccinated.”
6. Each unvaccinated employee must be tested weekly, beginning January 4, 2021. And the employer must maintain records of the test results for so long as the ETS is in effect. Over-the-counter tests from a local pharmacy are permissible, but the employee cannot self-administer and self-read the results (i.e., it must be proctored). Importantly, the ETS does not require the employer to bear the cost of this testing (but it acknowledges other laws and/or a CBA may require it). Thus, employers should refer to state or local requirements before deciding who will be financially responsible for testing costs. Additionally, for employees seeking an exception from vaccination due to a religious belief or medical disability, the employer may be required to pay the costs or weekly testing for such employees.
7. Employers must provide all employees with information about the ETS and workplace policy, a copy of the CDC document “[Key Things to Know About the COVID Vaccine](#)”, information about protections against retaliation and discrimination, and information about laws that provide for criminal penalties for knowingly supplying false statements or documents. Further, employers must make available to its

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employees the aggregate numbers of fully vaccinated employees at the workplace and the total number of employees at the workplace.

8. OSHA anticipates this ETS will be in effect for 6 months.

Please be mindful that several states have implemented or are implementing statutes and ordinances that address the topic of employer mandated vaccinations. And some of those states have outlawed such policies, thereby placing employers in the precarious position of having to choose which laws it will violate. Generally, a federal law will govern and supersede a contrary state law – but this assumes the federal law (here, the ETS) is valid and enforceable. Within 24 hours of the ETS being published at least two legal challenges have been filed. And it is possible that a Court, while addressing such challenges, imposes a stay (or restraining order) temporarily preventing the ETS from going into effect.

As you review the ETS, please feel free to contact us to discuss how best to develop a plan to address this new development.

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