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OSHA COVID-19 Vaccination and Testing ETS: Overview and Summary

On November 4, 2021, OSHA issued its 490-page document setting out its Emergency Temporary Standard for COVID-19 Vaccination and Testing, as published in the Federal Register at 86 Fed. Reg. 61402 (Nov. 5, 2021). The ETS requires covered employers to develop, implement, and enforce a mandatory vaccination policy by December 5, 2021, with all covered employees vaccinated by no later than January 4, 2022. Alternatively, the ETS permits covered employers to instead adopt a policy requiring employees to either get vaccinated or elect, in lieu of vaccination, to wear a face covering at work and undergo weekly COVID-19 testing. The ETS imposes many additional safety protocols, recordkeeping, and disclosure requirements for covered employers and employees beyond mandatory vaccination and testing.

Spencer Fane will be hosting a WorkSmarts™ webinar detailing the new ETS next Wednesday, November 10 at 2:00pm CT. Until then, here is a summary of the key ETS provisions and requirements:

1. **Which employers are covered by the ETS?**

   With few exceptions, the ETS applies to employers with a total of 100 or more employees at any time the ETS is in effect. This generally includes private employers and in states with OSHA-approved State Plans, state and local-government employers with 100+ employees. The exact requirements and deadlines that apply to employers covered by OSHA-approved State Plans (as opposed to federal OSHA) may vary slightly depending on the specifics of the ETS adopted by the applicable state, but all State Plan ETS must be at least as effective as the federal ETS in protecting workers and in preventing work-related injuries, illnesses and deaths.

Importantly, in determining the number of employees, an employer must count all employees across all U.S. locations, regardless of whether they are full-time or part-time, and regardless of their work location. However, independent contractors are not counted. Similarly, employers that hire temporary employees through a staffing agency are not required to count such temporary employees (although the staffing agency *does* need to count them in its own total). Likewise, employees of independently-owned franchisees do not count toward a franchisor's total.

The ETS applies to employers that hit the 100-employee threshold at any time that the ETS is in effect. This could mean, for example, that an employer with only 90 employees as of today would not be covered, but if that same employer hits 100 employees as of January 15, 2022, then it will become subject to the ETS at that time. Likewise, an employer that has 105 employees today cannot try to escape the ETS's application by reducing its employee count below 100 in the near future.

2. **You mentioned exceptions. Which employers are not covered by the ETS?**

   The ETS does not cover:

   - Employers that have fewer than 100 employees across all U.S. locations for the duration of time that the ETS remains in effect;
   - Workplaces that are covered by the requirements applicable to federal contractors and subcontractors under the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance (which, unlike the 100+ employee ETS, does NOT permit policies allowing for weekly testing and masking in lieu of vaccination); or
   - Workplaces that are covered by the Healthcare ETS.

3. **Are certain categories of employees exempted?**

   Yes. Covered employers do not have to impose the ETS requirements on certain groups of employees, including workers who:

   - Work from home;

- Work remotely by themselves (i.e., do not report to a workplace where other individuals are present); or
- Perform their work exclusively outdoors.

Importantly, however, all such workers DO count toward the 100 employee threshold for determining whether the employer is covered by the ETS overall.

4. **What are the relevant deadlines?**

   The ETS is effective today (November 5, 2021), which is the date it was published in the Federal Register.

   Except for COVID-19 testing requirements, the compliance deadline for all of the ETS requirements is 30 days after the ETS effective date, which likely means December 5, 2021.

   The COVID-19 testing requirements must be met within 60 days after the ETS effective date, which means January 4, 2022.

   These deadlines may ultimately be delayed slightly for employers covered by OSHA-approved State Plans. State OSHA Plans have 15 days to review the federal ETS following Federal Register publication and 30 days to either adopt the federal ETS in its entirety, or alternatively, to adopt an ETS that is at least as effective as the federal ETS.

5. **Big Picture: What does the ETS require by December 5, 2021?**

   Covered employers must take the following steps:

   - Determine and record the vaccination status of each employee, and maintain a roster with employees' vaccination status (all of which must be treated as confidential medical information).
   - Obtain and record a copy of proof of vaccination for all vaccinated employees (which must also be treated as confidential medical information).
   - Support vaccination by providing reasonable paid time off to get vaccinated and recover.

- Establish, implement, and enforce a written policy requiring mandatory vaccination for all employees (including new employees as soon as practicable) (OSHA sample policy available here), or in the alternative, a written policy that requires either vaccination or weekly COVID-19 testing and face coverings in the workplace in lieu of vaccination (OSHA sample policy available here).
- Establish, implement, and enforce a policy requiring that each employee promptly notify the employer when they receive a positive COVID-19 test or diagnosis, and provide for the immediate removal of such employees from the workplace until certain return-to-work criteria are met.
- Provide certain required information to each employee in a language and at a literacy level the employee understands.
- Implement a reporting procedure to ensure each work-related COVID-19 fatality is reported to OSHA within 8 hours of the employer learning of the fatality, and that each work-related COVID-19 in-patient hospitalization is reported within 24 hours.
- Make employee vaccination and testing records available to that employee and anyone having written authorized consent of that employee by the end of the next business day after a request.
- Make certain aggregate information available to any employee (including former employees) or employee representative (including authorized collective bargaining agents) available by the end of the next business day after a request, including (1) the aggregate number of fully vaccinated employees at a workplace; and (2) the total number of employees at that workplace.
- Make certain information, including required written policies and aggregate employee vaccination and workplace totals available to OSHA within four business hours of a request, and all other records required to be maintained under the ETS by the end of the next business day.

6. **Big Picture: What does the ETS require by January 4, 2022?**

Employers must ensure that all covered employees (meaning those that do not work from home, 100% remote, or outdoors) are fully vaccinated, or alternatively, if the employer has adopted a policy permitting weekly testing and face coverings

in lieu of vaccination, that those covered employees who are not fully vaccinated begin complying with the ETS weekly testing requirements.

7. **Can an employer permit exemptions from the mandatory vaccination requirement?**

   Yes. An employer's policy does not have to require vaccination by employees (i) for whom a vaccine is medically contraindicated; (ii) for whom medical necessity requires a delay in vaccination; or (iii) who are legally entitled to a reasonable accommodation under federal civil rights laws because of a disability or sincerely held religious belief.

8. **What if a covered employer has operations in a state or municipality that prohibits vaccination mandates?**

   OSHA takes the position that the ETS "will preempt inconsistent state and local requirements, including requirements that ban or limit employers' authority to require vaccination."

9. **What constitutes acceptable proof of vaccination?**

   The ETS identifies the following forms of documentation as acceptable proof of vaccination that an employer may consider and copy:

   - The record of immunization from a health care provider or pharmacy;
   - A copy of the COVID-19 Vaccination Record Card;
   - A copy of medical records documenting the vaccination;
   - A copy of immunization records from a public health, state, or tribal immunization information system; or
   - A copy of any other official documentation that contains (i) the type of vaccine administered, (ii) date(s) of administration, and (iii) the name of the health care professional or clinic site administering the vaccine.

   Alternatively, if an employee is unable to produce acceptable proof of vaccination from the above categories, then an employer may accept a signed and dated statement by the employee, "subject to criminal penalties for knowingly providing false information," in which the employee attests (i) to their vaccination status (fully or partially vaccinated), and (ii) that they have lost and

are otherwise unable to produce proof required by the ETS.

10. **Is an employer required to maintain the confidentiality of an employee's vaccination status and proof of vaccination status?**

    Absolutely. The ETS reaffirms that an employee's vaccination status constitutes confidential medical information, as does any documentation of the employee's proof of vaccination and COVID-19 testing results. The ETS requires employers to treat such information as confidential medical records that cannot be disclosed except as required or authorized by the ETS or other federal law. Such records must be maintained and preserved while the ETS remains in effect. Notably, however, such records are NOT subject to the 30-year recordkeeping requirement that applies to some employer-kept medical records pursuant to OSHA regulation.

    In addition, the ETS confirms that aggregate information about the number and percentage of employees who are vaccinated in an employer's workplace is NOT considered confidential since such aggregate information does not reveal an individual employee's personally identifiable medical information.

11. **What "support" must an employer provide in connection with an employee's efforts to get vaccinated?**

    The ETS requires an employer to provide a "reasonable amount" of time to each employee for each of their primary vaccination doses; and up to four hours of paid time, including travel time, at the employee's regular rate of pay for this purpose. If an employee chooses to get vaccinated outside of ordinary working hours, the employer is not required to provide any paid time off for vaccination.

    Additionally, an employer must provide "reasonable time" and paid sick leave to recover from side effects following any primary vaccination dose.

12. **What are the testing and face covering requirements for employees who are not fully vaccinated?**

    Within 60 days of the ETS publication (or by January 4, 2022), covered employers must impose the following requirements on employees who are not fully vaccinated (which includes employees who are only partially vaccinated and

employees who refuse to provide proof of full vaccination):

- An employee who reports at least once every seven days to a workplace where others are present must (i) be tested for COVID-19 at least once every seven days, and (ii) provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.
- An employee who does not report during a period of seven or more days to a workplace where other individuals are present (for example, because the employee has been teleworking for an extended period of time) must (i) be tested for COVID-19 within seven days prior to returning to the workplace; and (ii) provide documentation of that test result to the employer upon return to the workplace.

13. **Does the ETS address the types of acceptable testing?**

    Yes. An employee is NOT permitted to self-administer and/or self-read a test and then report the results unless the employer or an authorized telehealth proctor observes the test's administration.

    Instead, employers may only accept viral tests for SARS-CoV-2 that have been cleared, approved, or authorized (including EUA) by the FDA to detect current infection, and which have been:

    - Processed by a lab;
    - Administered at a doctor's office, urgent care, or pharmacy;
    - Proctored by an authorized telehealth proctor; or
    - Administered and processed either by the employer or with the employer's observation.

14. **If an employer chooses to implement a policy that permits employees to undergo weekly testing in lieu of vaccination, does the employer have to pay for the testing costs?**

    The ETS does not require employers to pay for such testing costs, but OSHA warns that "employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements."

The same is true for the cost of face coverings required for employees in a workplace who are not fully vaccinated. Employers may also be required under certain laws to compensate employees for the time spent to undergo testing. The U.S. Department of Labor has signaled that it anticipates issuing additional guidance on these issues in the future.

15. **What are the face covering requirements for employees who are not fully vaccinated?**

    Covered employer must require and ensure that employees who do not provide proof of full vaccination wear satisfactory, clean face coverings that fully cover the employee's nose and mouth when indoors and when occupying a vehicle with another person for work purposes. Several exceptions exist, including when:

    - An employee is alone in a room with floor to ceiling walls and closed doors;
    - For a limited time while the employee is eating or drinking at the workplace;
    - For a limited time for identification purposes in compliance with safety and security requirements;
    - Where the employer can show the use of face coverings is infeasible or creates a greater hazard that would excuse compliance.

16. **What information must a covered employer provide to all employees under the ETS "in a language and at a literacy level the employee understands"?**

    The ETS requires covered employers to make available several broad categories of information to all employees, although it emphasizes flexibility with respect to the method and form of such communications. OSHA has also made sample employee Fact Sheets available in English and Spanish here. The main categories of information that covered employers must provide under the ETS include:

    - In general, the requirements of the ETS and any employer policies and procedures established to implement the ETS.
    - A CDC publication about COVID-19 vaccine efficacy, safety, and the benefits of being vaccinated, titled "Key Things to Know About COVID-19 Vaccines," is available here.

- A summary of the OSHA regulations that prohibit an employer from discharging, discriminating against, or retaliating against an employee for reporting a work-related injury or illness or for exercising rights under the ETS or making an OSH complaint.
- The prohibitions of federal law providing for criminal penalties associated with knowingly supplying false statements or documentation (e.g., in connection with the employee's provision of proof of vaccination), which include 18 U.S.C. 10001 and OSH Act Section 17(g).

17. **Will the ETS be challenged in court?**

    Yes, almost undoubtedly. But it remains to be seen whether any court with sufficient authority will order for a stay of enforcement of the ETS while legal challenges work their way through the court systems. Covered employers probably should not hinge their bet that the ETS will be struck down before the December 5 compliance deadline.

Bottom Line

Covered employers need to act fast. They have only a month to establish and implement ETS-compliant COVID-19 vaccination, testing, and safety policies and procedures.

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