

November 5, 2021

OSHA ISSUES VACCINATION AND TESTING EMERGENCY TEMPORARY STANDARD FOR LARGER EMPLOYERS

To Our Clients and Friends:

Yesterday, November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) released its long-awaited emergency temporary standard (“ETS”) requiring most American workers to be vaccinated or undergo weekly COVID-19 testing. Importantly, the ETS states that it preempts state and local requirements that might stand in the way of employee vaccination (or that regulate testing protocols), even if it is possible for employers to comply with both those state requirements and the ETS.

The ETS applies to employers with more than 100 employees except in workplaces covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (the “Task Force Guidance”), which implements Executive Order 14042 for federal contractors. Workplaces covered by that Guidance are not covered by the ETS.

As expected, under the ETS employers with 100 or more employees must require employees to *either* be vaccinated *or* present a negative COVID-19 test weekly and wear a face covering when indoors. The ETS also requires employers to pay employees for time spent getting vaccinated and recovering from side effects.

By December 6, employers must comply with all requirements other than testing. This includes establishing a vaccination policy, determining employee vaccination status, providing the requisite paid time off, and ensuring that unvaccinated employees are masked.

Beginning on January 4, 2022, unvaccinated employees must undergo weekly testing. Any employee who has received all doses of the vaccine by January 4 does not have to be tested. The Task Force Guidance for Executive Order 14042 will be revised to postpone the current December 8 vaccination deadline and to require, like the ETS, that employees receive all vaccine doses by January 4.

In issuing the ETS, OSHA has also sought notice and comment, so the ETS may be converted to a “permanent” OSHA standard. Under the OSH Act, ETSs are to be in place for only six months. Comments are due December 6, 2021.

Some states and private employers have already announced that they have or will file litigation regarding the ETS, which could potentially result in a stay or in the ETS being invalidated. Litigation that is already pending could have the same impact on Executive Order 14042. Events in court likely will move quickly in the coming weeks.

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OSHA has also published FAQs,[1] a summary,[2] and fact sheet.[3] This alert provides an overview of the ETS contents and timing and previews some of its implications for employers.

Who Does (and Doesn't) the OSHA ETS Cover?

The ETS applies to “all employers with a total of 100 or more employees at any time” the ETS is in effect.

The ETS does not apply to:

- Federal contractor workplaces covered under the Task Force Guidance, which we previously discussed [here](#);
- Settings where any employee provides healthcare services or healthcare support services subject to the requirements of the Healthcare ETS, issued in June; and
- Employees of covered employers:
 - Who do not report to a workplace where other individuals such as coworkers or customers are present;
 - While working from home; or
 - Who work exclusively outdoors.

Can an Employer Require Testing in Lieu of Vaccination?

Yes. Under the OSHA ETS, an employer must *either*: (1) require that all employees are vaccinated; *or* (2) require unvaccinated employees to be regularly tested and wear masks in the workplace.

- An employee might be exempted from a vaccination requirement if the employee is entitled to reasonable religious or disability accommodations under federal civil rights laws, vaccination is medically contraindicated, or a medical necessity requires delay.
- An employer must ensure that each unvaccinated employee regularly submits a negative COVID-19 test result. Testing frequency for unvaccinated employees depends on whether the employee regularly reports to a workplace or was recently diagnosed with COVID-19:
 - If an employee regularly reports to a workplace, he must present a COVID-19 test result at least once every 7 days.
 - If an employee usually does not report to a workplace, e.g., he regularly works from home, he must test at least 7 days before returning to the workplace.

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- If an employee is diagnosed with COVID-19, by a health care professional or by a positive COVID-19 test result, then the employer must not require that employee to undergo testing for 90 days following the date of the positive test or diagnosis.

Must an Employer Pay for Employees' Time to Get Vaccinated?

The ETS requires that employers compensate employees for the time it takes to get vaccinated and to recover from vaccination side effects. This includes:

- Up to four hours paid time, including travel time, at the employee's regular rate of pay for each vaccination dose; and
- Paid sick leave for a "reasonable" amount of time to recover from side effects.
 - Employers may require employees to use accrued paid sick leave benefits for recovery from vaccination, but may not require employees to use existing leave entitlements for the time to get vaccinated.
 - But if an employee does not have accrued paid sick leave needed to recover from vaccine side effects, an employer may not require the employee to accrue negative paid sick leave or borrow against future paid sick leave.

Must an Employer Pay for Testing Costs?

The ETS does not require employers to pay for any costs associated with testing; however, other laws, regulations, or collective bargaining agreements may require an employer to pay for testing:

- California's Department of Industrial Relations has stated that employers are responsible for the costs of employer-mandated COVID-19 testing under the state's reimbursable business expense law.
- Some other states have business expense reimbursement laws or prohibitions on requiring employees to pay for medical testing in certain circumstances. These types of laws might be interpreted to place the burden on employers to pay for mandated COVID-19 tests.

To What Extent Does the ETS Preempt State Laws?

The ETS states that it preempts all state "*workplace* requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of a Federally-approved State Plan." This includes all "inconsistent state and local requirements relating to these issues . . . regardless of the number of employees." In the preamble to the ETS, OSHA was clear that it intends for the ETS to preempt state or local requirements that stand in the way of vaccination, testing, or masking, even if it is possible to comply with both the ETS and those state or local requirements. The sweeping language also may be interpreted to preempt state and local anti-discrimination laws that are more accommodating than the federal standard.

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The ETS does not purport to preempt more protective generally applicable state and local requirements that apply to the public at large. Such measures might include generally applicable state laws such as vaccine passports and mask mandates or more stringent requirements imposed by OSHA-approved state plans.

Are Masks Required for Unvaccinated Employees?

Under the ETS, employers must ensure that any employee who is not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another person for work purposes.

- The ETS includes an exception to the face covering requirement when an employee is alone in a closed room; for a limited time while eating or drinking; for a limited time for identification purposes; when an employee is wearing a respirator or facemask (such as a mask for medical procedures); or where the employer can show that the use of face coverings is not feasible or creates a greater hazard.

The ETS itself “does not require the employer to pay for any costs associated with face coverings.” But, as with other COVID-related costs, other laws or employment agreements may require that employers pay for or provide face coverings.

Notably, the ETS does not require fully vaccinated employees to wear face coverings indoors, even in areas of substantial or high transmission. But other laws or regulations may.

What Recordkeeping Requirements Does the ETS Impose?

The ETS requires employers to maintain a record and roster of each employee’s vaccination status and preserve these records and rosters while the ETS remains in effect. Critically, the ETS provides an exemption from this requirement for employers that previously ascertained (before the ETS was published) and retained records of employee vaccination status through another form of proof (including self-attestation). The ETS also requires employers to make available, for examination and copying by an employee or anyone with written authorization from the employee, the employee’s COVID-19 vaccine documentation and any COVID-19 test results for the employee. Additionally, employers must make available to an employee (or their representative) the aggregate number of fully vaccinated employees and total number of employees at the workplace.

What Else Does the ETS Require?

Employers must require employees to “promptly notify the employer” of a positive test result, remove any employee who receives a positive test from the workplace until the ETS return-to-work criteria are met, and report work-related COVID-19 fatalities and in-patient hospitalizations. The CDC document, “Key Things to Know About COVID-19 Vaccines,” must be provided to all employees, along with the employer’s policies established to comply with the ETS, OSHA’s anti-discrimination and anti-retaliation requirements, and information about OSHA’s penalties for supplying false statements or documentation.

What Are the Implications for Federal Contractor Employers?

As noted above, the ETS does not apply to workplaces covered by the Task Force Guidance for federal contractors. But to the extent that a federal contractor has workplaces that are not covered by the Task Force Guidance, it will need to ensure compliance with the ETS for those sites.

The Administration announced that the Task Force Guidance will be revised to mirror the ETS by requiring that covered employees have received all shots by January 4, 2022. That will mean that federal contractor employees, like employees covered by the ETS, would not need to meet the Task Force definition of “fully vaccinated” until January 18, 2022.

How Does the ETS Interact with Accommodation Requirements?

The ETS acknowledges that federal law requires reasonable accommodations for employees who cannot be vaccinated because of a religious belief or medical condition. Employers that elect to comply with the ETS by allowing employees to decide whether to get vaccinated or be tested weekly may not receive many accommodation requests because employees who cannot be vaccinated for medical or religious reasons can choose the weekly testing option.

By contrast, employers that elect to comply with the ETS by adopting a vaccination mandate (rather than opting for testing in lieu) should anticipate and prepare for accommodation requests from their workforces. OSHA predicts that 5% of employees will request accommodations from vaccine requirements, but the actual number may be significantly higher for certain segments of the workforce.

Employers that mandate vaccination should have robust protocols for reviewing and resolving accommodation requests, and should anticipate that such requests will begin immediately upon announcement of their vaccine mandates. For some employers, being prepared to handle accommodation requests will necessitate additional HR personnel training on compliance with federal law in the context of vaccines.

Employers should be aware that the ETS masking and testing requirements for unvaccinated employees will apply to employees who qualify for accommodations. Also of note, the ETS “encourages employers to consider the most protective accommodations such as telework, which would prevent the employee from being exposed at work or from transmitting the virus at work.” Particularly where remote work is not a viable accommodation, compliance with the masking and testing requirements may inform whether an employer can provide accommodations without incurring “undue hardship.”

Additional information about compliance with federal law in the context of employer-mandated vaccines can be found in our [client alerts](#) on these topics.

What Impact Could Legal Challenges Have?

Some court challenges to the ETS already have been filed, and more are likely. The challenges are being filed directly in federal courts of appeals, and the challengers are likely to soon seek a stay of the ETS’s

requirements pending a decision on the merits. Cases filed in different courts will be consolidated and assigned to a single court by lottery.

The litigation bears watching, since ETSs historically do not have a good track record on judicial review: Of the six challenged in court, only two have been upheld even in part. In the cases now being filed, challengers are likely to argue that OSHA has not met the standard to issue the ETS as an emergency rulemaking without notice and comment. They also are likely to challenge OSHA's authority to promulgate a vaccine-or-test mandate at all.

In addition, at least twenty-five states have brought challenges to the federal contractor vaccine mandate, which may result in a preliminary injunction prohibiting enforcement of those requirements. If the federal contractor mandate is enjoined, but the ETS is not stayed (or a stay is promptly lifted), federal contractor employers may have to comply with the ETS instead.

Employers should watch these lawsuits and other ETS-related developments carefully. Employers should also continue to monitor for new Task Force Guidance if they are federal contractors.

[1] <https://www.osha.gov/coronavirus/ets2/faqs>.

[2] <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf>.

[3] <https://www.osha.gov/sites/default/files/publications/OSHA4161.pdf>.



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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following in the firm's Administrative Law and Regulatory or Labor and Employment practice groups.

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