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## **Legal Challenges to OSHA's Vaccine & Testing Mandate**

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A little more than three months ago, President Biden called on the Department of Labor's Occupational Safety and Health Administration ("OSHA") to issue an emergency temporary standard ("ETS") to control the spread of COVID-19 in the workplace. On November 4, 2021, OSHA issued the highly anticipated COVID-19 Vaccination and Testing ETS, which requires employers with at least 100 employees to implement either a mandatory COVID-19 vaccination policy or a policy that allows employees who choose not to be fully vaccinated to undergo COVID-19 testing and report results every 7 days and wear approved face coverings while at work.

Within hours after the ETS was published in the Federal Register, several states, individuals, and businesses filed multiple lawsuits challenging its enforceability. These lawsuits were filed in the United States Court's of Appeal for the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 11<sup>th</sup> Circuits.

On November 6, 2021, the 5<sup>th</sup> Circuit granted a motion to temporarily stay enforcement of the ETS. On November 12, 2021, the 5<sup>th</sup> Circuit reaffirmed the stay blocking the enforcement of OSHA COVID-19 Vaccination and Testing ETS and ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order."

By way of background, when multiple parties sue a federal agency in different appeals courts, the United States Judicial Panel on Multidistrict Litigation consolidates the cases and conducts a lottery to determine which of court of appeals will hear the consolidated case challenging the ETS. On November 16, 2021, our very own, 6<sup>th</sup> Circuit was selected through the lottery process to hear the consolidated challenge to the ETS.

The 6<sup>th</sup> Circuit Court of Appeals is located in Cincinnati, Ohio and covers Kentucky, Michigan, Ohio and Tennessee. The 6<sup>th</sup> Circuit is a relatively conservative circuit and includes eight Democratic appointees and 20 Republican appointees. Federal appellate cases are normally heard by a 3-judge panel selected at random, which has yet to be named. However, recently, four separate groups of petitioners challenging the OSHA ETS have asked the 6<sup>th</sup> Circuit to hear the case *en banc*, meaning by all of the judges.

The 6<sup>th</sup> Circuit will soon hear arguments regarding the enforceability of the ETS. Once a decision is rendered by Court, it will be applied across the United States. Regardless of its ruling, the United States Supreme Court is likely to have the final word on the ETS. Therefore, a final determination regarding enforceability of the ETS may not be certain for a few weeks or even months.

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## **What Does The Legal Challenges Mean for Employers?**

Due to the pending legal challenges, the enforceability of the ETS is currently unclear. Presently, OSHA must refrain from enforcing the ETS until the 6<sup>th</sup> Circuit decides otherwise.

## **Where Does This Leave Employers?**

Employers should begin familiarizing themselves with the requirements of the ETS and prepare to implement the required policies and practices set forth in the ETS if or when the stay is lifted and the ETS becomes effective. According to OSHA, it remains “confident in its authority to protect workers in emergencies,” so employers should not assume that OSHA is giving up on the ETS.

Employers who are federal contractors or health care providers are subject to different federal vaccination mandates. While these mandates are being challenged, they have not been halted from being enforced by any federal court. Therefore, employers covered under Executive Order 14042 and the emergency regulation issued by the Centers for Medicare & Medicaid Services (CMS), should continue to implement vaccination policies and procedures to ensure compliance.

## **If Upheld, What Does OSHA’s ETS Require?**

Covered employers must establish, implement, and enforce either a written **mandatory** COVID-19 vaccination policy or a **voluntary** COVID-19 policy that allows employees to either choose to become fully vaccinated or both provide proof of regular COVID-19 testing and wear face coverings while at work.

## **When Must Employers Comply?**

Due to pending legal challenges, the ETS is currently stayed until the 6<sup>th</sup> Circuit states otherwise. If the 6<sup>th</sup> Circuit lifts the stay and/or upholds the ETS, the ETS provides that employers must require employees subject to a vaccination mandate policy to receive their final vaccination dose no later than January 4, 2022, which is also the deadline by which unvaccinated employees who are not subject to a mandatory vaccination policy must begin providing proof of regular testing to enter the workplace. The ETS also requires employers to comply with the other requirements of the rule, including masking for all unvaccinated workers and providing paid time off to receive vaccinations within 30 days of publication, by December 4, 2021. If the ETS is upheld, it is unknown whether additional time for compliance will be given for employers.

## **What Employers Are Covered?**

The ETS covers employers with 100 or more employees at any time in which the ETS is in effect. This includes all employees whether full-time, part-time, seasonal, remote, temporary, and/or minors. However, independent contractors are **not** counted towards the total number of employees. The employee threshold should be calculated on a company-wide basis and not based on a location-by-location basis. Multi-employer worksites need only count their **own** employees to calculate the 100 or more-employee threshold. Likewise, when employees of a staffing agency are placed at a host employer location, only the staffing agency should count these jointly employed workers for purposes of the 100-employee threshold for coverage.

The ETS does not apply to:

- Federal employees (who are subject to a separate Executive Order);
- State and local government employers in states without “State Plans” (this includes Ohio but not Michigan);
- Federal contractors covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors; or
- Workplaces where employees provide healthcare services or healthcare support services subject to Centers for Medicare and Medicaid Vaccination rule which was also published on November 5, 2021.

Once an employer has been deemed a covered employer as of November 5, 2021, it remains subject to the ETS even if the workforce falls below the 100-employee threshold. Likewise, if an employer now has fewer than 100 employees but reaches that threshold during the effective period of the ETS, the employer becomes a covered employer under the ETS.

### **Does the ETS Apply to All Employees?**

No. The ETS is focused on minimizing the spread of COVID-19 in the workplace. The ETS does not apply to employees who would otherwise be covered, but:

- Who do not report to a workplace where other individuals, such as coworkers or customers are present;
- Who are working from home; or
- Who work exclusively outdoors (e.g., an employee who works indoors on some days and outdoors on other days is not exempt from the requirements of this ETS).

### **Are There Exceptions to the Vaccination Requirement?**

Yes. Employers who implement a mandatory vaccination policy must permit exceptions when:

- A vaccine is medically contraindicated;
- Medical necessity requires a delay in vaccination;
- The employee is legally entitled to a reasonable accommodation under federal civil rights laws because of a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

### **Are Employees With Exceptions Required to Test Weekly For COVID-19?**

Yes. The ETS requires weekly COVID-19 testing of all unvaccinated employees, including those entitled to a reasonable accommodation from mandatory vaccination requirements. However, if testing for COVID-19 conflicts with an employee’s sincerely held religious belief, practice, or observance, the employee may be entitled to a reasonable accommodation.

### **What Does “Fully” Vaccinated Mean?**

Under the ETS, covered employers must determine the vaccination status of each employee. An individual is fully vaccinated two weeks after receiving the second dose of a two-dose vaccine series (Pfizer or Moderna), and two weeks after receiving a single-dose vaccine (Johnson & Johnson's Janssen). Booster shots and additional doses are not included in the definition of fully vaccinated under the ETS.

### **What Are the Acceptable Documents to Prove COVID-19 Vaccination Status?**

Covered employers are required to obtain proof of all employees' vaccination status, including whether employees are fully or partially vaccinated. Acceptable documentation to prove vaccination status includes:

- A record of immunization from a healthcare 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 the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

If an employee is unable to produce the acceptable documentation to prove vaccination status, an employee may provide attestation of their vaccination status, the reason they cannot produce the acceptable documentation, and the employee's best recollection of the details of the vaccination received. The attestation must also include the following language: "I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."

Employees who are unable to provide one of the above listed acceptable forms of proof of vaccination status must be treated as unvaccinated and must be required to submit proof of weekly COVID-19 testing and comply with face covering requirements.

### **Do Employers Need to Keep Records of Vaccination Status?**

Yes. Employers are required to maintain records of employees' vaccination status, including a roster of each employee's vaccination status and a copy of the acceptable proof of vaccination for fully or partially vaccinated employees. Employers must maintain these records at least as long as the ETS or any final rule is in effect. These records should be treated as confidential medical records and kept or saved in a separate file apart from the employee's personnel file.

### **Do Employers Have to Provide Time Off for Employees to Get Vaccinated?**

Yes. The ETS requires employers to provide employees with up to four hours of paid time off during the workday to receive each dose of the vaccine, including completing paperwork, travel time, and post-vaccination monitoring. Employers may not require employees to use sick time,

vacation time or other available paid time off to get vaccinated. Employers are not obligated to grant paid time to employees for time spent receiving the vaccine during non-work hours.

The ETS also requires employers to provide all employees reasonable paid time off to recover from any side effects that develop from receiving the vaccine. With properly drafted policies, employers may require employees to use sick time, vacation time or other available paid time off during this recovery period.

### **How Do the Testing Requirements for Not Fully Vaccinated Employees Work?**

Employees who report to a workplace and are not fully vaccinated by January 4, 2022 must submit to a COVID-19 test at least once every 7 days and wear a compliant face covering while working. Partially vaccinated or unvaccinated employees must provide documentation of the most recent COVID-19 test result no later than 7 days following the date the employee last provided such results.

### **What About Unvaccinated Employees Who Don't Work Regularly in the Employer's Workplace?**

Unvaccinated employees who are not regularly present in the workplace are not required to undergo weekly COVID-19 testing. However, these employees must test for COVID-19 within 7 days before entering the worksite and provide documentation of that test result to the employer before entering the workplace.

### **Who Must Pay For the COVID-19 Testing?**

Employers are not required to pay for employees to obtain COVID-19 tests. Payment for testing may be required under a collective bargaining agreement, another collectively negotiated agreement, or state/local law. Neither Ohio nor Michigan presently have statutes requiring employers to pay the cost of employee testing. Employers are not prohibited from arranging for on-site testing or paying for employee testing if they so choose.

### **Do Employers Have to Maintain a Copy of Each COVID-19 Test for Unvaccinated Employees?**

Yes. Along with the roster of all employees' vaccination status, employers must maintain a record of each test result required to be provided by each unvaccinated employee. These records are considered medical records and must be kept confidential and stored in a separate medical file.

### **Are There Any Exceptions to Weekly COVID-19 Testing?**

Yes. For individuals who have received a positive COVID-19 test result or who have been diagnosed with COVID-19, the ETS provides an exception from testing for the 90 days following the positive diagnosis or test.

## **What COVID-19 Tests Are Permitted?**

Permitted COVID-19 tests include those, cleared, approved, or authorized (including in an Emergency Use Authorization by the Food and Drug Administration) to detect current infection with the SARS-CoV-2 virus (*e.g.*, a viral test). The tests must be administered in accordance with the authorized instructions. Tests may not be both self-administered and self-read unless the employer or an authorized telehealth proctor observes all steps of the test.

Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens that are processed individually or as pooled specimens), proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing is done or observed by an employer.

A COVID-19 antibody test may not be used to satisfy the testing requirements.

## **What If an Employee Tests Positive for COVID-19?**

Regardless of COVID-19 vaccination status, employers must require all employees to provide prompt notice when they receive a positive COVID-19 test or diagnosis. Employees diagnosed with COVID-19 should be removed from the workplace until they receive a negative test result, meet the CDC's requirements to return to work in currently applicable "Isolation Guidance," or a licensed healthcare provider recommends their return to work.

## **Are Employers Required to Provide Paid COVID-19 Leave for Employees Removed from the Workplace?**

The ETS addresses only the four hours of paid time off to receive the vaccine and reasonable paid time off to recover from any vaccine side effects. The ETS *does not* require employers to provide paid time off to employees who are removed from the workplace as a result of a positive COVID-19 test or diagnosis. Employer policies offering sick leave, vacation time, or other available paid time off may cover such absences, and paid time off may be required by other state laws or pursuant to a collective bargaining agreement. In Ohio, employers are not required to provide paid time off due to a COVID-19. However, in Michigan employees may be entitled to paid time off due to COVID-19 diagnosis under Michigan's Paid Medical Leave Act (PMLA).

## **Who Is Required to Wear Face Coverings in the Workplace?**

All unvaccinated employees are required to wear a compliant face covering when indoors or occupying a car with another person for work purposes, except in the following circumstances:

- When an employee is alone in a room with floor to ceiling walls and closed doors;
- For a limited time while an employee is eating or drinking at the workplace;
- For identification purposes in compliance with safety and security requirements;
- When an employee is wearing a respirator, or a mask approved for performing medical procedures; and

- Where the employer can show that the use of face-covering is infeasible or greatest a greater hazard that would excuse compliance (i.e., when it is important to see an employee's mouth for reasons related to their job).

Compliant face coverings must cover the employee's nose and mouth and be replaced when wet, dirty, or damaged. Face shields, alone, are insufficient facial coverings but may be worn in addition to masks. Employers are not required to pay employees' costs for providing compliant face coverings if employees must use them.

### **What are Employers' Reporting Obligations?**

Employers must report to OSHA any ***work-related*** COVID-19 fatalities within eight hours of the employer learning of the fatality. Employers must report to OSHA any ***work-related*** COVID-19 in-patient hospitalizations within 24 hours of learning of the hospitalization.

### **What Other Information Regarding Vaccination Status Needs to be Provided to Employees or Others?**

An employee or anyone with written authorized consent from the employee is entitled to the COVID-19 vaccination records and test results maintained by an employer for that employee. Employers must provide these records to the authorized requestor by the end of the next business day following the request. The ETS also requires employers to provide or make otherwise available to an employee or an employee representative the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

### **Do Covered Employers Need to Submit their Vaccination Policy to OSHA?**

No, the ETS does not require employers to take affirmative action to submit its written vaccination policy to OSHA, but employers must be prepared to do so almost immediately after a request by the agency. Upon such request, employers must provide OSHA a copy of the compliant written COVID-19 policy and the roster showing the aggregate number of fully vaccinated employees at the workplace along with the total number of employees at the workplace within four (4) business hours. Any other documents the ETS requires employers to maintain must be produced to OSHA by the end of the next business day following an agency request.

### **What Should Our Policy Cover?**

To ensure that the vaccination policy is compliant, comprehensive, and effective, it should address the following:

- Requirements for COVID-19 vaccination and applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring a delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
- Information about how employees' vaccination status will be determined and how documentation will be collected from them;

- Paid time off required for receipt of the vaccine and other reasonable paid time off to recover from any side effects of receiving the vaccine;
- Employee obligations to notify the employer of positive COVID-19 tests and the circumstances related to removal of COVID-19 positive employees from the workplace and reinstatement following removal; and
- Disciplinary actions for employees who violate the policy.

In addition, employers should include all relevant information regarding the policy's effective date, to whom the policy applies, deadlines for submitting vaccination information or getting fully vaccinated, and procedures for compliance and enforcement.

### **What about Pre-Existing Vaccination Policies?**

It is not OSHA's intent for employers to duplicate current effective policies covering the requirements of this ETS; however, each employer with a current policy must evaluate that policy to ensure it satisfies all the requirements of the ETS. Employers with existing policies must modify and/or update their current policies to incorporate any missing required elements and must provide information on these new updates or modifications to all employees.

### **What Information Must Be Provided to Employees?**

Covered employers must provide their employees with the following information, in a language and literacy level that all employees may understand:

- Its policies and procedures which are designed to comply with the ETS;
- The Centers for Disease Control and Prevention's "Key Things to Know About COVID-19 Vaccines";
- OSHA's prohibition against retaliation for reporting workplace illnesses or injuries;
- OSHA's whistleblower protections; and
- A notice explaining the potential criminal penalties associated with knowingly supplying false statements or documentation.

### **What are the Criminal Penalties for Providing False Statements and/or Records of Vaccination?**

As noted above, the ETS requires employers to inform each employee of potential criminal penalties associated with knowingly supplying false statements or documentation. Employers may use an OSHA-issued notice to provide the required information to employees, with translations as necessary to ensure the information is provided in a language or languages the employees understand.

False statements or documents submitted for purposes of complying with policies required by this ETS could, upon conviction, be punished by a fine of not more than \$10,000 and/or by imprisonment for up to 5 years. If OSHA discovers that false statements or documents have been made or submitted, it will consider referrals to the US Department of Justice for criminal prosecution in appropriate cases and upon



### **How Does the ETS Affect Unionized Workforces?**

Employers in unionized workplaces with 100 or more employees must, like all covered employers, follow the minimum requirements established by the ETS. The ETS does not displace collectively bargained agreements that exceed the requirements of the ETS.

### **How Long Does the ETS Last?**

The ETS is a temporary rule and will remain in effect for six months unless a permanent standard is enacted before it expires. The ETS serves as a proposal for a permanent standard. In anticipation of developing a permanent standard, OSHA is accepting comments on the ETS, which are due by December 5, 2021.

### **Does the ETS Preempt State Law?**

One of the purposes of the ETS was to preempt state and local laws that interfere with an employer's ability to require vaccination, face-covering, or testing and OSHA has made clear that the ETS preempts state and local laws that prohibit employers from doing so.

States with existing approved OSHA plans, such as Michigan, have 30 days to adopt the federal standard or inform OSHA of implementing state standards that are as effective as the federal ETS.

OSHA is offering robust compliance assistance to help businesses implement the standard, including a free [webinar](#), [frequently asked questions](#), and other [compliance materials](#). However, should you have any questions regarding the ETS or how it may impact your business please contact any of the attorneys in Eastman & Smith Ltd.'s Employment Group or call us at 419-247-1616 to schedule a consultation.