

Lawsuits Portend Uncertain Future for New OSHA Vaccination Rule

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On November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) published its long-anticipated emergency temporary standard (“ETS”) on vaccination and testing applicable to most private employers with 100 or more employees, with the exception of healthcare employers and other settings covered under certain other federal rules. The ETS takes effect immediately; at the same time, it serves as a proposed “Final Standard” and, as such, permits 30 days of public comments and is subject to potential revisions.

Critically, the future of the ETS remains in doubt. On November 6, 2021, the Court of Appeals for the Fifth Circuit, in *BST Holdings, LLC v. OSHA*, temporarily stayed the rule’s implementation subject to the court’s further consideration of its enforceability. In addition, multiple other appellate court challenges are pending or threatened. Among other legal theories, they claim that OSHA exceeded its statutory authority by issuing the ETS and improperly preempting “anti-vaccination and masking” requirements in certain states.

Notwithstanding those challenges, the November 4 ETS must be complied with by covered employers unless and until it is struck down by the courts. The current compliance deadlines are December 5, 2021 for all requirements other than testing for employees who have not completed their primary dose(s) (i.e., implement policy, collect data about vaccinations, require masks for unvaccinated employees, provide paid time off, etc.), and January 4, 2022 for all employees to be fully vaccinated or submit to weekly testing.

The ETS establishes minimum vaccination, vaccination verification, face covering, and testing requirements to address COVID-19 in the workplace. Specifically, covered employers are required to take the following steps:

- **Policy Creation.** Develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly testing and wear a face covering in the workplace.
- **Vaccination Verification.** 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.

- **Paid Leave.** Provide employees with reasonable time, including up to 4 hours of paid time off, to receive each vaccine, as well as a reasonable amount of time and paid sick leave to recover from side effects experienced following each dose.
- **Testing Alternative.** Ensure that each employee who is not fully vaccinated test for COVID-19 once each week if working on the employer's premises, or within seven days before returning to work (if the employee is away from the workplace for a week or longer). The ETS does not require employers to pay for any costs associated with testing; however, payment may be required by other laws, regulations or collective bargaining agreements, and nothing prohibits employers from paying the costs.
- **Employee Notice.** Require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19. Covered employees must immediately remove any such employee from the workplace, regardless of vaccination status, and keep removed employees out of the workplace until they meet the criteria for returning to work.
- **Face Coverings.** Ensure that employees who are not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another person.
- **Employee Information.** Provide employees in language that employees can understand (1) information about the requirements of the ETS and workplace policies; (2) the CDC document "Key Things to Know about COVID-19 Vaccines;" (3) information about protections against retaliation and discrimination; and (4) information about the laws that provide for criminal penalties for knowingly supplying false statements or documents.
- **OSHA Reporting Obligation.** Report work-related COVID-19 fatalities to OSHA within 8 hours and report work-related COVID-19 hospitalizations within 24 hours of learning of same.

If an employer elects to adopt a mandatory vaccination policy to comply with the OSHA ETS, it must require vaccination of all employees (and of all new employees as soon as practicable), other than those (1) for whom a vaccine is medically contraindicated; (2) for whom medical necessity requires a delay in vaccination; or (3) who are legally entitled to a reasonable accommodation under federal civil rights laws, because they have medical conditions or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

We will continue to monitor these important developments.

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