

> Client Alert

OSHA Issues Emergency Temporary Standard Requiring Mandatory Vaccination or Weekly Testing for Large Private Employers

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If you require any additional information regarding workplace laws concerning the COVID-19 pandemic, or any other labor and employment issue, please contact any of the attorneys listed below

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On November 4, 2021, the United States Department of Labor's ("DOL") Occupational Safety and Health Administration ("OSHA") issued its long-awaited emergency temporary standard ("ETS") aimed at reducing the risk of COVID-19 transmission in the workplace. The ETS establishes binding requirements on large private-sector employers in order to help protect unvaccinated employees from workplace COVID-19 exposure. As such, the ETS directs businesses with 100 or more employees to mandate vaccinations for each member of their workforces or, alternatively, require workers to show a negative COVID test on a weekly basis. The ETS provides that employees who cannot produce negative test results or test positive for COVID-19 must be removed from the workplace. The ETS becomes effective immediately upon publication in the Federal Register on Friday, November 5, 2021.

ETS Requirements

The ETS requires covered employers to develop, implement, and enforce either a mandatory COVID-19 vaccination policy or a policy under which unvaccinated employees (including those not fully vaccinated) can elect to undergo weekly COVID-19 testing and wear a face covering at the workplace. Although employers anticipated the "mandatory vaccination or testing" requirement prior to the issuance of the ETS in light of [President Biden's mandate](#) earlier this year, OSHA's new directive provides additional requirements for employers as follows:

1. **Employers must determine the vaccination status of each employee**, obtain acceptable, *i.e.*, reliable, proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status;
2. Employers must **support workforce vaccinations by providing employees reasonable time, including up to 4 hours of paid time off**, to receive each vaccination dose, and reasonable time to recover from side effects experienced following each dose;
3. Employers must **ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work** (if away from the workplace for a week or longer). Employer payment for testing is not required under the ETS, but may be required by other laws, regulations, or collective bargaining agreements;
4. **Employers must (1) obtain prompt notice from their employees when they receive a positive COVID19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who receives a positive COVID-19 test result or is diagnosed with COVID-19 by a licensed healthcare provider; and (3) prohibit such employees from entering the workplace until they meet the ETS criteria for returning to work.;**
5. **Employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors or occupying a vehicle with another person for work purposes, except in certain limited circumstances;**
6. Employers must **provide employees the following documents**—promulgated by OSHA and the CDC—in language and at a literacy level the employees understand: (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](#)”; (3) information about protections against [retaliation and discrimination](#); and (4) [information about laws that provide for criminal penalties for knowingly supplying false statements or documentation](#). As this is an area which continues to evolve, OSHA as well as the CDC may amend the documents linked above, and/or provide additional documents for distribution and posting in the workplace;
7. Employers must report **work-related COVID-19 fatalities to OSHA within 8 hours** of learning about them, and **work-related COVID-19 in-patient hospitalizations within 24 hours** of the employer learning about the hospitalization.

Effect on Accommodations Under Federal Law

The ETS makes clear that if an employer opts to install a mandatory vaccination policy, the policy must require vaccination of all employees, excluding those: (1) for whom a vaccine is medically inadvisable; (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 because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement. Other jurisdictions may provide additional definitional materials or requirements regarding the manner in which employees are able to prove that they are entitled to any of these reasonable accommodations. *See e.g.*, our [prior alert on New York State's COVID-19 Vaccination Leave Law](#) and our alert on [New York City's mandatory vaccination requirements under the Key to New York City program](#).

Employers Covered by ETS

The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction, including employers in industries such as manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, maritime and healthcare. Within these industries, all employers that have a total of **at least 100 employees firm or corporate-wide, at any time the ETS is in effect, are covered**. Importantly, part-time workers count toward the 100-employee threshold. However, independent contractors are not included in the headcount. Employers should be dissuaded from reclassifying employees to avoid coverage under the ETS.

Employees of Covered Employers Not Subject to the ETS

The ETS does not apply to employees who do not report to a physical workplace where other individuals (such as coworkers or customers) are present, work from home, or who work exclusively outdoors.

Effective Dates of the ETS and Specific Provisions

The ETS is effective immediately upon publication in Federal Register, which is set to take place on Friday, November 5, 2021. Employers must address the ETS's specific provisions by the following dates:

- 30 days after publication, *i.e.*, Sunday, December 5, 2021: All requirements other than testing for employees who are not fully vaccinated;
- 60 days after publication, *i.e.*, Tuesday, January 4, 2022: Testing for employees who are not fully vaccinated.

Centers for Medicare & Medicaid Services Own Emergency Regulation

In addition to OSHA's rule, the Centers for Medicare & Medicaid Services ("CMMS") have issued its own emergency regulations on November 4, 2021 that require health care workers at hospitals, nursing homes and other facilities participating in Medicare and Medicaid to be fully vaccinated by January 4, 2022. CMMS' rule does not include the weekly testing option that is part of OSHA's regulations.

Insights

Within the next 30 days employers need to adopt a policy of mandatory vaccination or weekly testing for unvaccinated employees, and immediately comply with the aforementioned ETS requirements. It should be noted that in light of the fact that broad vaccine mandates have faced strenuous opposition from state and federal lawmakers and attorneys general, we anticipate that President Biden's mandate and accompanying ETS will also be subject to legislative challenges in the weeks and months ahead. Employers must nonetheless comply with the ETS now and for as long as it remains effective, irrespective of any state or local laws which restrict an employer's ability to impose vaccination, testing or masking requirements.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice concerning workplace laws concerning the COVID-19 pandemic, or other employment law questions that may arise from time to time and as otherwise needed.