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OSHA ISSUES VACCINE MANDATE

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The Occupational Safety and Health Administration ("OSHA") published a **new Emergency Temporary Standard** ("ETS") in the Federal Register today. This is the workplace vaccine mandate promised by President Biden on September 9th. Although the new mandate contains various expected provisions, it also presents a few surprises. Additionally, the new rule provides answers to some questions that have kept employers guessing since the President's September 9th announcement.

The most significant part of the new ETS is a requirement for employers with 100 or more employees to require COVID-19 vaccination as a condition of employment^[1]. In determining the 100-employee threshold for coverage under the new ETS, OSHA will include all employees "firm- or company-wide," which includes part-time employees, as well as employees whose job duties are primarily performed outside of a given workplace. Independent contractors and temporary employees who are not directly employed by an employer are not included within the 100-employee threshold, although employers may require such workers to comply with their vaccination policies. Seasonal workers and temporary workers employed directly by an employer are to be included in calculating the threshold 100-employee number. The vaccination status of individual employees does not affect calculation of the threshold number; i.e., even if an employer has 100, fully vaccinated employees, it is still covered by the ETS. Further, prior COVID-19 infections do not meet the definition of "fully vaccinated employee" under the ETS; consequently, employees with prior infections will still need to be vaccinated or undergo weekly testing.^[2]

Covered employers will have to "develop, implement, and enforce a mandatory COVID-19 vaccination policy," although the ETS provides an exception to this requirement for those covered employers that instead "establish, implement, and enforce a policy" that allows unvaccinated employees to elect to undergo weekly COVID-19 testing and wear a face covering at work. As part of the required COVID-19 vaccination policy, the ETS requires covered employers to determine the vaccination status of each employee; obtain "acceptable proof"^[3] of vaccination; maintain records of each employee's vaccination status; and maintain a "roster" of each employee's vaccination status.^[4] The ETS also requires covered employers to support employee vaccination by providing up to four hours of paid time to receive each vaccination dose, as well as paid sick leave to recover from adverse side effects following each dose. According to OSHA, employers may set a cap on the amount of paid sick leave available to employees to recover from any side effects, but the cap must be reasonable. Generally, OSHA presumes that, if an employer makes available up to two days of paid sick leave per primary vaccination dose for side effects, the employer would be in compliance with this requirement.

Although vaccine requirements are not new, and many employers already began imposing them well before the ETS, in some areas they are anticipated to result in workplace disruptions, including employee resignations. Possibly for this reason, OSHA included in the ETS a weekly testing alternative for employees who cannot or do

not want to receive a COVID-19 vaccine. For those employees who elect to undergo weekly testing and are physically present in the workplace at least once a week, covered employers must confirm the COVID-19 negative status of each such employee prior to their return to the workplace. Notably, the ETS does not require employers to pay for any costs associated with testing, although payment for such costs may be required by other laws or collective-bargaining agreements. The ETS also does not require employers to pay workers for time away from work as a result of a positive test although, again, payment for time off may be required by other laws or collective-bargaining agreements. Those employees who have been away from the workplace for seven days or longer must provide proof of a negative COVID-19 test within seven days of returning to work. Under the ETS, testing requirements apply to all unvaccinated employees, including those entitled to a reasonable accommodation from vaccination requirements. However, if testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice or observance, the worker may be entitled to a reasonable accommodation. In these cases, OSHA directs employers to **applicable guidance** from the Equal Employment Opportunity Commission.

The ETS also obligates covered employers to ensure that each unvaccinated employee wears a face covering whenever indoors or when occupying a vehicle with another person for work purposes. Covered employers may not prevent any vaccinated employee from wearing a face covering, unless doing so creates a serious workplace hazard. Unvaccinated employees are not required to wear a face mask under the ETS where they are alone in a room with floor to ceiling walls and a closed door, while they are eating or drinking, or where the employer can show it is infeasible or interferes with their job duties.

The ETS modifies OSHA's normal reporting standards, under which work-related hospitalizations and fatalities must be reported only if they occur within a certain time period following the work-related incident (24 hours for hospitalization and 30 days for a fatality). Instead, covered employers will now be required to report work-related COVID-19 hospitalizations and fatalities to OSHA within 24 hours of hospitalization and eight hours of a fatality. Further, covered employers must still notify OSHA even if the hospitalization or fatality occurs after those time periods. Covered employers must also require employees to provide prompt notice when they receive a positive test or are diagnosed with COVID-19.

The ETS will become effective as of publication today in the Federal Register (November 5, 2021) in those jurisdictions where federal OSHA has primary authority to **oversee health and safety laws**. However, OSHA provided a 30-day grace period for employers to comply with the ETS, meaning that most requirements in the ETS (including masking for unvaccinated employees and employer confirmation of employee vaccination status) will not become mandatory until December 5, 2021. OSHA also provided a separate, 60-day grace period for the mandatory vaccination requirements, meaning that employers will have until January 4, 2022 to begin enforcing the vaccine requirements or to begin verifying weekly employee testing for COVID-19.

In those states, like North Carolina, where the state has been delegated authority to operate the OSHA program, each such state has up to 30 days from today to either adopt the new ETS "as is" or to adopt its own, modified version. This means that the new ETS may not go into effect in North Carolina until as late as December 5, 2021. Individualized versions of the ETS must be "at least as restrictive" as the new federal ETS. Although North Carolina has traditionally adopted new federal OSHA rules without much, if any, modification, the Commissioner of the North Carolina Department of Labor ("NCDOL") has expressed some concerns about worker shortages and his Department's ability to staff enforcement for both the ETS and more typical workplace safety issues. Despite those concerns, he has also acknowledged North Carolina's obligations to follow OSHA's lead on workplace safety. Covered employers in North Carolina will need to pay close attention to how the NCDOL

responds to the ETS, since it may elect to adopt a modified version. Violations of the ETS requirements carry the risk of OSHA citations in the amount of \$13,653.00 per violation. Further, once a violation is issued, any failure by the employer to resolve the violation could result in "repeat citations" carrying significant, additional penalties until abatement of the violation.

Multiple challenges to the ETS are expected, with some having been announced even prior to ETS issuance. Some states also already have legislation or executive orders prohibiting employers from mandating employee vaccinations. Under both Section 18 of the Occupational Safety and Health Act and prior Supreme Court decisions, OSHA has preemptive authority to address workplace health and safety issues. As such, barring a successful challenge or "stay" of the ETS, covered employers must comply with all ETS requirements or face penalties from OSHA, even in state or local jurisdictions with otherwise conflicting legislation or executive directives. On the other hand, state and local jurisdictions generally are permitted to enforce health and safety obligations that are more restrictive than those imposed by OSHA. Consequently, employers are encouraged to continue consulting state and local COVID-19 restrictions as they assess requirements applicable to each workplace.

[1] The ETS requirements are not applicable to workplaces already covered by **OSHA's prior ETS for Healthcare**, or to those already covered by the **Safer Federal Workforce Task Force Covid-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors**. The ETS requirements are also inapplicable to workers whose jobs do not require them to enter a workplace where other individuals may be present.

[2] Employees having received a positive COVID-19 test are not required to be tested for 90 days from the date of such a test. OSHA has explained that this 90-day period is designed to avoid the likelihood of false positive tests. However, such employees would be required to wear face masks during this 90-day period.

[3] "Acceptable proof" can be: the record of immunization from a health care provider or pharmacy; a copy of the employee's U.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 that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s). Employers may accept originals, copies, or scanned versions of vaccination cards. Where employees cannot timely produce acceptable proof of vaccination, an employer may accept employee statements that attest to their vaccination status (fully vaccinated or partially vaccinated); attest that they have lost or are otherwise unable to produce proof of vaccination; and include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties." Employees should also include in their statements, to the best of their recollection, the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

[4] Both the records and roster required by the ETS are considered by OSHA to be employee medical records and must be maintained as such records in accordance with 29 CFR 1910.1020 and must not be disclosed except as required or authorized by the ETS or other federal law (e.g., the Americans with Disability Act). All personally identifiable medical information must be maintained in a confidential manner.

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