

## LABOR AND EMPLOYMENT

# ALERT

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## Will OSHA's Mandatory Vaccination/Weekly Testing Rule for Large Employers Survive Court Challenges?

By *Lisa M. Brauner*

More than 754,000 Americans have now died from Covid-19 during this pandemic. In an effort to stem the spread of this highly contagious deadly disease, in September, 2021, President Biden directed the federal Occupational Safety and Health Administration (OSHA) – the agency charged with enforcing the Occupational Safety and Health Act (OSH Act) – to issue an Emergency Temporary Standard (ETS) mandating that employers with 100 or more employees require employees to be vaccinated against Covid-19 or undergo weekly Covid-19 testing. OSHA's powers allow it to issue emergency temporary rules where it deems emergency standards are needed because workers are in "grave danger."

### OSHA'S EMERGENCY TEMPORARY STANDARD BECAME EFFECTIVE ON NOVEMBER 5

On November 4, 2021, OSHA announced its long-awaited ETS<sup>1</sup> mandating all private-sector U.S. employers (both for-profit and nonprofit) with at least 100 employees that are covered by OSHA, to develop, implement and enforce a mandatory Covid-19 vaccination policy, or adopt a policy requiring employees to either get vaccinated or undergo weekly Covid-19 testing and wear a face covering at work. Employees would be required to be fully vaccinated by January 4, 2022, and

after January 4, 2022 those employees who are unvaccinated would need to provide proof of a negative Covid-19 test to their employers on at least a weekly basis.

OSHA published its ETS in the Federal Register on November 5, the date that the interim final rule took effect.<sup>2</sup> The rule – which is expected to affect at least 84 million Americans – also requires covered employers to provide: 1) a reasonable amount of time during work hours, up to four hours' paid time off at an employee's regular rate of pay, for employees to get each dose of the vaccine; and 2) reasonable time and paid sick leave time to recover from vaccine side effects. Employers must also ensure all unvaccinated workers wear a face mask in the workplace by December 5, 2021. Employers may not require employees to use vacation, personal or paid sick leave for this purpose, but may permit them to use such leave to cover additional time needed to receive a vaccination dose that would otherwise be unpaid.

The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or clients/customers are present, employees while they are working from home, or employees who work exclusively outdoors.

<sup>1</sup> OSHA has created a Covid-19 vaccination ETS informational webpage with an FAQ, answering questions about permissible Covid-19 tests and the applicability of the ETS to states with their own state OSHA plans, providing sample mandatory vaccination policies for employers and information about the Covid-19 vaccination, where to find a vaccination site, information about weekly testing, and reasonable accommodations for disabilities and sincerely held

religious beliefs. See <https://www.osha.gov/coronavirus/ets2/faqs>.

<sup>2</sup> Although the ETS became immediately effective on November 5, it is an "interim" final rule as employers and other members of the public may submit public comment to OSHA by December 6, 2021, on any aspect of the ETS, including whether it should become a final rule.

## RECORDKEEPING AND INFORMATION REQUIREMENT

Employers must keep records on each employee's vaccination status and acceptable proof of vaccination for each employee who is fully or partially vaccinated. They also must maintain a roster of each employee's vaccination status and the results of Covid-19 tests. These records are deemed to be employee medical records and must be kept confidential. Employers also must report to OSHA any work-related Covid-19 fatalities within eight hours of the employer learning about the fatality, and report each work-related Covid-19 in-patient hospitalization within 24 hours of the employer learning about the in-patient hospitalization.<sup>3</sup> Of course, an employer must keep Covid-19 test results and vaccination status confidential as it would any other employee medical records.

The ETS also requires employers to provide employees or their representatives with information, when requested, about the number of fully vaccinated employees at a workplace and the total number of employees.

Employers must make employees aware of the OSH Act's provisions prohibiting retaliation against employees for filing an occupational safety or health complaint, reporting work-related injuries or illness, or otherwise exercising any rights afforded by the OSH Act. Finally, criminal penalties can be imposed against anyone who knowingly provides false statements or documentation.

## WHO PAYS FOR TESTS AND FACE COVERINGS?

The ETS states that employers may require unvaccinated employees to pay for their own weekly testing and face coverings. Note, however, that certain state or local laws and regulations or collective bargaining agreements may likely require employers to cover those costs and moreover, that the time spent getting tested for Covid-19 may be compensable hours worked as the U.S. Department of Labor has indicated.

<sup>3</sup> See OSHA's FAQ, #10. - <https://www.osha.gov/coronavirus/ets2/faqs>.

## OTHER IMPORTANT MANDATORY VACCINATION RULES AT THE FEDERAL LEVEL

### *Mandatory Staff Vaccination for Medicare/Medicaid Funding Recipients*

Aligning deadlines with the ETS, the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS) has issued a rule requiring all staff (employees, students, trainees and volunteers) working at healthcare facilities that receive Medicare and Medicaid funding to be fully vaccinated (with a second dose of a Moderna or Pfizer vaccine, or a first dose of the J & J vaccine) by January 4, 2022. This includes hospitals, home health care, ambulatory surgery centers, and long-term care facilities. The CMS rule is expected to cover more than 17 million workers.

### *Mandatory Vaccination for Federal Contractors*

Similarly, all federal contractors also must be fully vaccinated by January 4, 2022, with no weekly testing option, except that individuals seeking reasonable accommodation for disabilities and sincerely held religious beliefs must wear masks, observe physical distancing, and observe other safety protocols.<sup>4</sup>

## TEMPORARY COURT INJUNCTION AND WHAT IS NEXT FOR EMPLOYERS

At least 26 states have brought suit against OSHA, challenging the legality of the ETS, including pending actions in the 5th, 6th, 7th, 8th, 11th and District of Columbia Circuit Courts of Appeals. They argue, among other things, that the power to mandate vaccination rests with the states, not the federal government.

A coalition of states and private businesses also filed an emergency motion to stay enforcement of the ETS, seeking a permanent injunction against OSHA, the U.S. Department of Labor, and the Secretary and Assistant Secretary of Labor for Occupational Safety and Health, in the U.S. Circuit Court for the Fifth Circuit Court of Appeals, the federal appeals court covering Louisiana, Mississippi, and Texas.

On November 6, a three-judge panel of the U.S. Circuit Court of Appeals for the Fifth Circuit issued a temporary

<sup>4</sup> See OSHA's FAQ, # 6.H. - <https://www.osha.gov/coronavirus/ets2/faqs>.

injunction against OSHA, blocking implementation of the ETS, citing “grave constitutional and statutory” issues with the ETS and requiring the Biden administration to respond to the temporary injunction by November 8. The Court may decide to grant or deny the petitioners’ request for a permanent injunction. Regardless of the outcome, the losing party may appeal to the U.S. Supreme Court and it is unclear how the Supreme Court would rule.

#### WHAT SHOULD EMPLOYERS DO NOW?

Although there is uncertainty around the enforceability of OSHA’s ETS in light of the pending legal challenges, the ETS rules, as written, give employers some time to comply. As noted above, the first part of the ETS – the requirement for unvaccinated employees to wear face coverings – does not take effect until December 5, and the mandatory vaccination requirement does not take effect until January 4.

The Biden Administration is vowing to move forward with enforcement of OSHA’s ETS. Employers may want to consider encouraging or mandating as many of their workers as possible to get vaccinated against Covid-19 to keep workers and their co-workers safe (with exemptions, of course, for those who need reasonable accommodations for disabilities or sincerely religious beliefs unless doing so would pose an undue hardship on the employer). *Employers should continue to stay tuned for further updates on the outcome of the pending litigation which could very well make its way to the U.S. Supreme Court for a final answer.* ◆

*This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.*

*For more detailed analysis on a wide range of legal issues, please see Schnader’s Covid-19 Resource Center at [www.schnader.com/blog/covid-19-coronavirus-resource-center](http://www.schnader.com/blog/covid-19-coronavirus-resource-center).*

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*For more information about Schnader’s Labor and Employment Practices Group or to speak with a member of the firm, please contact:*

*Jo Bennett  
Co-Chair, Labor and Employment Practices Group  
215-751-2134  
[jbennett@schnader.com](mailto:jbennett@schnader.com)*

*Michael J. Wietrzychowski  
Co-Chair, Labor and Employment Practices Group  
856-482-5723  
[mwietrzychowski@schnader.com](mailto:mwietrzychowski@schnader.com)*

*Lisa M. Brauner  
Partner  
212-973-8170  
[lbrauner@schnader.com](mailto:lbrauner@schnader.com)*

www.schnader.com

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