

Labor & Employment Alert
November 8, 2021

**OSHA ISSUES EMERGENCY TEMPORARY STANDARD WHICH REQUIRES
A VACCINE MANDATE POLICY WITH AN EXCEPTION FOR WEEKLY TESTING**

OSHA issued its much-anticipated Emergency Temporary Standard (ETS) late last week on Thursday, November 4, 2021. In general, the ETS requires employers to establish, implement, and enforce a mandatory COVID-19 vaccination policy. The ETS provides a limited exemption from the vaccine mandate which permits an employer to establish a policy which allows employees to choose either vaccination or regular weekly COVID-19 testing and wear a face covering in the workplace as an alternative to vaccination.

ETS Subject to Immediate Challenge

Not surprisingly, the ETS was subject to immediate challenges leading a federal court in the Fifth Circuit in New Orleans to temporarily stay the ETS on Saturday, November 6, 2021. The Biden administration has until today, Monday, November 8, 2021, to file a response to the challenge, and it is likely that the Fifth Circuit will rule later this week on whether the ETS should be enjoined. Whatever the Fifth Circuit decides, it will likely be challenged by the losing party and may ultimately result in the Supreme Court determining the validity of the ETS. Additionally, there are challenges in other federal jurisdictions across the country. Stay tuned for further judicial action regarding implementation of the ETS.

Covered Employers

The ETS applies to private employers with 100 or more employees.

OSHA does not apply directly to public employers in Massachusetts because Massachusetts does not have an OSHA-approved state plan. However, Massachusetts law requires that public employers provide protections for employees consistent with OSHA's standards. Specifically, MGL c. 149, §6 ½ and 454 CMR 25.02 incorporate standards promulgated under OSHA's general duty clause, such as the ETS. Pursuant to this statute and implementing regulations, public employers with 100 or more employees may also be required to comply with the ETS. The Massachusetts Department of Labor Standards is anticipated to provide further guidance regarding the applicability of the standard to public employers.

The ETS does not apply to healthcare workplaces that are governed by OSHA's Healthcare ETS.

General Requirements

The ETS imposes 10 basic requirements on covered employers. The effective date of the ETS is November 5, 2021, but employers are not required to comply with most of the requirements, with the exception of testing requirements, until December 5, 2021 (30 days after publication). The following chart outlines the requirements and the compliance dates:

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Requirement	30 days after publication: 12/05/2021	60 days after publication: 1/04/2022
1. Develop, implement, and enforce a mandatory COVID-19 vaccination policy, which can include an exception giving employees the option to either get vaccinated or undergo weekly COVID-19 testing and wear a face covering at work	X	
2. Determine the vaccination status of each employee, obtain acceptable proof of vaccination, and maintain records and a roster of each employee's vaccination status	X	
3. Provide employees reasonable time, including up to four (4) hours of paid time, to receive each primary vaccination dose, and reasonable time and paid sick leave to recover from any side effects following each primary vaccination dose	X	
4. Ensure that employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer)		X
5. Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis	X	
6. Remove any employee who received positive COVID-19 test or COVID-19 diagnosis	X	
7. Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes	X	
8. Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits by providing the document, " Key Things to Know About COVID-19 Vaccines "; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation	X	
9. Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours	X	
10. Make records of an employee's COVID-19 vaccine documentation and any COVID-19 test results available to that employee. Make available to an employee, or employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace	X	

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Some Frequently Asked Questions

How are employees counted to determine if an employer meets the 100-employee threshold?

To determine the number of employees, employers must count all employees across all of their U.S. workplaces. In other words, the count is based on employees for the entire business *versus* employees at an individual location. The following employees are included in the count:

- Full-time employees
- Part-time employees
- Employees who work from home
- Temporary and seasonal employees
- Employees who work exclusively outdoors
- Minor employees

The following individuals are not included in the count:

- Independent contractors
- Employees of staffing agencies

Are there certain employees not subject to the ETS even if the employer meets the 100-employee threshold?

Yes. The ETS does not apply to employees who work exclusively from home or who work exclusively outdoors. These employees do, however, count towards the 100-employee threshold.

If an employer adopts a mandatory vaccination policy without a testing alternative, may it provide exceptions for certain employees?

A mandatory vaccination policy may provide exclusions for employees in the following three categories:

- Employees for whom a vaccine is medically contraindicated
- Employees for whom medical necessity requires a delay in vaccination
- Employees legally entitled to a reasonable accommodation by reason of disability or sincerely held religious beliefs

A policy which includes additional exclusions may not meet OSHA's definition of a mandatory vaccination policy.

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Can an employer require employees to use existing personal time or sick leave to get vaccinated?

Employers cannot require employees to use personal time or sick leave to receive their COVID-19 vaccine. Rather, employers have to provide up to four hours (4) of paid time to employees to receive the vaccine.

How much time is reasonable time that employers are required to provide employees to recover from side effects experienced from the vaccine?

While the ETS does not specify the amount of paid sick leave the employer is required to provide for side effects, OSHA presumes that if an employer makes up to two days of paid sick leave available per primary vaccination dose for side effects, the employer will be in compliance with this requirement. If an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from the side effects of the vaccine dose.

If employers offer a testing option as part of their vaccine policy, are they required to pay for the testing and/or the time an employee spends getting tested?

The ETS does not require employers to pay for any costs associated with testing. However, OSHA's Frequently Asked Questions point out that employer payment for testing may be required by other laws, regulations or collective bargaining agreements. The FAQ's are silent on the topic of payment for time spent by employees getting tested. While a compelling argument can be made that employees should bear the cost associated with testing, including getting tested on their own time, since it is the result of an employees' choice not to get vaccinated, the issue of pay for testing has not been conclusively determined under either Massachusetts or federal wage and hour laws. Also, as discussed below, the answer may turn on whether the testing is an accommodation for a disability or a sincerely held religious belief.

If employers do not offer a testing option as part of their vaccine policy, but have employees for whom a vaccine is medically contraindicated, employees for whom medical necessity requires a delay in vaccination, and/or employees who are legally entitled to a reasonable accommodation of exemption from the vaccine due to a disability or a sincerely held religious belief, are they required to pay for the testing and/or the time an employee spends getting tested?

As stated above, while the ETS does not require employers to pay for any costs associated with testing, whether an employer may be required to pay for such testing as a reasonable accommodation or because of medical contraindications or medical necessity would likely be

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determined by an undue hardship analysis. Obviously, this is a fact-intensive determination and the outcome would be based on an individualized assessment of multiple undue hardship criteria.

In unionized workforces, are employers required to bargain with the union about the vaccine mandate?

While covered employers may not be required to bargain over the *decision* to implement the ETS, covered employers may be required to provide notice and an opportunity to bargain over the *impact* of implementation of the ETS. Any bargaining obligations can only be determined after careful review of the applicable collective bargaining agreement. Additionally, if an employer wishes to implement protections that are *more stringent* than the ETS, employers may be required to provide the union with notice and an opportunity to bargain over the *decision* to implement those more stringent requirements (e.g. requiring all employees to be vaccinated *versus* offering a testing option).

Key Takeaways

The common element is the uncertainty surrounding the issuance of the ETS.

1. At the core, the validity of the ETS is being challenged in a number of federal courts, and the ultimate result of such litigation will obviously have a bearing on employer implementation of the standard.
2. It is uncertain at this point whether employers who allow employees to choose a testing option as an alternative to mandatory vaccination will be required to pay for the testing and/or the time spent by employees to get tested.
3. It is uncertain at this point whether the ETS applies to public employers in Massachusetts.

While we await further guidance on the above from both the Department of Labor Standards and the Attorney General here in Massachusetts, employers who have already implemented testing protocols or who have unionized work forces are wise to consult with labor counsel regarding payment and bargaining obligations. Employers who have not implemented vaccine policies should determine whether, if the ETS is ultimately held up, it will apply to them, and then begin to develop a strategy for implementing a policy, given the short compliance time frame.

This Client Alert was prepared by Rachel Millette and Nan O'Neill, and was reviewed by Kathryn Murphy, Kier Wachterhauser and Kevin Bresnahan. If you have any questions, please contact Nan O'Neill, Kier Wachterhauser or the attorney assigned to your account, or call (617) 479-5000.

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