



Employment Update

Keeping You Informed About Employment

November 5, 2021

OSHA's Emergency Temporary Standard for COVID-19 Vaccinations



By **Jordann Wilhelm**

OSHA has now released its highly anticipated emergency temporary standard (“ETS”) with the document scheduled to be published on the Federal Register on November 5, 2021.

Who Is Covered By The ETS?

The ETS requires businesses with 100 or more employees to mandate that their employees receive a COVID-19 vaccine. The ETS applies to all private employers with 100 or more employees firm or corporate-wide. The ETS will also apply to state and local government employers in states with OSHA approved State Plans. The ETS does not cover workplaces already covered by the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or settings where any employee provides healthcare services or healthcare support services when subject to the requirements of OSHA's Healthcare ETS.

In determining whether an employer has 100+ employees, employers must include all employees across all of their U.S. locations, regardless of the employee's vaccination status or where they

perform their work. Part-time employees also count towards the company total, but independent contractors do not. The determination of whether an employer has more than 100 employees and falls within the scope of this ETS is based on the number of employees employed on the effective date of the ETS (November 5, 2021). However, if an employer subsequently hires employees and reaches the 100-employee threshold, the employer will subsequently be covered under the ETS. In other words, if an employer has 100+ employees on or after November 5, 2021, the ETS applies to the employer.

Although the ETS will apply to an employer with 100+ employees, the requirements do not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, while working from home, or who work exclusively outdoors.

What Is Required By The ETS?

The ETS requires that covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy with a limited exception for employers that instead develop, implement, and enforce a policy allowing employees to elect either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

Such a policy must require vaccination of all employees, other than those employees who fall into one of three categories: (1) those for whom a vaccine is medically contraindicated, (2) those for whom medical necessity requires a delay in vaccination, or (3) those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held

religious beliefs, practices, or observances that conflict with the vaccination requirement.

Employers must support COVID-19 vaccination and provide employees with a reasonable amount of time to receive their vaccination dose(s) and provide up to four (4) hours paid time at the regular rate of pay for this purpose. The employer must also provide reasonable time and paid sick leave to employees recovering from side effects experienced following vaccination.

Employees who are not fully vaccinated must be tested for COVID-19 at least once every seven (7) days and provide documentation of the most recent test result to the employer no later than the 7th day following the last date the employee provided test results. If an employee does not provide documentation of a COVID-19 test result, the employer must keep the employee removed from the workplace until the employee provides a test result. Employees who are not fully vaccinated must also wear a face covering when indoors and when occupying a vehicle with another person for work purposes.

Similarly, when an employee receives a positive COVID-19 test result, or has been diagnosed with COVID-19, the employee must be removed from the workplace until they receive a negative test result, meet the CDC's return to work criteria, or receive a recommendation to return to work from a licensed healthcare provider. Notably, the ETS does not provide for paid leave when an employee is sent home as a result of a positive COVID-19 test result or diagnosis.

To comply with this ETS, an employer must receive proof of vaccinations from employees. To be

acceptable as proof of vaccination, any documentation should generally include the employee's name, 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).

Employers must comply with most provisions of the ETS within 30 days after the date of publication in the Federal Register. Employers must comply with the testing requirement within 60 days after the date of publication in the Federal Register.

What If The ETS Conflicts With Local Laws?

The ETS is intended to preempt State and local orders, laws, or requirements relating to these issues, including requirements that ban or limit an employer's authority to require vaccination, face covering, or testing. Even in States with OSHA-approved State Plans, any State law relating to an issue regulated within this ETS is intended to be preempted unless it is submitted for OSHA's approval as a supplement to the State Plan. The ETS is, however, expected to be challenged by private parties and some States.

OSHA Resources

OSHA has released a [Fact Sheet](#) and [Summary](#) of the COVID-19 Vaccination and Testing ETS prior to the official publishing of the ETS on November 5, 2021. Following official publication, the ETS will be codified in Chapter 29 of the Code of Federal Regulations Parts 1910, 1915, 1917, 1918, 1926, and 1928.

If you have any questions, please call the Radey Law Firm at 850-425-6654.

This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.