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What Employers Need to Know About the New OSHA Emergency Temporary Standard on Vaccines and Testing

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Legal Disclaimer

This webinar is based on available information as of November 17, 2021, but everyone must understand that this webinar is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Stated Purpose of ETS

- Establish minimum standards for:
 - Vaccination, verification, face covering, and testing requirements
 - To address “grave danger” of Covid-19 in the workplace.
- Preempt state and local laws that interfere with the employer’s authority to require the above
- Rule specifically referenced those states where a law or executive order forbid private companies from enacting standards (Montana and Texas, for example)
- Ultimately the courts will decide whether a “grave danger” exists



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OSH Act and the November 5th ETS

- OSH Act allows OSHA to make Emergency Temporary Standards – “grave danger”
- ETS takes effect November 5, 2021
- Enforcement begins December 6, 2021 except for testing component
- Enforcement on testing component begins January 4, 2022
- Because this is an Emergency Temporary Standard, which does not go through the ordinary rule making process, the ETS lasts 6 months



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Public vs. Private Employers

- If you are a public employer, whether or not this applies to you depends upon whether or not your state has their own safety plan that it enforces, which is approved by the federal government
- If you are in a “state plan” state like Utah and Nevada, within 30 days your state must either adopt the ETS or change your state plan to be “at least as effective” as the ETS.
- In “state plan” states, the ETS applies to public entities.
- In states that operate under enforcement of the federal plan, like Idaho, the ETS does not apply to public entities.



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ETS Legal Status

- Multiple legal challenges by states including Utah and Idaho
- Fifth Circuit Court of Appeals stayed enforcement – day after ETS was released
- OSHA announced it will hold off on implementation and enforcement – for the moment
- Yesterday, all the cases were consolidated by JPML lottery – the Sixth Circuit will hear all consolidated challenges
- Expect a motion to lift the stay very soon
- Make plans, put them in place, wait to see – don’t scramble at the end if ETS holds up



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Covered Employers Under ETS

- 100 or more employees (for now) – seeking comment for smaller
 - Part-time employees count
 - Independent contractors do not
 - All employees across all offices/locations in the US count
- Related entities
 - Counted as a single employer if “handle safety matters as one company”
 - No guidance on “safety matters”
 - No guidance on whether integrated operations doctrine or other tests from other laws will be used



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Covered Employers Under ETS

- “Single Employer” considerations
 - How interrelated are employers with regard to safety issues
 - One safety director, or one for each entity
 - How have any prior OSHA complaints been responded to – the “mother ship” or the individual company
 - One safety policy, or individualized safety policies
 - How treated under other laws (although OSHA has not said whether this will be relevant)



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Covered Employer – One Way Street

- If covered employer as of November 5, 2021, ETS applies during duration of ETS being in place
- If not covered as of November 5, 2021, but hire more workers so get over 100 employee threshold, then ETS applies – not clear how long you have to comply if become covered employer say, on January 10, 2022



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Employer Coverage v. Employee Coverage

- It is different
- Employees count towards the 100 threshold but might not be covered by the ETS
- What?
- If have 101 employees, 99 of them work exclusively outside, the employer is covered, but only 2 employees are (those who work inside) are covered (have to be vaccinated or test + face covering)
- Staffing company employees do not count as the client employees



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Exempt Employers

- ETS does NOT apply to
 - Workplaces that are covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
 - Work settings where an employee provides healthcare services or healthcare support services when subject to the requirements of 29 CFR 1910.502



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Excluded Employees

- Employees Not Covered*
 - Those who work where no co-workers or customers are present
 - Those employees working from home (WFH)
 - Those employees who work *exclusively* outdoors
- If these typically remote or outdoor employees come into the office, the ETS will apply

*included for count of employees, but excluded from mandate



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ETS Requirements

- Mandatory vaccination program OR voluntary vaccination + weekly testing + face covering
- Employers must also:
 - Establish and enforce written policy
 - Provide information to employees on vaccines and requirements of ETS
 - Provide paid time off to get vaccinated and recover from side effects
 - Maintain a roster of vaccination status
 - Comply with notice and removal requirements when EE contracts COVID



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ETS Requirements

- Collect and log proof of vaccination
 - Acceptable proof: (scans/photos/digital record is OK, if it can be stored)
 - Immunization record from a pharmacy or health care provider
 - Copy of a vaccination card
 - Copy of a medical record which documents immunization record
 - Copy of immunization records from a public health, state, or tribal immunization information system
 - Copy of any other official documentation that contains the type of vaccine administered, date(s), name of provider
- If an employee is unable to provide proof, he or she may provide a signed attestation provided by employer (includes notice of possible criminal penalties)



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Written Policy Requirements

- Employers must have a written policy. Policy must include:
 - requirements for COVID-19 vaccination;
 - applicable exclusions from the written policy
 - medical contraindications,
 - medical necessity requiring delay in vaccination,
 - reasonable accommodations for workers with disabilities
 - Reasonable accommodations for workers with sincerely held religious beliefs);
 - information on determining an employee's vaccination status and how this information will be collected;
 - paid time and sick leave for vaccination purposes

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Written Policy Requirements (Continued)

- notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace
- how the employer is making required information available to employees
- disciplinary action for employees who do not abide by the policy
- all relevant information regarding the policy's effective date
- who the policy applies to
- deadlines (e.g., for submitting vaccination information, for getting vaccinated)
- procedures for compliance
- procedures for enforcement

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Vaccination Policy: Establish, Implement & Enforce

■ Enforcement

- If an employee cannot locate proof of vaccination, she must attempt to do so
 - An employee without proof should be treated as unvaccinated
 - Policy must include consequences for non-compliance
 - Employees who are not vaccinated and who do not provide proof of a negative test should be removed from the office
 - Employees who test positive should be removed from the office; follow return to work protocols
- Penalties are severe for non-enforcement - \$13,653 per violation, \$136,532 for willful or repeated violations



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Paid Time Off

- Employer *is* required to provide reasonable time off for employees to get vaccinated (up to 4 hours of duty time for each dose); additional unpaid protected leave may be requested and should be granted if reasonable
- An employer cannot require an employee to use accrued paid leave
- Up to 2 workdays of sick leave following each dose is required (use sick leave first; 2 days leave granted if no leave)
- Pay for time employees take to get tested? No direct guidance from OSHA, but OSHA isn't in charge of this area of law. If testing during shift, obviously yes. But check FLSA, state and other laws, CBAs.



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Recordkeeping

- Create and maintain a log – inspections may occur.
- Employers must retain copies of documents (vaccinations & tests)
- Test results are considered to be employee medical records and maintained as such under 29 CFR 1910.1020 while ETS is in effect
- ADA requires medical records to be kept separate from HR files, only able to be accessed by select few who have a need for the information.
- Aggregate number of fully vaccinated employees at workplace and total number of employees at workplace upon request of any employee (by end of the next business day).
- OSHA and employee may request individual test results



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The Testing Alternative

- Recommendation replaces symptom screen and temperature checks as more effective mitigation measures – to catch pre-symptomatic and asymptomatic cases and help with early treatment
- Definition: not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor
- Minimum frequency of testing the unvaccinated is every 7 days.
- Employee should provide test result document every 7 days
 - Employers may want to set a schedule for testing
 - Teleworking employees must test w/in 7 days *before* arrival at work



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The Testing Alternative

- Employer not required to pay costs associated with the actual testing
 - Make sure you're not required to pay such as under collective bargaining
 - May volunteer to pay for testing
- Employers much require each employee to promptly notify employer when they are Covid-19 positive; must be immediately removed (paid time off not required here).
- Employers are prohibited from requiring testing for 90 days after
 - Positive Covid-19 test or
 - Positive diagnosis by a licensed healthcare provider

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Testing (& Masking) Alternative

- Employers must ensure employees who are not fully vaccinated wear a face covering when
 - Indoors
 - In a vehicle with another person for work purposes
- Exceptions
 - When alone in an enclosed room w/door closed
 - When eating or drinking, or for safety or identification purposes (limited time)
 - When wearing respirators or facemasks
 - Where use of face coverings is infeasible or creates a greater hazard

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OSHA REPORTING

- Work-related fatality must be reported to OSHA within 8 hours
- Work-related in-patient hospitalization must be reported w/24 hours
- Follow instructions in § 1904.39 except for 39(a)(1) and (a)(2) and (b)(6) (requirement is not limited to length of time between infection and death)
- Reporting detail:
 - Name(s), time, location of exposure that led to fatality
 - Fatality or in-patient hospitalization
 - Brief description of the incident; contact info of designated contact person



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OSHA REPORTING

- How to Determine Whether a Covid-19 Exposure is Work-Related:
 - Consider the type, extent, and duration of contact the employee had at work with other people, particularly the general public;
 - Consider physical distancing and other controls that impact the likelihood of work-related exposure;
 - Consider the extent and duration of time spent in a shared indoor space with limited ventilation; and
 - Consider whether the employee had work-related contact with anyone who exhibited signs and symptoms of Covid-19.



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Thank You



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