



MEMORANDUM

TO: Our Clients

FROM: Cohen, Weiss and Simon LLP

DATE: November 5, 2021

RE: OSHA Emergency Temporary Standard
Regarding COVID-19 Vaccines

On November 4, 2021, the Occupational Safety and Health Administration (OSHA), a division of the United States Department of Labor (DOL), announced a new emergency temporary standard (“ETS”)¹ requiring all private-sector employers with 100 or more employees to mandate that their employees either get fully vaccinated against COVID-19 or undergo weekly COVID-19 testing and wear a face covering in the workplace.² The ETS will apply to approximately 67% of the United States workforce.³

Scope and Applicability

The ETS applies to employers with at least 100 employees at any time that the ETS is in effect.⁴ While not addressed in the ETS itself, the preamble to the ETS includes a detailed discussion of how to calculate whether a workplace includes 100 employees. This analysis includes consideration of whether (1) there are any joint employers (whose employees are counted), (2) there are any independent contractors (who are not counted), (3) whether there are

¹ The Secretary of Labor, pursuant to the OSH Act, “shall” issue an ETS upon finding that an ETS is necessary to address a grave danger to workers. 29 U.S.C. § 655(c)(1). OSHA is not bound by the procedural and notice-and-comment requirements of the Administrative Procedure Act when promulgating an ETS.

² U.S. Dep’t of Labor, *Department of Labor Issues Emergency Temporary Standard to Protect Workers from Coronavirus*, OSHA National News Release (Nov. 4, 2021), <https://www.osha.gov/news/newsreleases/national/11042021>. The Biden Administration first announced its intent to promulgate this rule on September 9, 2021.

³ 86 Fed. Reg. 61512 (Nov. 5, 2021).

⁴ 29 C.F.R. § 1910.501(b)(1). Note that if an employer has at least 100 employees as of November 5, 2021, but less than 100 employees as of November 10, they are still required to comply with this rule. The same is true of employers who have less than 100 employees as of November 5 but accrue at least 100 employees at some point while the ETS is in effect.

any part-time employees or seasonal employees (who are counted), and (4) whether a single corporate entity has multiple locations (employees at various locations are counted together).⁵

The ETS does not apply to workplaces already covered by the federal contractor and subcontractor vaccine mandate⁶ or workplaces in which any employee provides healthcare services or healthcare support services, which also are already covered by a federal vaccine mandate.⁷

The ETS does not apply to employees who work exclusively from home or outdoors, or who work where no coworkers or customers are present.⁸ However, while these employees are not covered by the ETS, they do count towards whether their employer meets the 100-employee threshold.

Vaccination Policies

Under the ETS, covered employers must either (1) implement a mandatory vaccination policy for all employees⁹ or (2) give their employees a choice between becoming fully vaccinated against COVID-19 or regularly¹⁰ testing for COVID-19 and wearing a face covering at the workplace (a “vaccinate-or-test” policy).¹¹

Mandatory vaccination policies must require vaccination of all employees, including newly hired employees, except employees “[f]or whom a vaccine is medically contraindicated,” “[f]or whom medical necessity requires a delay in vaccination,” or who are legally entitled to a reasonable accommodation under federal civil rights laws because of a disability or sincerely held religious belief, practice, or observance that conflicts with the vaccination requirement.¹²

In the alternative, employers may adopt and enforce a written vaccinate-or-test policy. If an employee who is not fully vaccinated and is covered by a vaccinate-or-test policy fails to

⁵ 86 Fed. Reg. 61513-61515 (Nov. 5, 2021).

⁶ 29 C.F.R. § 1910.501(b)(2)(i).

⁷ 29 C.F.R. § 1910.501(b)(2)(ii).

⁸ 29 C.F.R. § 1910.501(b)(3)(iii).

⁹ 29 C.F.R. § 1910.501(d)(1).

¹⁰ These tests must be weekly if the employee reports to work at least once every seven days. If the employee reports to work less than every seven days (e.g., they mainly telework and come into the office every two weeks), they must be tested for COVID-19 within seven days prior to returning to the workplace. 29 C.F.R. § 1910.501(g).

¹¹ 29 C.F.R. § 1910.501(d)(2).

¹² *Id.*

provide required documentation of a COVID-19 test result, they must be removed from the workplace until they provide a test result.¹³

Full vaccination refers to a person's status two weeks following their final dose of a COVID-19 vaccine, which must be either (1) approved by the FDA, including authorization for emergency use, (2) listed for emergency use by the World Health Organization, or (3) administered as part of a clinical trial in the U.S.¹⁴

Employers must determine the vaccination status of each employee by acceptable proof, including record of immunization from a health care provider or any other official documentation of vaccination. If no official proof is available, an employee may provide a signed and dated statement attesting to (1) their vaccination status, (2) that they lost or are unable to produce official documentation of their vaccination, (3) the type, date, and administering entity of the vaccination, and (4) that they understand that a false statement may subject them to criminal penalties.¹⁵ If no such documentation is provided, the employer must assume that the employee is not fully vaccinated. Documentation of each employee's vaccination status, including whether they applied for a reasonable accommodation, must be maintained and preserved by the employer while this ETS remains in effect.

Employers are required to provide a reasonable amount of time for employees to get vaccinated. Up to four hours of that time must be paid at the employee's regular rate of pay. Employers also are required to provide a reasonable amount of time and paid sick leave for employees to recover from the side effects from each dose of a COVID-19 vaccine.¹⁶

Testing for Employees who Are Not Fully Vaccinated

If employers implement a vaccinate-or-test rule, employees who are not fully vaccinated must regularly obtain an appropriately administered COVID-19 test authorized by the FDA. These tests may not be "both self-administered and self-read unless observed by the employer or an authorized telehealth proctor."¹⁷

Notably, under the ETS, employers are not required to pay for employees' weekly testing, although they may be required to do so under other laws, regulations or collective

¹³ 29 C.F.R. § 1910.501(g)(2).

¹⁴ *Id.*

¹⁵ 29 C.F.R. § 1910.501(e).

¹⁶ 29 C.F.R. § 1910.501(f).

¹⁷ 29 C.F.R. § 1910.501(c).

bargaining agreements.¹⁸ Employers are, however, required to maintain records of all employee test results.¹⁹ These test results must be preserved and maintained and may not be disclosed except as required by federal law while this ETS remains in effect.²⁰

Face Coverings for Employees Who Are Not Fully Vaccinated

Employees who are not fully vaccinated must wear face coverings when indoors or occupying a vehicle with another person unless they are:²¹

- Alone in a room with floor-to-ceiling walls and a closed door;
- Eating or drinking for a limited time;
- Identifying themselves for safety and security reasons for a limited time; or
- Wearing a respirator or face mask.

It is the employer's responsibility to ensure that employee face coverings remain intact and fully cover an employee's nose and mouth.²²

Authorized face coverings must be "made with two or more layers of a breathable fabric that is tightly woven (i.e., fabrics that do not let light pass through when held up to a light source)," secured to the head, and tightly fitted.²³ Face coverings may be made of clear plastic as long as they otherwise fit this description.²⁴

Employers are not required to pay for any face coverings used in the workplace.²⁵

Although the ETS does not address whether employers must require customers or visitors to wear face coverings, it explicitly states that the rule does not preclude an employer from requiring face coverings for customers or visitors to the workplace.²⁶

¹⁸ 29 C.F.R. § 1910.501(g)(1).

¹⁹ 29 C.F.R. § 1910.501(g)(4).

²⁰ *Id.*

²¹ 29 C.F.R. § 1910.1020(i)(1)(i)-(iii).

²² 29 C.F.R. § 1910.1020(i)(2)-(3).

²³ 29 C.F.R. § 1910.501(c).

²⁴ *Id.*

²⁵ 29 C.F.R. § 1910.1020(i)(2)-(3).

²⁶ 29 C.F.R. § 1910.1020(i).

Treatment of Employees Who Test Positive for COVID-19

Covered employers must require all employees, whether vaccinated or unvaccinated, to promptly notify them if they test positive for COVID-19 and immediately leave the workplace until:

- Employees test negative for COVID-19 according to a nucleic acid amplification test after receiving a positive result on a COVID-19 antigen test;
- Employees meet the return to work criteria in the CDC’s “Isolation Guidance” by isolating for ten days after symptom onset and not returning to work until 24 hours after their fever subsides and any other symptoms have subsided or, if the employee had no symptoms, waiting until 10 days have passed since the positive test date; or
- A licensed healthcare provider authorizes the employee’s return to work.²⁷

The ETS does not require employers to provide paid time to any employee for removal due to a positive COVID-19 test or diagnosis of COVID-19.²⁸

Informational Requirements

The ETS requires employers to inform employees “in a language and at a literacy level the employee understands” about:²⁹

- The requirements of the ETS;
- The CDC guidance, “Key Things to Know About COVID-19 Vaccines”,³⁰
- The OSH Act’s anti-discrimination provisions applicable to employees who report a work-related injury or illness or who otherwise exercise their rights under the OSH Act and its implementing regulations, including the ETS; and
- The OSH Act’s criminal penalties for knowingly supplying false statements or documents.

²⁷ 29 C.F.R. § 1910.501(h)(2).

²⁸ 29 C.F.R. § 1910.501(h).

²⁹ 29 C.F.R. § 1910.501(j).

³⁰ Available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>.

Employers are also required to provide employees with their COVID-19 vaccination and test result documentation within one business day of an employee's request.³¹

Reporting Requirements

The ETS requires that covered employers report work-related COVID-19 fatalities within eight hours of the employer learning about the fatality and work-related COVID-19 in-patient hospitalizations within 24 hours of learning about the hospitalization³² These reports must occur by phone, in person, or by electronic submission on OSHA's website.³³

Effective and Compliance Dates

OSHA's standard goes into effect on November 5, 2021, the date of its publication in the Federal Register. Employers must comply by December 5, thirty days following the ETS's effective date.³⁴ **This means that employers must determine employee vaccination status, adopt their compliance policy, begin providing paid time for employees to get vaccinated, and begin requiring employees who are not fully vaccinated to wear masks in the workplace by December 5.**

However, employees who are not fully vaccinated will only be required to test for COVID-19 beginning on January 4, 2022.³⁵ This staggered compliance schedule is intended to ensure that employees will have enough time (60 days) to become fully vaccinated before they are required to begin regular testing for COVID-19 at their own expense.

Preemption of State Laws and Regulations

The ETS explicitly preempts any state or local laws which prohibit vaccine mandates, mandatory face coverings, or otherwise contradict any provision of this standard.³⁶

³¹ 29 C.F.R. § 1910.501(l).

³² 29 C.F.R. § 1910.501(k).

³³ 29 C.F.R. § 1904.39(a).

³⁴ 29 C.F.R. § 1910.501(m)(2).

³⁵ *Id.*

³⁶ 29 C.F.R. § 1910.501(a) ("This section . . . preempt[s] inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees.").

Unionized Workplaces and Other Applicable Laws

While the ETS establishes minimum rules with which covered employers must comply, it provides that collective bargaining agreements or other negotiated agreements may exceed any of the ETS's requirements.³⁷ Thus, for example, unions may bargain to require employers to pay for regular COVID-19 testing and face coverings for employees who are not fully vaccinated, and additional paid leave for employees who must be removed from the workplace due to a positive COVID-19 diagnosis. Additionally, the ETS recognizes that other laws or regulations may require employers to bear the burden of some or all of these costs.³⁸

Enforcement of the ETS in "State Plan" States

Twenty-two states and territories follow "State Plans," which allow them to implement their own private-sector workplace health and safety standards. Although these states are required to enact standards "at least as effective" as any promulgated by OSHA,³⁹ they are only required to implement such standards within thirty days of the promulgation of a new OSHA standard. These states include Alaska, Washington, Oregon, California, Hawai'i, Nevada, Utah, Arizona, New Mexico, Wyoming, Minnesota, Iowa, Michigan, Indiana, Kentucky, Tennessee, North Carolina, South Carolina, Virginia, Maryland, Vermont, and the Virgin Islands.⁴⁰ Thus, in these states, there may be a delay in enforcement of the ETS, especially in those states that have announced an intent to challenge the legality of the ETS or other vaccine mandates.⁴¹

Conclusion

Litigation around the issue of whether OSHA has the statutory authority to issue the ETS is both pending and imminent. Governors or Attorneys General of Alabama, Arizona,

³⁷ 29 C.F.R. § 1910.501(a) (affirming the right of "most private-sector employees to take collective action to improve their wages and working conditions" and collectively bargain for mandate requirements exceeding those required by OSHA's ETS).

³⁸ 29 C.F.R. § 1910.501(h)-(i).

³⁹ Bruce Rolfsen, *Some States Could Stymie Enforcement of OSHA's Shot-or-Test Rule*, Bloomberg Law (Oct. 19, 2021), <https://news.bloomberglaw.com/safety/some-states-could-stymie-enforcement-of-oshas-shot-or-test-rule>.

⁴⁰ Five more states (Illinois, New York, New Jersey, Connecticut, and Maine) and Puerto Rico have an OSHA State Plan that only covers state and local public-sector workers.

⁴¹ See, e.g., Bruce Rolfsen & Chris Marr, *OSHA Warns States Slow to Adopt Health-Care COVID-19 Rule*, Bloomberg Law (Oct. 19, 2021), <https://news.bloomberglaw.com/daily-labor-report/osha-seeks-to-force-state-adoption-of-health-care-covid-19-rule> (noting that Arizona, South Carolina, and Utah have not yet adopted an equivalent ETS to OSHA's healthcare worker ETS promulgated on June 21, 2021). Twenty-four Attorneys General wrote a public letter to President Biden on September 16, 2021 announcing their intention to challenge implementation of the ETS.



Attorney/Client Privileged

Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, and South Dakota have announced their intent to challenge the ETS.⁴² Various civil service organizations and covered employers have also announced their intent to sue. We will continue to monitor developments regarding the ETS and its implementation.

⁴² Andrew DeMillo & Geoff Mulvihill, *GOP State Officials Push Back on Employer Vaccine Mandate*, APNews.com (Nov. 5, 2021), <https://apnews.com/article/covid-states-suing-employer-vaccine-mandates-f4300ed015ed716a1054949cf199a25a>.