

OSHA Releases Emergency Temporary Standard for Private Employers

NOVEMBER 5, 2021

On November 4th, the Occupational Safety and Health Administration (“OSHA”) released a much-anticipated [emergency temporary standard](#) (“ETS”) requiring private employers with 100 or more employees company-wide to mandate vaccination or weekly testing and masking for their unvaccinated employees. Among other things addressed below, the ETS requires covered employers to ensure all unvaccinated workers begin wearing masks by December 5, 2021 and provide a negative COVID-19 test on a weekly basis beginning January 4, 2022.

Legal challenges to the ETS have been and will be made, but until these challenges are resolved, covered employers must prepare for compliance.

Covered Employers

All private employers with 100 or more employees companywide are covered under the ETS. This includes all employees, whether they are full time, part time or working on a temporary basis. Independent contractors and leased employees (where the client employer is not the employer of record) are not counted.

The standard does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or in settings where employees provide healthcare services or healthcare support services subject to the requirements of the Healthcare ETS.

The standard also does not apply to employees who work remotely or employees who work exclusively outdoors.

Collection of Vaccination Information

The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee’s vaccination status, and maintain a roster of each employee’s vaccination status.

Mandatory Communication to Employees

The ETS requires employers to provide employees the following in a language and at a literacy level the employees understand: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document “Key Things to Know About COVID-19 Vaccines”; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation. This should be sent out as soon as possible.

Cost of Testing

The ETS does not require employers to cover the cost of testing; however, employers will be required to comply with state and local laws that require employers to pay for employment-related costs. For example, California requires the reimbursement to employees for necessary business expenses, which could apply here. Employers should also determine whether the cost of testing, if paid for by the employee, will bring the employee’s weekly pay below minimum wage. If so, both the Fair Labor Standards Act and some state laws would not allow this.

Paid Time Off Requirements

The ETS requires employers to provide employees with up to four hours of paid time off to receive the vaccine during normal work hours. This includes time spent scheduling the vaccine appointment, completing paperwork, receiving the vaccine, and traveling to and from the vaccination site. Employers are not required to offer paid time off to employees who choose to receive the vaccine outside of their regular work hours.

Employers must also provide a reasonable amount of paid sick leave to recover from side effects experienced following vaccination; however, employers may require employees to use paid sick leave benefits already provided by the employer.

Additionally, state COVID-19-related laws might also require additional paid leave for time to get or recover from the vaccine.

For employers who include a testing option for unvaccinated workers, the time spent obtaining a COVID-19 test may be considered hours worked depending on the circumstances, such as directing employees to use a specific provider at specific times.

Reporting COVID-19 fatalities and hospitalizations

The ETS requires employers to report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Next Steps for Employers

Given that the new ETS requires covered employers to ensure all unvaccinated workers begin wearing masks by December 5, 2021 and provide a negative COVID-19 test on a weekly basis beginning January 4, 2022, it is recommended that covered employers immediately:

- Determine if they will require mandatory vaccination for all employees (with an exception for those with valid medical or religious accommodation requests) or allow unvaccinated employees the option of weekly testing;
- Issue a written communication to employees outlining the Company’s vaccination policy in accordance with the ETS (including sending the required communications in the appropriate language and literacy level to employees, as described above), and the consequences for noncompliance; and
- Help employees find testing locations.

Please contact your Winston relationship attorney if you are interested in discussing the ETS in more detail, if you need assistance with preparing a Vaccination Policy and employee communication regarding the same, and/or for further information on any of the matters discussed herein.

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