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Locke Lord QuickStudy: OSHA to Large Employers – Your Employees Must Get Vaccinated or Get Tested and Mask Up

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UPDATE: On January 13, 2022, the Supreme Court of the United States [stayed OSHA’s COVID-19 Vaccination and Testing Emergency Temporary Standard \(“ETS”\)](#) pending disposition of the applicants’ petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants’ petitions for writ of certiorari to the Supreme Court, if such writs are timely sought. In the Supreme Court’s opinion, the majority found that the applicants are likely to succeed on the merits of their claim that OSHA lacked the authority to impose the mandate. In making this finding, the majority recognized that Congress has given OSHA the power to regulate occupational dangers, but it has not given OSHA the power to regulate public health more broadly.

U.S. Secretary of Labor Marty Walsh subsequently issued a [statement](#) regarding OSHA’s position. Secretary Walsh’s statement provided, in part:

“OSHA will be evaluating all options to ensure workers are protected from this deadly virus.

We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive [COVID-19 guidance](#) to help them uphold their obligation.

Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the [COVID-19 National Emphasis Program](#) and [General Duty Clause](#).”

The litigation will proceed in the Sixth Circuit before the three-judge panel consisting of Judge Stranch, Judge Gibbons, and Judge Larsen. However, the OSHA ETS and its requirements for vaccination or testing will not take effect while the litigation is pending.

PRIOR UPDATES: ?

On November 6, 2021, the United States Court of Appeals for the Fifth Circuit temporarily stayed

?enforcement of the OSHA ETS. ?

On November 12, 2021, only a few days before the Fifth Circuit was set to potentially lose ?jurisdiction of the lawsuit, it issued an Opinion reaffirming and extending its stay pending review ?of the motions for a permanent injunction. ?

Following the Fifth Circuit’s November 12th Opinion, OSHA released a statement that it was ??“suspend[ing] activities related to the implementation and enforcement of the ETS pending ?future developments in the litigation.” ?

On November 16, 2021, the pending litigation was assigned to the Sixth Circuit. Once the case was assigned to the Sixth Circuit, the Sixth Circuit ?had the authority to modify, revoke, or leave the Fifth Circuit stay in place. ?

Petitioners requested the case be heard en banc rather than by a typical three-judge panel. On ?December 15, 2021, the Sixth Circuit denied the request for en banc review, and the case was ?ultimately assigned to a three-judge panel consisting of Judge Stranch, Judge Gibbons, and ?Judge Larsen. ?

On December 17, 2021, the Sixth Circuit issued an [Opinion](#) lifting the Fifth Circuit’s stay of the ETS. Several petitioners filed an emergency appeal of the Sixth Circuit’s decision to the Supreme Court.

Following the Sixth Circuit’s December 17th Opinion, OSHA released a statement that it “will not issue citations for noncompliance ?with any requirements of the ETS before January 10 and will not issue citations for ?noncompliance with the standard’s testing requirements before February 9, so long as an ?employer is exercising reasonable, good faith efforts to come into compliance with the ?standard.” ?

COVID-19 Vaccination and Testing Emergency Temporary Standard

On November 4, 2021, OSHA issued its COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS), and it became effective the following day upon publication in the Federal Register. As indicated by President Biden in his September 9, 2021 six-pronged plan, the ETS requires that employers institute mandatory vaccine policies or, alternately, a policy permitting weekly testing in lieu of vaccination. Employers are required to comply with most requirements of the ETS by December 5, 2021. However, employers will have until January 4, 2022 to begin complying with the testing requirements.

1. Which employers are covered?

The ETS applies to employers with 100 or more employees company-wide at any time that the ETS is in effect. This means that if an employer has 100 or more employees on any day on or after November 5, 2021, the employer will be covered and required to comply with the ETS, even if the employer later falls below the 100-employee threshold. When counting employees, employers must include all employees—including seasonal and temporary employees—and not just employees at a certain worksite.

Workplaces that are covered by the federal contractor vaccination mandate or the June 2021 Healthcare ETS will

be exempt from complying with the COVID-19 Vaccination and Testing ETS. However, the exception will only apply if the employer is actually covered (e.g., the federal contract has been amended to require compliance with the federal contractor guidance) and only at the covered worksite. Thus, an employer may have some workplaces covered by the COVID-19 ETS while other workplaces are covered by the government contractor vaccination mandate.

2. Do all employees have to comply?

Except in limited circumstances, all employees of a covered employer must comply with the ETS. Employees who report to a workplace where no other coworkers or customers are present, who are completely remote, or who work exclusively outside do not have to comply with the ETS vaccination and/or testing requirements. An employer can still choose to make excepted employees follow the requirements.

3. What are employers required to do?

a. Adopt a written policy

The ETS requires an employer to adopt either (1) a mandatory vaccination policy requiring all employees to be fully vaccinated with the exception of those employees who have been granted a religious or medical exemption, or (2) a policy permitting anyone who is not vaccinated by January 4, 2022 to provide proof of regular testing for COVID-19. An employee does not have to be “fully vaccinated” by January 4, 2022 to be exempt from complying with the testing requirements. However, the employee must have received all required doses of the vaccine (i.e., the single dose or both doses in a two-dose series). Notably, an employer can enforce different requirements for different sections of its workforce. For instance, an employer could permit testing as an alternative for unvaccinated office workers, but require workers in manufacturing facilities to be vaccinated without a testing alternative, subject to medical and religious exemptions.

OSHA posted policy templates on its ETS page for employers who wish to adopt a mandatory vaccination policy and for employers who wish to provide a testing alternative.

b. Request proof of vaccination

An employer must request proof of vaccination from every employee and keep this proof on file. The employer must also prepare and maintain an employee roster with each employee’s vaccination status. These records must be treated as confidential medical records.

If an employer has already recorded an employee’s proof of vaccination or attestation of vaccination prior to the ETS being issued, the employer does not have to recollect the information. If an employer has not yet collected proof of vaccination, it must require the employee to provide actual proof (e.g., COVID-19 vaccine card or medical provider record). An employee who has lost his/her proof of vaccination and is otherwise unable to produce proof of vaccination may provide an attestation, but such attestation must contain certain mandatory representations imposed by the ETS.

c. Provide paid time off

For employees who have not yet received the vaccination, employers are required to provide up to four hours of paid time off per vaccination dose, to be provided separate from an employee's general paid time off or sick leave. If, however, the employee chooses to get vaccinated during non-working hours, such as on a Saturday, the employer does not have to pay for the time.

In addition to the time off to receive a vaccine, an employer must provide employees reasonable paid leave to recover from vaccine side effects. Employers can require employees to use available sick leave, or paid time off if the employer has a general paid time off policy rather than sick leave policy, for recovery time. However, if an employee does not have sick leave or paid time off available, the employer must provide additional paid leave. OSHA presumes that two days will be a reasonable recovery period.

d. Testing requirements

If an employer decides to permit the testing alternative, employees who report to the worksite one or more times in a seven-day period must be tested once every seven days. If an employee does not report to the worksite once every seven days, then the employee must be tested within seven days prior to returning to the worksite and must provide the test before entering the worksite. If an employee does not provide the required test result the employee may not be permitted to enter the worksite until he/she provides the result. The employer must keep a record of all testing results and treat them as confidential medical records.

If an employee has tested positive for COVID-19, the employer cannot require the employee to test again for 90 days following the positive test.

Employers can permit employees to use any COVID-19 test approved by the FDA for use or Emergency Use Authorization. However, self-administered and self-read tests are not acceptable testing methods unless they are observed by the employer or a telehealth provider.

The ETS does not require employers to pay for COVID-19 tests. However, payment may be required by other laws, regulations, or collective bargaining agreements. We anticipate that the EEOC will issue clarifying guidance on who is required to pay for tests for employees with medical and religious exemptions. Additionally, employers need to be aware that there are certain state laws (e.g., California and Illinois) that may require an employer to pay for the tests.

The Department of Labor's Wage and Hour Division (DOL WHD) has already released some guidance regarding the compensability of time spent obtaining a COVID-19 test. However, during a November 4, 2021 webinar, the DOL WHD indicated that it will provide additional FAQs on this issue in the near future.

e. Masking requirements

Unvaccinated employees must continue to wear face coverings in the workplace unless they are alone in an enclosed room, for a limited time while eating or drinking, for a limited time for identification purposes, if wearing the mask would create a greater hazard, or they are wearing a respiratory/face mask as defined by the ETS.

f. Employee information requirements

Employers must provide employees with information about each provision of the ETS, the policies and procedures used to implement the ETS, protections against retaliation, and information of criminal penalties attached to providing false information, among other items mandated by the ETS.

g. Recordkeeping requirements

An employer must maintain the vaccination information of all employees, including the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace. If an employee requests, the employer must make the employee's vaccination and testing records available to the employee or the employee's representative, as well as the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace. This information must be provided by the end of the next business day after the request.

An employer must also provide this information to OSHA upon request. The employer's ETS policy and the aggregate numbers must be provided to OSHA within four hours of the request. The remaining records (i.e., employees' vaccination and testing records) must be provided by the end of the next business day.

h. Reporting requirements

The ETS requires employers to report each work-related COVID-19 in-patient hospitalization or fatality regardless of the amount of time between the workplace exposure and the death or hospitalization. Employers must report each employee work-related COVID-19 fatality to OSHA within 8 hours of learning of the fatality. Employer must report each employee work-related COVID-19 in-patient hospitalization to OSHA within 24 hours of learning of the hospitalization.

An employer is not required to report a fatality or hospitalization if the employer determines that exposure to COVID-19 clearly did not occur in the workplace.

4. What if there is a conflicting state law?

Importantly, the ETS preempts all state or local laws that interfere with an employer's right to enforce requirements for vaccinations, masking, or testing. Therefore, any efforts by a state, such as the Texas Executive Order, to limit an employer's ability to implement a mandatory vaccination policy, masking requirements, or testing requirements, will not be enforceable.

5. Does OSHA have more information for employers?

OSHA released [Frequently Asked Questions](#) (FAQs) on the ETS. In addition to the questions already answered, OSHA has provided an email for employers to use to submit additional questions: ETS@dol.gov. OSHA will be updating the FAQs frequently based on the questions it receives from employers and other stakeholders.

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