

New OSHA Standard Imposes Vaccine Mandate Or Weekly Testing Requirement For Large And Mid-Size Businesses

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On November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) issued its long-awaited emergency temporary standard regarding COVID-19 Vaccination and Testing (“the ETS”). Although the ETS takes effect immediately, it also serves as a proposal for a final standard under Section 6(b) of the Occupational Safety and Health Act.

Within hours of the ETS’s publication in the Federal Register, states and affected companies began to launch legal challenges. Just two days after the ETS was issued, the U.S. Court of Appeals for the Fifth Circuit granted a nationwide stay, citing “cause to believe there are grave statutory and constitutional issues” with the ETS. As discussed in further detail below, legal challenges are also pending in other jurisdictions.

New OSHA Standard Requires Covered Employers To Identify Vaccination Status, Impose COVID-19 Safety Requirements, And Report Data

The ETS generally applies to employers under OSHA’s jurisdiction that have a total of at least 100 employees. The ETS does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or in settings where employees provide healthcare services or healthcare support services, which are covered by separate COVID-19 rules. Watt Tieder covered the requirements applicable to federal contractors and subcontractors here. The ETS also does not apply to employees who work remotely.

Covered employers face significant new requirements. The ETS requires employers to 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.

Further, covered employers are required to develop, implement, and enforce a mandatory COVID-19 vaccination policy. An exception exists, however, for employers that instead establish, implement, and enforce a policy requiring employees who are not fully vaccinated to undergo weekly COVID-19 testing and wear a face covering at the workplace. The ETS requires employers to support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each dose, and reasonable time and paid sick leave to recover from any side effects experienced following each dose. Employers are not required to pay for testing. Notably, booster shots are not included in the ETS definition of “fully vaccinated.” Thus, employers need not mandate that employees receive boosters.

The ETS also requires employers to: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any such employee from the workplace, regardless of vaccination status; and (3) keep removed employees out of the workplace until they meet criteria for returning to work.

Employers must report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization. “Work-relatedness” is determined by reference to 29 C.F.R. § 1904.5.

Numerous Legal Challenges Raised, ETS Effective Date In Question

As of publication, challenges to the legality of OSHA’s ETS are pending in the 5th, 6th, 7th, 8th, and 11th U.S. Circuit Courts of Appeals. *See, e.g., BST Holdings, LLC, et al. v. OSHA*, No. 21-60845 (5th Cir. filed Nov. 5, 2021); *Kentucky v. OSHA*, No. 21-4031 (6th Cir. filed Nov. 5, 2021); *Indiana v. OSHA*, 21-3066 (7th Cir. filed November 5, 2021); *Missouri, et al. v. Biden*, No. 21-3494 (8th Cir. filed Nov. 5, 2021); *State of Florida v. OSHA*, No. 21-13866 (11th Cir. filed Nov. 5, 2021). Private companies and states alike have argued that the ETS exceeds the authority of the federal government and/or OSHA’s authority under its enabling statute. *See id.*

On November 6, 2021, the Fifth Circuit granted a nationwide stay, citing “cause to believe there are grave statutory and constitutional issues” with the ETS. The stay is temporary, and litigation is ongoing. The Fifth Circuit ordered the government to respond to the petitioners’ motion for a permanent injunction by Monday, November 8. Petitioners’ reply is due Tuesday, November 9. Additional appeals appear likely.

Pending Resolution Of Legal Challenges, Employers Should Prepare To Achieve Compliance

The outcome of OSHA’s ETS is uncertain - the Fifth Circuit’s stay could be lifted at any time. With several pending lawsuits in other jurisdictions, we may see inconsistent or contradictory opinions amongst the various Courts of Appeals.

Pending resolution of the legal challenges, employers should thoroughly review the requirements of the ETS and prepare to achieve compliance. This includes determining who within the organization will be subject to the vaccination or test-and-mask requirements, how and when data on employee vaccination and/or testing status will be collected and maintained, and who will be responsible for maintaining required records and reporting qualifying events to OSHA. Employers that have not already implemented an organization-wide vaccination program should consider what an appropriate program might look like, and how such a program would be administered.

If you have questions about the ETS or its impact on your business, do not hesitate to contact Watt Tieder for assistance.