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The Wait is Over: OSHA's Much-Anticipated Vaccine or Regular Testing Mandate Published (Updated)

Legal Update

11.05.2021

Update – December 20, 2021: Following the stay issued by the Fifth Circuit Court of Appeals on November 5, legal challenges to the OSHA ETS filed in circuit courts across the country were consolidated in the Sixth Circuit. On December 17, the Sixth Circuit Court of Appeals granted the federal government's emergency motion to dissolve the stay issued by the Fifth Circuit.

The Department of Labor released a statement on December 18 indicating its intent to implement and enforce the OSHA ETS now that the stay has been lifted. In its statement, the DOL announced new compliance dates. In states that are governed solely by federal OSHA, employers must (1) comply with all requirements, except the testing requirement, by January 10, 2022, (this compliance deadline was originally the December 6); and (2) comply with testing requirements by February 9, 2022 (this compliance deadline was originally the January 4).

Petitioners have appealed the Sixth Circuit ruling to the U.S. Supreme Court, which will ultimately decide whether or not to allow the ETS to move forward. While we await a decision from the Supreme Court, employers covered by the ETS should start planning to implement a compliant vaccination policy in order to meet OSHA's new compliance dates. Fredrikson & Byron will continue to closely monitor this litigation and will keep clients updated with any changes.

Update - November 8, 2021: The Fifth Circuit Court of Appeals has stayed implementation of the OSHA ETS pending further litigation, referencing statutory and constitutional issues. The petitioners, a group of companies, including BST Holdings, and five states, are seeking a permanent injunction, and additional briefs are to be filed on Monday and Tuesday, November 8 and 9.

Whatever the court's ruling on the permanent injunction, it is expected that an expedited review by the U.S. Supreme Court will be sought. Fredrikson & Byron is closely tracking these and other developments and will continue to keep clients up to date on the changes.

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The Federal Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (ETS) in the Federal Register on November 5, 2021, requiring employers with 100 or more employees to issue and implement a written policy to ensure that their employees are fully vaccinated against the COVID-19 virus, or that they submit to regular testing for COVID-19 and wear specified face coverings when in the workplace. The ETS is a part of President Biden's Path Out of the Pandemic COVID-19 Action Plan.

In states that are governed solely by federal OSHA, employers must (1) comply with all requirements, except the testing requirement, by December 6, 2021 (30 days after publication of the ETS); and (2) comply with testing requirements by January 4, 2022 (60 days after publication of the ETS). This means that time is limited for employers to prepare and implement a compliant policy and process and to meet the other requirements of the ETS. States that have their own OSHA-approved workplace safety and health programs (State Plans) have 30 days to adopt the federal ETS as written or to draft their own standard that is at least as effective. The ETS preempts contradictory state and local laws and executive orders that attempt to limit the employers' ability to create and enforce mask, testing and vaccination mandates.

Update: Following the Fifth Circuit's November 5 stay of the OSHA ETS and the Sixth Circuit's December 17 dissolution of that stay, the Department of Labor has announced new compliance dates of January 10, 2022, for all requirements except testing, and February 9, 2022, for the testing requirement.

What employers are covered?

The ETS applies to employers with 100 or more employees except federal contractors and subcontractors that are covered by the *Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* and settings where any employee provides healthcare or healthcare support services when subject to OSHA's Standard 1910.502.

The 100-employee threshold is determined by counting employees on a company-wide basis, not by location. Employers must count all employees—including remote, part-time and full-time employees, but not independent contractors.

What employees are covered?

All employees of covered employers are covered except employees who do not report to a workplace where other persons are present including employees who work exclusively from home, or outdoors, or who work alone in the workplace.

What policies and notices are required?

Covered employers must prepare, implement and enforce a compliant policy. The policy must contain numerous specific provisions laid out in the ETS. At a high level, compliant policies include those policies requiring that all employees, who do not

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qualify for an exemption, are fully vaccinated against COVID-19, and policies giving employees the option to choose between providing proof of full vaccination status or providing proof of submitting to the regular COVID-19 testing and masking requirements set forth in the ETS. The policy must also address reasonable accommodation under federal and state law, among other requirements. Employers may choose to adopt one type of compliant policy for one or more segments of the workforce and another for other segments of the workforce.

In addition to issuing a compliant written policy, employers must provide employees with several specific documents described in the ETS regarding vaccines, the employer's policies, OSHA anti-retaliation provisions and possible criminal penalties for knowingly supplying false statements or documentation.

Do employers need to provide paid time off in connection with the COVID-19 vaccinations?

Covered employers are required to provide employees up to four hours of paid sick leave per "primary" vaccination dose the employee receives during work hours. "Primary" doses are those required to become fully vaccinated, but do not include booster shots. Employers cannot require employees to use PTO, accrued sick leave or other employer-provided benefits for this purpose. Beyond four hours per primary dose, any additional leave is unpaid but "protected," meaning that the employer cannot terminate an employee for using a "reasonable amount of time to receive their primary vaccination doses."

Covered employers must also provide reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose. Employers may require employees to use their current bank of employer-provided paid time off or paid sick leave, if available. If the employee has only one bank of leave (such as under a PTO policy that provides paid time off for illness and vacation), the employer may require that the employee use that bank, or, alternatively, if the employee has both paid sick leave and other types of leave, the employer may only require the employee to use the bank of paid sick leave. Employers may not require employees to go into a negative balance for this leave. Rather, if the employee has no available employer-provided paid leave, the employer must provide additional paid leave. OSHA has indicated that two days of paid leave is a "reasonable" amount of time for recovery from each primary vaccine dose. The paid leave requirement is not retroactive for employees who are already vaccinated.

The ETS requires that COVID-19-positive employees be removed from the workplace until one of three specific criteria are met. It does not, however, require that employers provide paid time off for employees who become infected with COVID-19. Employees may, of course, have accrued time off under employer policies, or have other employer-provided benefits that allow for paid time off in these instances, and there may be additional benefits for employees under state or local laws such as sick and safe time ordinances.

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What tests meet the requirements of the ETS?

Tests that are cleared, approved or authorized, including in an Emergency Use Authorization by the FDA, to detect current infection with the SARS-CoV-2 virus (a viral test) and that are administered in accordance with authorized instructions are acceptable. Examples include tests with specimens that are processed by a laboratory, proctored over-the-counter tests and point of care tests. Antibody tests are not acceptable under the ETS and neither are tests that are both self-administered and self-read. Employers may choose to offer testing in the workplace if they wish to do so.

What records must be collected and retained?

The ETS provides specific reporting and recordkeeping obligations. The ETS specifies the types of acceptable records that must be collected and maintained regarding proof of vaccination and testing results. These records must be maintained in accordance with confidentiality obligations for the duration of the ETS. The ETS also outlines the reporting requirements for work-related COVID-19 fatalities and hospitalizations.

What are the potential penalties for noncompliance?

Penalties for violations of OSHA rules range from \$13,653 per violation for serious, other-than-serious and posting requirements to \$136,532 per violation for willful or repeated violations.

Are there other mandates?

As indicated above, there are separate mandates that apply to federal contractors and subcontractors.

Update: On December 7, 2021, a federal court for the Southern District of Georgia issued a nationwide injunction halting implementation of the federal contractor and subcontractor vaccine mandate.

In addition, the Centers for Medicare and Medicaid Services (CMS) released a separate interim final rule with comment period on November 4, 2021, requiring certain Medicare and Medicaid certified facilities to implement a vaccine mandate on facility staff (the CMS Vaccine Mandate), with first or one-time doses due by December 6, 2021, and full vaccination by January 4, 2022 (religious and medical exemptions may apply).

Update: The CMS Vaccine Mandate has also been subject to numerous legal challenges and is currently enjoined in 25 states, with appeals pending before the U.S. Supreme Court. While a nationwide injunction was partially lifted by the Fifth Circuit Court of Appeals on December 15, 2021, CMS has not yet revised an earlier statement that, pending further developments in the litigation, it would not enforce the mandate anywhere in the nation. For more information on the status of the CMS

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Vaccine Mandate, please reference the article released by our colleagues in the Health Law Group.

The facilities to which the CMS Vaccine Mandate applies include: hospitals, ambulatory surgery centers, long-term care facilities, home health agencies, hospices, intermediate care facilities for individuals with intellectual disabilities, comprehensive outpatient rehabilitation facilities, certified outpatient rehabilitation agencies providing physical therapy and speech language pathology, community mental health centers, home infusion therapy suppliers; rural health clinics, federally qualified health centers, end-state renal disease facilities, psychiatric residential treatment facilities and programs of all-inclusive care for the elderly (PACE). Entities that are enrolled in Medicare solely as physician offices are not covered by the CMS Vaccine Mandate.

Closing Thoughts

This ETS is unprecedented (and, including the commentary, is nearly 500 pages) and contains many moving parts. The commentary carries the clear message that the goal is ensuring that adult Americans are vaccinated. The ETS is already facing challenges in federal courts from states and businesses looking to prevent it from being enforced. We will continue to monitor any legal proceedings and any further guidance that may be issued regarding the various interpretations of the ETS provisions.

The Employment & Labor Group at Fredrikson regularly assists clients in the navigation of this complex legal landscape, determining when and to what extent the ETS and other mandates apply to their businesses and employees, preparing and implementing compliant policies and developing strategies to promote employee retention in today's changing workplace. We invite you to contact any member of our Employment & Labor Group if we can be of assistance.

For assistance specific to the Centers for Medicare and Medicaid Services (CMS) interim rule noted above, we invite you to contact any member of our Health Law Group.