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1775 Eye Street, N.W., Suite 1100
Washington, D.C. 20006
202 974 2300 Phone |
www.nmhc.org

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Employer Update on OSHA COVID-19 Emergency Temporary Standard (Vaccine Mandate)

By: By Ashley Hirano, Esq. and Robert Foster, Esq.
of Sheppard, Mullin, Richter & Hampton, LLP

December 2021 UPDATE: On December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit reinstated the ETS, reversing the nationwide stay previously imposed by the Fifth Circuit. Subsequently, several petitions have been filed requesting review by the Supreme Court. In response, OSHA adjusted the ETS compliance deadlines and issued the following statement:

“To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA 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. OSHA will work closely with the regulated community to provide compliance assistance.”

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Based in Washington, DC, the National Multifamily Housing Council (NMHC) is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Nearly one-third of Americans rent their housing, and almost 15 percent live in an apartment (buildings with five or more units). For more information, contact NMHC at 202/974-2300, e-mail the Council at info@nmhc.org, or visit NMHC's Web site at www.nmhc.org.

About the Authors

Ashley Hirano and Robert Foster are associates in the Labor and Employment Practice Group of Sheppard Mullin Richter & Hampton, LLP's San Diego and Del Mar, California offices. Ashley primarily focuses her practice on providing common-sense employment advice and counsel to her clients nationwide on all aspects of the employment life cycle. Robert represents employers in various types of employment litigation and counsels clients on OSHA compliance and investigations. Over the past year plus, Ashley and Robert have become go-to resources for their clients on the ever-changing legal landscape, including the latest vaccination-or-test mandates and government orders.

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The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific circumstances or business situations. For specific legal advice, consult your attorney.

General Background

On September 9, 2021, President Biden announced his COVID-19 Action Plan, entitled “The Path Out of the Pandemic”, which instructed the Occupational Safety and Health Administration (“OSHA”) to develop a COVID-19 emergency temporary standard (“ETS”) mandating COVID-19 vaccinations or weekly testing for private employers with 100 or more employees.

OSHA published the ETS on November 5, 2021, and the following day, the U.S. Court of Appeals for the Fifth Circuit issued an emergency stay prohibiting implementation of the ETS in response to a petition by various states, employers, religious groups, and individual citizens. After expedited briefing, the Fifth Circuit issued an order on November 12, 2021, requiring that OSHA “take no steps to implement or enforce” the ETS “until further court order.”

What is the current status of the ETS?

There were numerous other challenges to the ETS filed throughout the country. All of the petitions were transferred and consolidated with the U.S. Court of Appeals for the Sixth Circuit as of November 16, 2021. Briefing is to be completed by December 10, 2021, meaning any decision is unlikely before December 13, 2021. The Sixth Circuit’s ruling will then likely be subject to review before the U.S. Supreme Court.

Pending the Sixth Circuit’s decision and potential Supreme Court review, the ETS should remain stayed. OSHA has issued a release stating it has “suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.” Nonetheless, employers should familiarize themselves with the ETS requirements in case the stay is lifted and the ETS ultimately becomes enforceable.

Does the ETS cover my company?

The ETS applies to all private employers with a total of 100 or more employees at any time the ETS is in effect. Businesses must review their employee counts **company wide**, not at each facility or location. The count includes full-time and part-time employees, onsite and traveling employees, and temporary and seasonal workers (that are working at the time the ETS is in effect). Even though they may not be subject to the ETS’s requirements, businesses must include in their counts employees working exclusively outdoors, employees working from home, and employees otherwise excluded from coverage under the new ETS. Independent contractors, however, do not need to be included in the count.

What about multi-employer worksites?

The ETS specifically addresses multi-employer worksites such as construction sites. **Each** company represented—the host employer, the general contractor, and each subcontractor—would only need to count its **own** employees. The host employer and general contractor do not need to count the total number of workers from all employers at each site.

But, consistent with the above, each employer must include the total number of workers it employs regardless of where they report for work on a particular day. So, for example, if a general contractor has more than 100 employees spread out over multiple construction sites, that employer is covered under the ETS even if it does not have 100 or more employees present at any one worksite.

Are any workplaces or employees exempt?

The ETS does not apply to workplaces covered under the Biden administration's Executive Order governing federal contractors and subcontractors.¹ The ETS also does not apply to the following employees:

- 1) Employees who do not report to a workplace where others (i.e. coworkers or customers) are present (in other words, they work entirely alone);
- 2) Employees who work from home; or
- 3) Employees who work exclusively outdoors.

To be considered working “exclusively outdoors,” the employee must work outdoors on **all** days of work, not just some, and must work outdoors for the entire workday with the exception of minor indoor use for brief periods of time, such as restrooms or stopping into an administrative office. The employee also cannot routinely share vehicles with others as part of their work duties.

FOOTNOTES

¹ Additionally, if an employer's employees work in certain healthcare or healthcare support settings covered by the federal Healthcare Emergency Temporary Standard, those regulations and requirements will apply instead. Employees of providers and suppliers participating in Medicare and Medicaid programs also may be required to comply with the vaccination mandate under the Centers for Medicare & Medicaid Services (“CMS”) Omnibus Interim Final Rule, which is complementary to the ETS.

What if my company is in a state with an OSHA-approved State Plan?

Employers in states like California that have an OSHA-approved State Plan are governed by the applicable State Plan's occupational safety and health standards and regulations. State Plans are required to adopt and enforce standards that are "at least as effective" as, or stricter than, OSHA's requirements. OSHA initially gave State Plans 15 days to notify it whether the State Plan will adopt the ETS or amend any COVID-19 emergency temporary standards currently in place for the state.

OSHA also initially required the State Plan's standard to be published within 30 days of publication of the ETS and to remain in effect for the duration of the ETS. However, because OSHA has suspended implementation and enforcement of the ETS pending the current appeals of the ETS, numerous State Plans, including Cal/OSHA, have paused their adoption of the ETS.

Does ETS apply in states with laws that prohibit requirements under the ETS?

Yes. The ETS preempts states, and political subdivisions of states, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19, except under the authority of an OSHA-approved State Plan. In fact, OSHA expressly stated that it intends for the ETS to preempt and invalidate any state or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing.

What are employers required to do under the ETS?

The main requirements of the ETS include the following:

- **Written mandatory vaccination/testing policy:** Employers must establish, implement, and enforce a written policy that *either* mandates that all covered employees be fully vaccinated against COVID-19 (unless an employee qualifies for a medical or religious exemption) *or* allows employees to choose between showing proof of their full vaccination status or providing weekly test results and wearing face coverings indoors.
- **Determine employees' vaccination status:** Employers must determine the vaccination status of each employee by:

- Obtaining and maintaining acceptable proof of each employee's vaccination status;
- Maintaining a roster of each employee's vaccination status.

The vaccination records and roster must be maintained for as long as the ETS remains in effect and should be maintained as confidential employee medical records in accordance with federal and state laws. Employers who previously collected vaccination records or attestations prior to the effective date of the ETS do not need to re-verify or collect new attestations.

- **Employee testing:** The requirements for employee testing of employees who do not provide proof of full vaccination include the following:
 - Proof of COVID-19 testing must be provided to the employer once every 7 days.
 - Employees who are away from the workplace for a period of seven (7) or more days must be tested within seven (7) days prior to returning to the workplace and provide proof of a negative test result upon returning to the workplace.
 - **Any** employee who does not provide proof of testing must be excluded from the workplace until the employee provides a negative test result.
 - Employers must maintain a record of each test result provided by the employee or obtained during tests conducted by the employer. Records of test results must be kept for as long as the ETS is in effect and maintained as confidential employee medical records.
 - Tests may not be self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
 - Although the ETS does not require employers to pay for any costs associated with weekly testing, the ETS recognizes that employers may be required to cover these costs by other laws, regulations, or collective bargaining agreements.
- **Face coverings:** Employees who do not provide proof of full vaccination must wear a face covering when indoors and when occupying a vehicle with another person for work purposes.

The ETS also expressly prohibits employers from preventing any employee from voluntarily wearing a face covering or facemask unless the employer can demonstrate wearing such covering would create a hazard of serious injury or death. Like testing costs, the ETS does not require employers to cover the cost of face coverings, but the ETS acknowledges that

payment may be required by other laws, regulations, or collective bargaining agreements.

- **Paid time off for vaccination and recovery:** Employers must provide employees with up to four hours of paid time at their regular rate of pay to receive each dose of the vaccine. If an employee has exhausted all available paid sick leave, the employer must provide additional paid sick leave to recover from any side effects of the vaccine. Employers should be aware of overlapping state laws that may require additional time off or paid sick leave for these purposes, and ensure they are complying with the most protective law governing their employees.
- **Notification of confirmed COVID-19 case:** The employer's written policy must require employees to promptly notify the employer upon learning that the employee tested positive for or was diagnosed with COVID-19, regardless of vaccination status. Employers must remove any employees with a confirmed COVID-19 case from the workplace immediately. In order to return to work, an employee must: (1) receive a negative result on a COVID-19 nucleic acid amplification test (NAAT); (2) satisfy the return-to-work criteria under the CDC's "Isolation Guidance;" or (3) be cleared to return to work by a licensed healthcare provider.
- **Employee and OSHA access to vaccination and test records:** Employers must make available, for examination and copying, the individual proof of COVID-19 vaccine documentation and any COVID-19 test results required by the ETS for a particular employee to that employee and to anyone with written authorized consent from the employee. An employee or employee representative also may request the total number of fully vaccinated employees at a workplace and the total number of employees at that workplace. In both instances, employers must comply with the request by the end of the next business day after the request. If requested by OSHA, employers must provide a copy of the employer's written policy within four hours and all other records required by the ETS by the next business day.
- **Provide information to employees:** Employers must inform each employee, in a language and at a literacy level the employee understands, about the following:
 - ETS requirements;
 - Employer's policies and procedures implemented to comply with the ETS;
 - Certain information on vaccines, including the CDC's **Key Things to Know About COVID-19 Vaccines**;

- The employer cannot discharge or otherwise discriminate or retaliate against an employee for reporting a work-related injury or illness; and
 - There are criminal penalties associated with knowingly supplying false statements or documentation related to an employee's proof of vaccination or test result.
- **Reporting of COVID-19 deaths and hospitalizations:** Employers must report each work-related COVID-19 death to OSHA within eight hours of the employer learning of the employee's death. Employers also must report each work-related COVID-19 in-patient hospitalization to OSHA within 24 hours of learning about the hospitalization.

Can employees request a medical or religious exemption from the vaccination or testing requirements?

Yes. Employers who elect to require mandatory vaccination cannot require vaccination for employees:

- Who are medically contraindicated for a COVID-19 vaccine;
- For whom medical necessity requires a delay in vaccination; or
- Who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.

Employees who are granted a reasonable accommodation or otherwise exempted from the vaccination requirement, however, are still subject to the testing and face covering requirements for unvaccinated employees.

If the testing and/or face covering requirements also conflict with the employee's disability or religion, the employer will need to engage in the interactive process with the employee to determine if a potential reasonable accommodation that does not pose an undue burden is available. The ETS refers employers to the EEOC's guidance for determining when reasonable accommodations may be needed due to an employee's disability or religion.

What should employers do while the ETS is stayed?

All of the requirements under the ETS, except for weekly testing of employees who are not fully vaccinated, were supposed to become effective on Decem-

ber 6, 2021 (the testing requirement was delayed until January 4, 2022 to allow for time to obtain vaccinations).

However, the ETS requirements currently are stayed pending the legal challenges that have been filed, and it is unclear precisely when employers will receive an answer on the ETS, and what that answer will be. In the meantime, to be prepared if the stay is lifted or the ETS ultimately becomes effective, employers can take the following steps:

1. Determine whether the employer is covered by the ETS and what employees are covered.
2. Survey employees on their vaccination status.
3. Research available testing options and associated costs, both of which may vary by geographic location.
4. Determine whether the company intends to mandate vaccinations or allow employees to choose between getting fully vaccinated or undergoing weekly testing and wearing face coverings when required.
5. Prepare a draft policy and supporting materials for publication if the ETS becomes effective.
6. Prepare and/or update protocols for handling positive COVID-19 cases in the workplace, including leave of absence and return to work policies and procedures.
7. Review state and/or local laws that may apply to the workforce to determine whether any state or local laws may require additional employee protections beyond the ETS's requirements.

Additional Resources Available from OSHA

- **[Summary of the ETS](#)**
- **[Frequently Asked Questions on the ETS](#)**
- **[Mandatory Vaccination Policy Template](#)**
- **[COVID-19 Vaccination, Testing and Face Covering Policy Template](#)**