

Preparing for a Novel November: OSHA Releases Its Long-Awaited Vaccination Mandate for Employers with 100 or More Employees

Working Together

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On November 4, 2021, the Occupational Safety and Health Administration (OSHA) released its long-awaited rule addressing COVID-19 vaccinations for employers with 100 or more employees. Promulgated as an emergency temporary standard (ETS), the rule requires “covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and

wear a face covering at work in lieu of vaccination.” **Under the ETS, covered employers must implement compliant policies by December 5, 2021, and by January 4, 2022, must require that employees who are not fully vaccinated be tested for COVID-19 at least weekly.**

The ETS applies to private employers with 100 or more employees “firm- or corporate-wide” and to state and local-government employers in states with OSHA-approved State Plans. For purposes of counting employees, FAQs published by OSHA clarify that “the count should be done at the employer level (firm- or corporate-wide), not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted.”

While all employees are counted for purposes of meeting the 100-employee threshold, “the ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors.”

Importantly, **the ETS does not apply to federal contractors, subcontractors, and workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors** who are subject to the more stringent requirements imposed by the President’s executive order issued in September. It also does not apply to “settings where any employee provides healthcare services or healthcare support services when subject to the requirements of the

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Healthcare ETS.”

Employers who elect to mandate vaccinations “must determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee’s vaccination status, and maintain a roster of each employee’s vaccination status.” Covered employers must provide employees with up to four hours of paid time to receive each vaccination dose as well as paid sick leave to recover from side effects experienced following each dose.

Alternatively, employers who go the route of mandatory testing in lieu of mandatory vaccinations must “ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). **Critically, employers are not required to pay for any costs associated with testing under the ETS.** Unvaccinated employees must also wear a face covering at all times while indoors and/or in a vehicle with another person for work purposes.

The ETS also contains reporting requirements. If an employer learns of a work-related COVID-19 in-patient hospitalization or death, it must report this information to OSHA within 24 hours or 8 hours, respectively.

Finally, the ETS imposes specific notice and informational obligations on employers. Employers must provide to employees, “in a language and at a literacy level the employees understand: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document ‘Key Things to Know About COVID-19 Vaccines’; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.” The ETS also requires that employers “make available for examination and copying an employee’s COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee.” Upon request by an employee (or an employee representative), employers must also provide the number of fully vaccinated employees out of the total number of employees at the workplace.

Although the ETS is effective immediately, employers have 60 days to comply with the testing requirements and 30 days to comply with all other requirements. In light of these short deadlines, employers who will be directly impacted by these requirements should immediately begin discussing the COVID-19 vaccination and testing policies and procedures they will need to implement to comply. This will enable your organization to ensure compliance with the new federal mandate and avoid significant operational disruptions and/or fines.

Our Labor and Employment attorneys have been working closely with organizations to navigate these types of issues and can assist your organization in determining whether these requirements apply, and if so, how to ensure compliance. Pullman & Comley has policy templates (including vaccination policy templates) and other useful resources to assist your organization in addressing these complicated issues. Please contact any

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of Pullman & Comley's Labor and Employment attorneys for more information.

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