

November 2021

Client Advisory

Biden Vaccine Mandate Rules Issued By OSHA: Vaccine or Testing Required By January 4, 2022

Just shy of two months after President Biden announced that private employers would be required to implement a “soft” vaccine mandate. (See our Alert on this announcement [here](#)), the Occupational Safety and Health Administration (“OSHA”) issued the Emergency Temporary Standards (“ETS”) for private employers of 100 or more employees. This ETS is effective the date of its publication in the federal register, which is slated for November 5, 2021. All private employers will need to implement this soft vaccine by January 4, 2022 – meaning all employees must either be fully vaccinated as defined in the ETS or undergo weekly testing by that date. All other requirements of this ETS, including the mask mandate of unvaccinated workers, will need to be implemented by December 5, 2021.

Private employers with 100 or more employees (companywide) as of the effective date or any time thereafter are required to implement a written mandatory vaccine policy, with an exception for written policies that allow employees to refuse the vaccine and instead undergo weekly testing and wear a face covering in the workplace. Once an employer is within the scope of the ETS, they will remain subject to the ETS regardless of whether their number of employees falls below the 100 employee threshold at any time. For purposes of this threshold, employers should count employees who are any of the following: full time, part time, fully remote, partially remote, mobile, vaccinated, unvaccinated, exclusively outdoors, and indoors. The ETS lays out examples and scenarios for purposes of counting. There are intricacies in counting temporary employees from staffing agencies that depend on the size of both host and staffing employers.

Even though an employer may be covered, not all of their employees (even if they count for purposes of the threshold) will be covered by the ETS. Employees that are not subject to the ETS are: (1) employees working from home, (2) employees working exclusively outside, and (3) employees who do not report to a workplace where other workers or customers are present. For purposes of the ETS, the workplace is expressly defined to exclude any employee’s residence.

As part of the written policy, private employers must require acceptable proof of vaccination from employees

(examples are outlined in the ETS and include but are not limited to vaccination card, immunization record, or medical records documenting same). Private employers must also maintain records of vaccination as well as create and maintain a roster of employee vaccination statuses. Both are specifically categorized as confidential medical information. The records and roster must be maintained for the duration that the ETS remains in effect.

As to the time needed to obtain the vaccine, private employers are required to provide employees with a reasonable time for each primary dose – specifically, up to four hours of paid time off, including travel time, at the employee’s regular rate of pay. Private employers must also provide reasonable time and paid sick leave to employees recovering from side effects impacting their ability to work from any primary vaccine dose. Remember, this paid time off must start being provided by covered employers by December 5, 2021.

As to the weekly testing option for employees who refuse to get vaccinated:

- (1) any employees that report to the workplace at least once every seven (7) days where other employees or customers are present must get tested once every seven (7) days, providing proof of same;
- (2) any employees that do not report to the workplace seven (7) days or more where other employees or customers are present do not need to undergo weekly testing, but must provide test results upon within seven (7) days before the day of their return to the workplace; and
- (3) Any employee that has received a positive test result for COVID-19 or been diagnosed with COVID-19 cannot be forced to undergo testing for the ninety (90) days subsequent to their positive test result or diagnosis.

Employers are not required to pay for the testing. However, that does not preempt state or local law or collective bargaining agreements from requiring payment of costs related to testing, which means that if state law requires employers pay for testing, the ETS does not relieve that

legal burden. Failure of employees to provide the test result means employers must remove that employee from the workplace until compliance with the soft vaccine mandate. Employers are required to maintain a record of each test result for each employee. The test results are also to be treated as confidential medical records.

Employees who select the testing option must wear face coverings when indoors or occupying a vehicle with another person unless they are alone in a room with floor to ceiling walls and a door. Of course, there are also exceptions to this mask mandate, including when employees are eating or drinking, when a covering is infeasible for the job duties, or when a covering would cause more harm than good to the employee. Employers are not required to pay for face coverings, but state and local laws may require such payment of costs – as already is the case in New Jersey. Remember, the mask mandate is required for unvaccinated people as of December 5, 2021 (regardless of whether weekly testing begins before January 4th).

Employers must also require employees promptly notify them of any positive COVID-19 test result or diagnosis from a licensed health care provider and must prohibit such employees from the workplace. Employees would be permitted to return to the workplace after either a negative test result, after the end of an isolation period as outlined by the CDC, or after a recommendation from a licensed health care provider that they can return to the workplace. Note – employers are still not required to pay for time off related to a COVID-19 positive result or diagnosis. Again, state or local laws can require employers to do more here than the ETS.

Employers are required to give employees notice of the requirements of the new ETS and of their policies and procedures adopted pursuant to or in compliance with this ETS, to specifically give the “Key Things to Know About COVID-19 Vaccines” document from the CDC, and to give employees notice of key federal regulations under the Occupational Safety and Health Act (“OSH Act”), prohibiting discrimination and retaliation for those engaged in OSHA activity and of the OSH Act’s penalties for providing false information. Employers also have further reporting requirements to OSHA concerning COVID-19 deaths. OSHA has the ability to request employers show COVID-19 test results or vaccine statuses which must be turned over within one business day of notice of the request to see same. Within four business hours of a request for a policy or aggregate numbers, employers must turn over same. Finally, within the next business day, employers must comply with all other requests.

The preamble of this ETS addresses how OSHA preempts state law, to the extent it requires something different or in conflict.

Interestingly, OSHA specifically left open the door slightly to implement an additional ETS or set of ETS that would apply to smaller employers.

As an aside, while this ETS does not apply to federal agencies or federal contractors subject to President Biden’s Executive Orders and/or the Safer Federal Workforce Task Force Guidance, the December 8 deadline for all covered federal contractors to ensure their employees are vaccinated has been extended to this January 4, 2022, deadline as well. This ETS also does not apply to certain healthcare employers already subject to OSHA’s June ETS, specific to the healthcare industry, and President Biden’s Executive Order requiring vaccine mandates for entities receiving federal funding. Further, there is no weekly testing exception from this ETS that applies to healthcare employers receiving Medicare or Medicaid funding.

Covered employers must act now in order to be fully compliant in a timely manner with the OSHA ETS. If you are a private employer determining whether OSHA’s new ETS applies to you or are navigating how to implement the mandatory vaccination policy implemented under this ETS, please contact [Peter Frattarelli](#) at 856-354-3012 or pfrattarelli@archerlaw.com, or [Ashley LeBrun](#) at 201-498-8533 or alebrun@archerlaw.com, or any member of Archer’s [Labor and Employment Group](#).

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