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Employer Checklist: Complying with the COVID-19 Vaccination and Testing Standard

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On November 5, 2021, OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard ("ETS") became effective. The ETS mandates COVID-19 vaccination or testing requirements for employers with 100 or more employees. The deadline to comply with obligations related to COVID-19 testing for employees who are not fully vaccinated is January 4, 2022. The deadline to comply with all other obligations is December 5, 2021. Unless extended by rule-making procedures, the ETS will expire six months from the effective date.¹

Only one day after the ETS became effective, the federal Fifth Circuit Court of Appeals ordered an emergency stay of implementation of the ETS. *See BST Holdings et al. v. OSHA*, No. 21-60845 (5th Cir. Nov. 6, 2021). Although the petition for the stay sought a nationwide stay, the Fifth Circuit's order does not specify whether the stay is nationwide or only with respect to the Fifth Circuit jurisdiction (Mississippi, Louisiana, and Texas). There should be clarity once the Fifth Circuit decides whether to issue an injunction. Further complicating matters is that where multiple petitions are filed in separate federal circuits challenging a federal rule, which is the case here, the U.S. Judicial Panel on Multidistrict Litigation may determine which federal circuit decides the challenge through a lottery system. If the case is transferred to another federal circuit, then that federal circuit could decide whether to lift the stay granted by the Fifth Circuit.

While the stay is certainly a victory for those opposing the ETS, the legal battle over the ETS is far from over. The Fifth Circuit will next decide whether to enjoin the ETS, and such an injunction could affect the ETS as a whole or it could carve out parts of it. And it is not clear when an injunction, if any, will be issued. Further, if the case is transferred to another federal circuit, which could be more favorable to OSHA, that federal circuit could lift the stay altogether. This challenge will eventually make it to the U.S. Supreme Court, which has already shown a willingness to enforce vaccine mandates.²

In any event, given the uncertainty, employers cannot afford to wait for the outcome of the legal challenge to start preparing for compliance with the ETS. This alert provides employers with a checklist of action items to consider for compliance with OSHA's new standard.

¹ The ETS also preempts inconsistent state and local requirements, including those that ban or limit an employer's ability to require COVID-19 vaccination. While preemption may be more straightforward in some cases, it is more complicated in others. For example, where a state mandates vaccination, but does not allow for a religious exemption to the mandate, there is a conflict with the ETS. While it is unsettled whether a more stringent state law still would apply, for now the safer approach would be to apply the more stringent requirement as that is the spirit of the ETS.

² However, the challenge to the ETS presents issues of comity regarding whether a federal agency, versus Congress, has the authority to enact such a sweeping rule as the ETS. So, the Supreme Court's past actions regarding vaccine mandates may not have much value in predicting how the Supreme Court will treat this challenge to the ETS.

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Scope of Workplaces Covered by the ETS

As an initial matter, employers must determine whether they are covered by the ETS, which requires asking the following questions:

- **Does the employer have 100 or more employees?** To determine whether the employer has 100 or more employees required for coverage under the ETS, based on current guidance –

The following employees must be counted:

- Employees working across multiple workplaces
- Employees working at offsite locations, such as customer homes
- Part-time employees
- Employees working from home (however, the ETS' requirements would only apply to the employees who work in the office at least part time around other individuals, and not to those working exclusively from their homes)
- Employees working exclusively outdoors
- Temporary and seasonal workers employed directly by the employer
- Minor employees

The following employees must *not* be counted:

- Independent contractors
- Employees from staffing agencies
- Employees of contractors or subcontractors at a multi-employer site

The above determination is based on the number of employees as of the effective date of the standard. If the employer has 100 or more employees on the effective date, the ETS applies for the duration of the standard. If the employer has fewer than 100 employees on the effective date, the ETS would not apply to that employer as of the effective date. However, if that same employer subsequently hires more workers and meets the 100-employee threshold for coverage, the employer would then be expected to come into compliance with the standard's requirements. Once an employer has come within the scope of the ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer's workforce.

- **Is the employer in a federal OSHA state?** The ETS currently only applies to states covered by federal OSHA. Employers subject to state OSHA [plans](#) are not currently covered by the ETS. Within 15 days of the effective date of the ETS, each state OSHA plan is required to notify Federal OSHA regarding whether the state plan would adopt the ETS or issue a similar rule that is at least as effective as the

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ETS. Either way, state plans are required to have the rule in place within 30 days of the effective date of the ETS.

- ***Is the employer subject to the Safer Federal Workforce Task Force COVID19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (“Federal Contractor Vaccine Mandate”)?*** The ETS specifically states that it does not apply to workplaces covered by the Federal Contractor Vaccine Mandate. So, an employer that is covered by the latter, is not covered by the ETS.
- ***Is the employer subject to OSHA’s Healthcare COVID-19 Standard?*** On June 21, 2021, OSHA issued an Emergency Temporary Standard imposing certain COVID-19 safety obligations on numerous healthcare employers (“Healthcare COVID-19 Standard”). Any employer that is covered by the Healthcare COVID-19 Standard, is not subject to the ETS. However, the ETS might apply to the employer’s workplace locations that are specifically exempted by the Healthcare COVID-19 Standard. Such locations include among others, locations where healthcare support services are not performed in a healthcare setting (e.g., off-site laundry, off-site medical billing) and locations where telehealth services are performed outside of a setting where direct patient care occurs.

Healthcare employers should note that if they participate in and are certified under the Medicare and Medicaid programs and are regulated by the CMS health and safety standards known as the Conditions of Participation, Conditions for Coverage, and Requirements for Participation, then they are expected to abide by the requirements established in the separate CMS Omnibus Staff Vaccination Rule (“CMS Rule”), which was also published in the Federal Register on November 5, 2021.

In sum, the ETS does not apply to healthcare employers who are covered by the CMS Rule or the Healthcare COVID-19 Standard. However, the Healthcare COVID-19 Standard will expire on December 21, 2021. So, unless it is extended through rule-making procedures, healthcare employers who are not subject to the CMS Rule would then be subject to the ETS after that date.

- ***Are employees otherwise exempted from the ETS?*** The ETS does not apply to employees of covered employers: (1) who do not report to a workplace where other individuals such as coworkers or customers are present; (2) while working from home; or (3) who work exclusively outdoors.

Action Items for Covered Employers

- ***Leverage Existing Workplace Procedures:*** The ETS imposes multiple obligations on employers and requires compliance in a fairly short amount of time. It would be prudent for employers to assess whether they can leverage existing procedures for COVID-19 vaccination, testing, tracking, recordkeeping and other procedures that may be required for compliance with the ETS. For example, any existing procedures for vaccination tracking, for requiring testing for employees exempt from vaccination, and for reporting and excluding COVID-19 cases in the workplace may be adapted to the ETS. Such an approach may minimize the time and effort needed for compliance with the ETS.
- ***Adopt COVID-19 Vaccination Policy.*** Employers must establish, implement, and enforce a written mandatory vaccination policy requiring each employee to be fully vaccinated subject to exemptions for medical disabilities and sincerely-held religious beliefs. To comply with this requirement, employers may adopt the model vaccination policy available [here](#) or develop their own policies consistent with similar terms.

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- **Adopt Testing Policy (Discretionary):** In addition to (or instead of) a vaccination policy, employers may choose to implement a COVID-19 Testing Policy. This policy would allow employees who are not vaccinated to opt either to be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19. Employers who choose to allow testing, may adopt the model testing policy available [here](#) or develop their own policies consistent with similar terms.

While the ETS on its face does not require a testing policy, according to the FAQs to the ETS, weekly COVID-19 testing of all un-vaccinated employees is required, including those entitled to a reasonable accommodation from the vaccination requirements. Thus, employers with employees who are exempted from vaccinations, will need to either have a testing policy for such employees or have these employee work remotely so that they are no longer covered by the ETS' vaccination/testing requirement.

- **Track Employee Vaccination Status:** Employers must require employees who are not exempted from being vaccinated due to medical disabilities or sincerely-held religious beliefs, to report their vaccination status as outlined in the vaccination policy. As the definition of "workplace" excludes an employee's personal residence, employees who work entirely remotely are not subject to this requirement. Employers need not re-document vaccination status of employees whose status was determined prior to the effective date of the ETS, provided that the employer has retained records of that determination.
- **Require Acceptable Proof of Vaccination:** Employers must implement a procedure to monitor and confirm the information provided by the employees including checking for proof of vaccination. Acceptable proof of vaccination status includes:
 - The record of immunization from a healthcare provider or pharmacy;
 - A copy of the 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 healthcare professional(s) or clinic site(s) administering the vaccine(s).

If an employee is unable to produce one of the acceptable forms of proof of vaccination as provided in the vaccination policy, the employee is allowed to attest to his or her vaccination status by using specific language provided for in the ETS. Any employee who does not provide one of the acceptable forms of proof of vaccination status must be treated as not fully vaccinated under the ETS.

Allow Reasonable Accommodation: The ETS requires employers to exempt from vaccination employees: (1) for whom a vaccine is medically contraindicated; (2) for whom medical necessity requires a delay in vaccination; or (3) who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious belief, practice, or observance that conflicts with the vaccination requirement. Further, if testing for COVID-19 conflicts with an employee's disability or sincerely held religious belief, practice or observance, the employee may also be entitled to a reasonable accommodation.

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Employers should have procedures in place for requesting an exemption from vaccination/testing and providing supporting documentation for the exemption, reviewing the provided information, engaging in an interactive process with the employees, and rendering a decision on the exemption request.

- **Track Compliance with Periodic Testing Requirements:** The employer must have procedures to track that each employee who is not fully vaccinated complies with periodic testing requirements as follows:
 - An employee who reports at least once every 7 days to a workplace where other individuals such as coworkers or customers are present: (1) Must be tested for COVID-19 at least once every 7 days; and (2) Must provide documentation of the most recent COVID-19 test result to the employer no later than the 7th day following the date on which the employee last provided a test result.
 - An employee who does not report during a period of 7 or more days to a workplace where other individuals such as coworkers or customers are present (e.g., teleworking for two weeks prior to reporting to a workplace with others): (1) Must be tested for COVID-19 within 7 days prior to returning to the workplace; and (2) Must provide documentation of that test result to the employer upon return to the workplace.

If an employee does not provide documentation of a COVID-19 test result, that employee must be removed from the workplace until the employee provides a test result. However, if the employee has received a positive COVID-19 test or has been diagnosed with COVID-19 by a licensed healthcare provider, the employer must not require that employee to undergo COVID-19 testing for 90 days following the date of the employee's positive test or diagnosis. This is because of the potential for a false positive test. However, in this situation, the employee must continue to wear a face covering.

- **Payment for COVID-19 Testing:** The ETS does not require employers to pay for any costs associated with testing. However, employer payment for testing may be required by other laws or regulations. For example, several states have laws that require employers to pay for medical examinations, which may include COVID-19 testing.
- **Maintain Confidentiality of Vaccination and Testing Information:** Records related to the tracking of employee vaccination status and testing should be considered employee medical records and must be segregated and maintained as such and must not be disclosed except as required or authorized by the ETS or other applicable law.
- **Implement Mandatory Face Coverings:** Employers must require each employee in the workplace who is not fully vaccinated to wear face coverings when indoors and when occupying a vehicle with another person for work purposes. Employers may adopt the model face covering policy that is included in the link above for the testing policy. The ETS does not require employers to pay for any costs associated with face coverings. However, other applicable laws or regulations may require employers to provide or cover the costs of face coverings. Workplaces where employees are required to wear respirators need to comply with OSHA's mini respiratory protection program located [here](#).
- **Allow Paid Time off for Vaccination and Recovery:** Employers must work with Human Resources to facilitate providing up to four hours paid time, including travel time, at the employee's regular rate of pay

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for purposes of getting vaccinated. This time for vaccination cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.

Employers must also implement procedures providing reasonable time and paid sick leave to employees to recover from side effects experienced following any primary vaccination dose to each employee for each dose. However, unlike in the case of time spent for vaccination, if an employee already has accrued paid sick leave, an employer may require the employee to use that paid sick leave when recovering from side effects experienced following a vaccination dose (single dose of one-dose vaccine or each dose of a two-dose vaccine). However, employers cannot require an employee to accrue negative paid sick leave or borrow against future paid sick leave to recover from vaccination side effects. In other words, the employer cannot require an employee to go into the negative for paid sick leave if the employee does not have sufficient accrued paid sick leave available to recover from any vaccine side effects.

- **Require Notification by Employees:** Employers must have procedures in place to enable employees to promptly notify the employer when they receive a positive COVID-19 test or are diagnosed with COVID-19.
- **Exclude COVID-19 Cases from the Workplace:** Employers must also have procedures in place to immediately remove from the workplace any employee who receives a positive COVID-19 test or is diagnosed with COVID-19 and keep the employee removed until the employee:
 - Receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing;
 - For at least 10 days after symptom onset and until 24 hours after their fever subsides without the use of fever-reducing medications or as per CDC guidance; or
 - Until employee receives a recommendation to return to work from a licensed healthcare provider.
- **Communicate ETS Mandated Information to Employees:** Employers must ensure that the employees understand: (1) the ETS-related workplace policies; (2) the CDC's COVID-19 vaccine [information](#); (3) that employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses, and that OSHA protects employees from retaliation by employers when complaining to OSHA; and (4) criminal penalties associated with knowingly supplying false statements or documentation.

This information may be communicated to employees via a training session where the employer walks the employees through the various pieces of information. Alternatively, employers may supply the information to employees via their standard mode of communicating information to employees such as via email, uploading on the employee portal or delivering hard copies to each employee. Regardless of the mode of communication, employees should have access to the information, should be provided an opportunity to ask questions about the information, and should be required to certify that they have read and understand the information.

- **Recordkeeping:** Employers must maintain records created for compliance with the ETS including the workplace policies and those related to tracking vaccination status of the employees. The employer must also maintain a roster of each employee's vaccination status. The roster must list all employees

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and clearly indicate for each one whether they are fully vaccinated, partially (not fully) vaccinated, not fully vaccinated because of a medical or religious accommodation, or not fully vaccinated because they have not provided acceptable proof of their vaccination status. Although unvaccinated employees will not have proof of vaccination status, the standard requires the employer to include all employees, regardless of vaccination status, on the roster.

Additionally, employers must track aggregate numbers of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

When requested by an employee or an employee representative, the employer must make available to the requester, the COVID-19 vaccine documentation and any COVID-19 test results for that particular employee, and the aggregate number of fully vaccinated employees at a workplace (along with the total number of employees at that workplace), by the end of the next business day after the request.

- ***OSHA-reporting of COVID-19 fatalities and hospitalizations:*** Each work-related COVID-19 fatality must be reported within 8 hours of the employer learning about the fatality. Additionally, each work-related COVID-19 in-patient hospitalization must be reported within 24 hours of the employer learning about the in-patient hospitalization. Notably, this is already an existing obligation on employers, but OSHA included it in the ETS to emphasize the importance of reporting.

Conclusion

While there is already uncertainty based on the legal challenges to the ETS, the short deadline imposed by the ETS does not leave time for employers to take a wait-and-see approach. Therefore, we hope that this checklist provides a useful resource for employers to understand and implement these new requirements.

We will continue to monitor for any new developments and further guidance on the ETS.

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- [Checklist for Implementing the New York HERO Act Infectious Disease Exposure Prevention Plan – 09/15/2021](#)
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- [OSHA Updates COVID-19 Guidance to Mirror Recent CDC Recommendations – 08/18/2021](#)
- [OSHA Issues COVID-19 Emergency Temporary Standard for Healthcare Employers – 06/14/2021](#)
- [OSHA Issues New Guidance for Protecting Unvaccinated or Otherwise At-risk Workers from Exposure to COVID-19 – 06/14/2021](#)
- [Checklist for Employers Mulling Relaxing COVID-19 Safety Rules for Fully Vaccinated Employees – 05/20/2021](#)
- [Update on OSHA's COVID-19 National Emphasis Program and Enforcement – 03/30/2021](#)
- [OSHA Announces New National Emphasis Enforcement Program on COVID-19 – 03/15/2021](#)
- [OSHA Issues Revised COVID-19 Guidance for Workplaces – 02/02/2021](#)
- [OSHA Reminds Employers to Continue Assessing Employee Safety Regarding COVID-19 Hazards, While Also Not Neglecting Common Workplace Hazards – 6/17/2020](#)

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- [COVID-19 and OSHA: Why Employers May See More Inspection Activity and More Injuries and Illnesses Being Recorded as Work-Related](#) – 05/21/2020
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