

## Labor & Employment Alert December 20, 2021

### **OSHA ETS Vaccination and Testing Requirements Enforcement To Begin on January 10, 2022 and February 9, 2022**

On December 17, 2021, the United States Court of Appeals for the Sixth Circuit lifted a stay on enforcement of the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS), which was issued on November 4, 2021.

OSHA's ETS generally requires employers with 100 or more employees to establish, implement, and enforce a mandatory COVID-19 vaccination policy. The ETS also allows an employer to establish a policy permitting employees to choose regular weekly COVID-19 testing and wear a face covering in the workplace as an alternative to vaccination. With respect to the public sector, at this moment, there has been no clear guidance on whether the ETS applies to public sector employees in Massachusetts.

On December 18, 2021, following the Sixth Circuit's decision, OSHA announced that it will exercise its enforcement discretion, and will **not** issue citations to covered employers with at least 100 employees for noncompliance with any requirements of the ETS **before January 10, 2022**, and will **not** issue citations to said employers for noncompliance with the ETS' testing requirements **before February 9, 2022**, as long as the employer exercises reasonable, good faith efforts to become compliant. The idea is to provide covered employers with enough time to comply with the ETS.

#### **General Requirements of the ETS**

Under the ETS, covered employers are required to develop, implement, and enforce a COVID-19 vaccination policy. The policy may include a statement outlining the option to get vaccinated or undergo weekly testing and wear a face covering. Employers are also required to determine the vaccination status of each employee and obtain proof of vaccination, as well as maintain records and a list of each employee's vaccination status.

In addition, employers must provide employees with a reasonable time, including up to four (4) hours of paid time, to receive the primary vaccination dose or doses, in the case of a 2-dose series, as well as reasonable time and paid sick leave to recover from side effects of that dose. For employees not fully vaccinated, covered employers must ensure that they wear face coverings when indoors or when in a vehicle with another individual for work-related reasons.

Covered employers must provide each employee with information about the ETS, along with workplace policies and procedures, and vaccination efficacy, safety and benefits by disseminating the document, "[Key Things to Know About COVID-19 Vaccines](#)." In addition, employers must

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provide information as to protections against retaliation and discrimination, as well as laws that provide for criminal penalties for knowingly providing false documentation.

Covered employers are also responsible for reporting work-related COVID-19 fatalities to OSHA within eight (8) hours and work-related COVID-19 in-patient hospitalizations within twenty-four (24) hours.

Lastly, covered employers must make available to an employee their records of COVID-19 vaccination and any COVID-19 test results. Employers must also make available to an employee, or employee representative, the total number of fully vaccinated employees at a workplace and the total number of employees at the workplace.

As for testing, covered employers need to ensure that employees not fully vaccinated are tested for COVID-19 at least once a week if working in the workplace. For employees who are away from the workplace for one week or more, they must be tested within seven (7) days before returning to work. Employers must also require that employees provide prompt notice of a positive COVID-19 test or diagnosis. Upon knowing of the employee's positive COVID-19 test or diagnosis, employers must remove said employee from the workplace.

For more information, here is OSHA's recent statement on ETS and testing requirements: [OSHA New Statement on ETS Enforcement](#).

In the meantime, if you have not already done so, and you are a private employer with 100 or more employees, it would be prudent to start developing a policy which at the threshold requires a determination whether you are going to mandate vaccinations or allow employees an opportunity to test and wear a face mask as an alternative. Additionally, the ETS requires development of other protocols which are outlined in our November 8, 2021 client alert and which are summarized above. See [Osha Issues Emergency Temporary Standard Which Requires a Vaccine Mandate Policy with an Exception for Weekly Testing](#) (MHTL Nov. 8, 2021 Client Alert).

However, you should be aware that immediately upon the Sixth Circuit's lift of the stay, the Sixth Circuit's action was appealed to the U.S. Supreme Court by twenty-seven (27) states, business groups, and religious entities who are requesting that the Supreme Court put a hold on the Sixth Circuit's decision. As of this writing, the Supreme Court has not issued a ruling regarding the ETS. Given that OSHA has signaled a fairly short lead time for enforcement with its statement in response to the Sixth Circuit ruling, it is important to begin to put the steps in place, so that if the ETS is upheld by the Supreme Court, you will be ready for a likely short enforcement window imposed by OSHA.



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