

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

### **OSHA issues COVID-19 vaccination Emergency Temporary Standard**

On November 5, the Occupational Safety and Health Administration (OSHA) issued a generally applicable Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to ensure their workers are fully vaccinated or routinely tested for COVID-19. As expected, legal challenges were filed immediately. On November 6, a federal appeals court temporarily blocked the ETS, pending further court action.

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### **Background**

Section 6(c)(1) of the Occupational Safety and Health Act (OSH Act or Act) requires OSHA to issue an ETS when it determines workers are exposed to a “grave danger” from workplace exposure to toxic materials, harmful physical agents, or new hazards and immediate action is necessary to protect them. Concluding that occupational exposure to COVID-19 poses a grave danger to unvaccinated workers, OSHA issued an ETS on November 5 intended to protect them from the risk of contracting the virus at work.

### **ETS highlights**

The ETS establishes minimum vaccination, vaccination verification, face covering and testing requirements to address the grave danger of COVID-19 in the workplace. OSHA is relying on the ETS to pre-empt inconsistent state and local requirements relating to these issues — in particular, requirements that ban or limit employers’ authority to require vaccination, face coverings or testing, regardless of the number of employees. Key requirements are highlighted below.

### **Covered employers**

The ETS generally applies to employers in all workplaces that are under OSHA’s authority and jurisdiction. While the ETS is in effect, employers that have a total of at least 100 employees across all of their U.S. locations, regardless of their vaccination status or where they work, are covered. For

purposes of the 100-employee threshold, full-time, part-time and seasonal workers are counted but independent contractors are not.

### **Federal contractors and certain healthcare workers**

The ETS does not apply to workplaces covered under the [Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#) (released on September 24) or in settings where employees provide healthcare services or healthcare support services subject to the requirements of the [Healthcare ETS](#) issued on June 21. (See our [June 17, 2021 FYI](#).)

**Buck comment.** On November 4, the Centers for Medicare & Medicaid Services (CMS) issued an interim final rule requiring millions of healthcare workers at a broad range of facilities paid by Medicare and Medicaid to get a COVID-19 vaccination. The rule took effect immediately. Regardless of whether they have patient-facing roles, covered workers will have to be fully vaccinated by January 4, 2022 unless they receive a medical or religious exemption.

The administration also announced that the deadline for covered federal contractor employees to be fully vaccinated against COVID-19 would be extended from December 8 to January 4, 2022, establishing a common deadline for workers to receive their shots under OSHA, CMS and federal contractor requirements.

### **Remote workers and certain other employees**

The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. However, these employees will count toward the rule's 100-employee threshold described above.

### **Employer vaccination policies**

The ETS requires covered employers to develop, implement and enforce a mandatory COVID-19 vaccination policy or a policy allowing employees who are not fully vaccinated to test weekly for COVID-19 and wear a face covering at the workplace instead. A so-called "hard" mandate would require vaccination of all employees, other than those: (i) for whom a vaccine is medically contraindicated; (ii) for whom medical necessity requires a delay in vaccination; or (iii) 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. OSHA recognizes there may be employers who develop and implement partial mandatory vaccination policies, i.e., that apply to only a portion of their workforce.

### **Employee vaccination status**

The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status. Although the ETS expressly excludes

vaccination records and documentation of negative test results from OSHA's 30+ year record-retention requirement for employee medical records, it does require them to be maintained and preserved while the ETS remains in effect.

Acceptable proof of vaccination status may include, for example: (i) the record of immunization from a healthcare provider or pharmacy; (ii) a copy of the COVID-19 Vaccination Record Card; (iii) a copy of medical records documenting the vaccination; (iv) a copy of immunization records from a public health, state or tribal immunization information system; or (v) a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the healthcare professional(s) or clinic site(s) administering the vaccine(s). Where an employee is unable to produce any of the foregoing, they may provide an attestation, but only if it includes language stating that knowingly providing false status information may subject them to criminal penalties.

### **Paid time off for vaccination and recovery**

The ETS requires employers to provide employees reasonable time — up to four hours of paid time, including travel time, at the employee's regular rate of pay — to receive each vaccination dose, and reasonable time and paid sick leave to recover from any side effects.

### **Weekly testing for unvaccinated**

The ETS requires employers to ensure that each employee who is in the workplace at least once a week but is not fully vaccinated is tested for COVID-19 at least weekly or within 7 days before returning to work following an absence of a week or longer.

### **Acceptable types of weekly testing**

The ETS defines "COVID-19 test" as any form of testing for SARS-CoV-2 that is:

- Cleared, approved or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test)
- Administered in accordance with the authorized instructions
- Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor

Antibody tests that are not used to diagnose an active COVID-19 infection will not satisfy a weekly testing requirement.

**Paying for testing.** While employers may choose to pay for the costs associated with testing, the ETS does not require it. However, employers would be responsible for those costs if an employee is participating in the testing program because of a medical or religious accommodation. Employers also may be required to assume the costs by other laws, regulations, collective bargaining agreements or other collectively negotiated agreements.

**Removing employees who test positive.** The ETS requires employers to:

- Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19
- Immediately remove any employee from the workplace, regardless of vaccination status, who tests positive or is diagnosed with COVID-19 by a licensed healthcare provider
- Keep removed employees out of the workplace until they satisfy return-to-work criteria

### **Providing information to employees**

The ETS requires employers to provide employees in a language and at a literacy level the employees understand with information about:

- The requirements of the ETS
- Workplace policies and procedures established to implement the ETS
- The CDC document “Key Things to Know About COVID-19 Vaccines”
- Protections against retaliation and discrimination
- Laws that provide for criminal penalties for knowingly supplying false statements or documentation
- Opportunities to examine and copy an employee’s own COVID-19 vaccine documentation and test results

### **Face coverings**

With certain limited exceptions, the ETS requires employers to 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. As with testing, the ETS does not require employers to pay for face coverings. However, employer payment may be required by other laws, regulations, collective bargaining agreements or other collectively negotiated agreements. Employers must allow employees, regardless of vaccination status, to wear face coverings unless it creates a serious workplace hazard, such as interfering with the safe operation of equipment.

### **Reporting COVID-related fatalities and hospitalizations**

The ETS requires employers to report work-related COVID-19 fatalities to OSHA within eight hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of learning about them.

### **Recordkeeping**

The ETS requires employers to make available to employees and others with the employee’s written authorization the employee’s COVID-19 vaccine documentation and any COVID-19 test results. Employers must also make available to an employee, or an employee representative, the aggregate

number of fully vaccinated employees at a workplace along with the total number of employees at the site.

### Effective date and important deadlines

The ETS is effective as of November 5. Employers must ensure that all requirements other than testing for employees who have not completed their entire primary vaccination dose(s) are in place within 30 days (or by December 5). Weekly testing of employees who have not received all doses required or a primary vaccination must be in place within 60 days (or by January 4, 2022).

While an ETS can only last for six months, it also serves as the proposal for a permanent OSHA standard which must go through the formal rulemaking process. Comments on whether it should become a final rule may be submitted by December 5.

### Legal challenges ahead

A number of states, industry associations, businesses, religious groups and advocacy organizations have already challenged the administration's authority to mandate vaccination. Others are expected in the coming days.

Cases are currently pending in federal Courts of Appeals for the Fifth, Sixth, Eighth, and Eleventh Circuits. Citing "grave statutory and constitutional issues," the Fifth Circuit has already acted — temporarily staying the vaccine rule pending further court action. Stay requests are pending in other circuits. Whether the ETS survives these challenges remains to be seen.

### In closing

Employers should closely monitor legal developments. While the future of the ETS is unclear, employers should determine whether they would be subject to the new requirements and continue to take steps to ensure compliance should the mandate be upheld.

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