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Update re Federal OSHA Emergency Temporary Standard Requiring Employers to Mandate COVID-19 Vaccinations or Regular Testing

On November 4, the federal Occupational Safety and Health Administration (Fed/OSHA) issued its anticipated Emergency Temporary Standard (ETS) requiring all employers with 100 or more employees to adopt, implement, and enforce a policy requiring employees to get fully vaccinated against COVID-19 or to submit to weekly COVID-19 testing. As expected, the ETS was immediately challenged by a number of states, business groups, and employers. On November 6, the Fifth Circuit Court of Appeal issued a temporary injunction against the implementation of the ETS, citing “grave statutory and constitutional issues” with the ETS. The Court gave the federal government until Monday, November 7, to file arguments prior to the Court deciding whether to issue a permanent injunction. As such, this issue is currently very much in flux, especially considering that there are numerous other challenges to the ETS in other courts.

Even though this issue is still up in the air, we decided to provide an overview of what the ETS contains, should it ultimately be implemented. However, we want to be clear about two very important issues:

1. The ETS as written contains far too many specific provisions to fully describe here (the official document explaining it is over 150 pages long - [Read the entire document here](#)) ; and
2. We have to wait and see if this is actually going to go into effect, based on how the various court will rule. This will almost certainly make its way to the U.S. Supreme Court at some point. **As of right now, November 6, 2021, however, you are not required to comply with the ETS.**

Basic Overview of the Fed/OSHA ETS:

Here is how the US Department of Labor (USDOL) described the basic requirements of the Fed/OSHA ETS in a November 4, 2021 press release:

“The ETS . . . requires employers to provide paid time to workers to get vaccinated and to allow for paid leave to recover from any side effects.

The ETS also requires employers to do the following:

- Determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated

employees and maintain records and a roster of each employee's vaccination status.

- Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove the employee from the workplace, regardless of vaccination status; employers must not allow them to return to work until they meet required criteria.
- Ensure each worker who is not fully vaccinated is tested for COVID-19 at least weekly (if the worker is in the workplace at least once a week) or within 7 days before returning to work (if the worker is away from the workplace for a week or longer).
- Ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes."

(See <https://www.osha.gov/news/newsreleases/national/11042021>.)

Fed/OSHA's Guidance Materials:

Naturally, this new rule has left employers across the country with countless questions about how this new standard will be applied. Concurrent with the release of the Fed/OSHA ETS, the USDOL issued guidance as follows:

- A 30-minute webinar (<https://www.youtube.com/watch?v=ixxkn3Y8z6g>);
- FAQs (<https://www.osha.gov/coronavirus/ets2/faqs>); and
- Various "compliance" materials (<https://www.osha.gov/coronavirus/ets2>).

Common Questions We Have Received:

Here are some of the most common questions that we have been getting:

Which employers are covered by the Fed/OSHA ETS? How are employees counted?

The Fed/OSHA ETS covers employers with 100 or more employees. In determining whether the company meets the 100-employee threshold, employers must include full-time, part-time, temporary, and seasonal employees in the count. Notably, employers at multi-employer worksites are not required to aggregate all employees at a particular worksite. Similarly, employers are not required to count staffing company employees unless the employer also employs those staffing company employees directly. As such, the employees of farm labor contractors and/or staffing agencies are

not counted for purposes of determining whether the entity controlling the worksite (e.g., grower, processor, packinghouse, etc.) meets the 100-employee threshold.

Are outdoor workers covered?

Employers must include outdoor workers in determining whether the company meets the 100-employee threshold. However, the vaccination and testing requirements do not apply to employees working exclusively outdoors.

How can covered employers comply with Fed/OSHA's ETS?

The Fed/OSHA ETS provides covered employers with two different options for compliance:

(A) Adopt, implement, and enforce a mandatory vaccination policy; i.e., a policy that requires all employees to get fully vaccinated (unless the employee qualifies for a medical or religious exemption).

or

(B) Adopt, implement, and enforce a policy that provides employees with the choice of either showing proof of vaccination status or participating in weekly testing (or equivalent safeguards such as 100% remote work).

Note: Under both options, employees that qualify for a medical and religious exemption from vaccination must be still undergo at least weekly testing and wear a face covering.

What is the deadline for compliance?

Covered employers have until January 4, 2022, to either (A) have all employees either fully vaccinated (again, unless exempt), or (B) commence weekly testing. Given the definition of “fully vaccinated” (see below), employers need to immediately begin thinking about how they will approach the Fed/OSHA ETS.

The deadline to comply with the other provisions in the Fed/OSHA ETS is 30 days after the ETS is published in the Federal Register. The ETS was published on November 5, which means the anticipated deadline for compliance is December 5, 2021.

What qualifies as “fully vaccinated”?

The Fed/OSHA ETS defines “fully vaccinated” to mean two weeks after an individual’s second dose in a two-dose series, such as Pfizer or Moderna’s vaccines, or two weeks after a single-dose vaccine, such as Johnson & Johnson’s Janssen vaccine. The rule also includes vaccinations approved by the U.S. Food and Drug Administration (FDA) and World Health Organization (WHO).

What documentation is required to prove an employee's vaccination status?

The Fed/OSHA ETS requires employers to obtain proof of vaccination through the following means:

- Record of immunization from a healthcare provider or pharmacy;
- A copy of the employee's 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 verifying vaccination with information on the vaccine name, date(s) of administration, and the name of healthcare professional or clinic site that administered the vaccine.

What does the weekly testing option look like?

If an employee is not fully vaccinated (regardless of whether they are exempt due to a medical or religious accommodation) and reports to a workplace, then the employee must undergo at least once-weekly COVID-19 testing. If an employee reports to the workplace less often than every seven days, then the employee must provide proof of a negative test taken within seven days prior to their return.

Does the Fed/OSHA ETS replace/preempt the Cal/OSHA ETS?

The USDOL guidance indicates that state OSHA programs must be at least as effective as the OSHA ETS in protecting workers from COVID-19 hazards and that state OSHA programs have 30 days to adopt the ETS or implement a regulation that is at least as effective as the ETS. Further, under the Fed/ETS, state plans, such as Cal/OSHA, must notify Fed/OSHA of the action they will take within 15 days. As such, this is a developing area that we are carefully watching.

What This Means for Employers:

While we agree that this law is unconstitutional in numerous ways, we need to wait and see how the various court challenges are resolved. California employers that will be covered by the Fed/OSHA ETS, if ultimately implemented, should carefully review the new standard and work closely with their employment law counsel to determine how they will approach compliance.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.