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OSHA Issues Emergency Temporary Standard for Large Employer Vaccine Mandate

November 8, 2021

On November 6, 2021, the US Court of Appeals for the Fifth Circuit issued an order freezing implementation of the OSHA ETS pending a challenge to the constitutionality of the vaccine mandate. We will keep you updated about developments in the case.

Should covered employers be required to comply with the ETS, it contains detailed minimum safety requirements for covered employers, including requiring employee vaccination or testing, and states that it supersedes contrary state or local laws, including those that ban vaccine or mask mandates. If the ETS survives legal challenges, covered employers who do not comply with the ETS requirements can face fines of up to $13,650 per violation.

Covered employers should take note of two key dates, as outlined below.

By December 5, 2021, covered employers must:

- Establish a written vaccine policy that complies with the ETS.
- Begin providing paid time for employees to get vaccinated.
- Require unvaccinated employees to wear masks in the workplace.
- Determine vaccination status of each employee, obtain acceptable proof of vaccination, and maintain records and roster of vaccination status.

By January 4, 2022, covered employers must:

- Require employees to either be fully vaccinated or undergo weekly testing.

We anticipate that these deadlines may be tolled pending judicial review.

Who is covered by the ETS?

The ETS covers all employers with 100 or more employees companywide, including remote, part-time and seasonal employees, but excluding independent contractors.

For franchiser-franchisee situations where the franchisee is independently owned, the franchiser's employees and each franchisee's employees are counted separately for purposes of meeting the 100-employee threshold.

The ETS does not apply to federal contractors or healthcare employers covered by other executive orders mandating vaccines.

Vaccination requirement

The ETS requires that all employees of covered employers, except those who work remotely, outdoors or in workspaces where no other individuals are present, be either fully vaccinated against COVID-19, or submit to weekly COVID-19 testing and wear a face mask. The ETS definition of "fully vaccinated" tracks the Centers for Disease Control and Prevention CDC definition of the same term: An employee currently is considered fully vaccinated two weeks after receiving either two doses of Pfizer or Moderna, or one dose of the Johnson & Johnson vaccine. The definition in the ETS does not yet address boosters. Employees must be fully vaccinated by January 4, 2022 or undertake weekly COVID-19 testing.

Beginning December 5, 2021, covered employers must also provide employees with up to four hours of paid time to receive each dose of the vaccine, and reasonable time and paid sick leave to recover from any side effects from the vaccine.

Weekly testing option

Beginning December 5, 2021, employees who are not fully vaccinated must wear a mask when indoors at a covered employer's workplace or when in a vehicle with a co-worker for work-related purposes. There is no mask requirement while eating or if the employee is working alone in an enclosed office.

Beginning January 4, 2022, employees who are not fully vaccinated, including those granted a medical exemption or an exemption based on a sincerely held religious belief, must also obtain a negative COVID-19 test result within seven days before entering a covered employer's indoor workplace. For employees who are not fully vaccinated and working every day from a covered employer's indoor workplace, this means that such employees must undertake weekly testing. Employees who are not fully vaccinated and work exclusively from home are not required to undertake any testing, and employees working in a covered employer's workplace less than once per week must undergo a test within seven days before coming to the workplace.

The test can be administered by a healthcare provider, or self-administered and self-read if the testing process is proctored by the employer or an authorized telehealth proctor. The ETS does not require covered employers to pay for the cost of the test, although employers may voluntarily do so. In some cases, covered employers may be required to cover the cost of the test under collective bargaining agreements or state or local law.

Required notices

By December 5, 2022, covered employers must establish a written policy consistent with the ETS requirements. Covered employers must also provide employees with the following information, in a language the employee understands:

- Information about the requirements of the ETS, including the requirements of 29 CFR§ 1910.501.
- The CDC document titled Key Things to Know About COVID-19 Vaccines.
- Information about protections against retaliation and discrimination contained in 29 CFR § 1904.35(b)(1)(iv) and Section 11(c) of the OSH Act.
- Information about laws that provide for criminal penalties for knowingly supplying false statements or documentation, specifically 18 U.S.C. § 1001 and Section 17(g) of the OSH Act.

Covered employers must also provide to all employees, upon request, the total number of fully vaccinated workers at a workplace, and the total number of workers at that workplace.

Recordkeeping

In connection with the ETS, covered employers must fulfill and continue to adhere to the following recordkeeping and reporting requirements:

- By December 5, 2021, determine the vaccination status of each employee, obtain proof of vaccination for each vaccinated employee and maintain a record of each employee's vaccination status. Proof may be in the form of a vaccination card, medical paperwork or an attestation. An attestation is sufficient only if the employee also attests that they lost the medical paperwork.
- Maintain a record of each COVID-19 test provided by each employee. The test results are considered medical records and may not be disclosed except as required by the ETS or federal law.
- Maintain an employee "roster" that lists employees and whether they are fully vaccinated, partially vaccinated, not fully vaccinated because of an exemption, or not fully vaccinated because they have not provided acceptable proof of vaccination status. The roster is also considered a medical record and may not be disclosed except as required by the ETS or federal law.
- Report work-related COVID-19 deaths to OSHA within eight hours of learning of the death, and work-related COVID-19

inpatient hospitalizations within 24 hours of learning of the hospitalization. Deaths and hospitalizations of workers who work remotely are not considered “work-related” and need not be reported.

OSHA has provided two sample policies that comply with the ETS: One requires vaccination for all employees, and one allows employees to choose whether to get vaccinated or undergo weekly testing and wear face masks.

If you have any questions about or related to OSHA’s ETS, please reach out to a member of the Cooley employment team.

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