

Employment Practices Liability

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OSHA Releases Long-Awaited Emergency Temporary Standard (ETS) For Mandatory Vaccine/Weekly Testing For Large Employers

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Federal OSHA just released its long awaited emergency temporary standard requiring mandatory vaccine/weekly testing for large employers. While Federal OSHA does not apply to municipalities, it sets a standard that can be voluntarily utilized. Moreover, we are following state OSHA guidelines to ascertain whether the state will follow in the footsteps of Federal OSHA.

The ETS applies to employers in all workplaces that are under OSHA's authority and jurisdiction (except those that fall under the ETS for healthcare or federal contractors/subcontractors). The ETS applies to all employers that have at least 100 employees at any time the ETS is in effect. The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present. It does not apply to employees who work from home or work exclusively outdoors. Note, however, that the ETS covers employers with 100 or more employees regardless of how many work at any particular workplace.

The ETS is effective immediately upon publication in Federal Register. Employers have 30 days of publication to comply with vaccine requirements (ensuring primary dose) and testing within 60 days of publication for those who have not received all doses. Publication is scheduled for November 5, 2021.

The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, except where medically contraindicated, where medical necessity requires delay in vaccinations, or who are legally entitled to a reasonable accommodation under federal civil rights laws due to disability or sincerely held religious beliefs. In the alternative, employers do not need a mandatory vaccination policy if they instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing (weekly if they come to a workplace at least once per week and within seven days of reporting to a workplace) and wear a face covering at the workplace.

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. The ETS requires employers to support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.

The ETS requires employers to ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace

at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). 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, regulations, or collective bargaining agreements or other collectively negotiated agreements. In addition, nothing prohibits employers from voluntarily assuming the costs associated with testing. Testing cannot be both self-administered and self-read unless observed by the employer or an authorized tele-health proctor.

The ETS requires employers to: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; (3) keep removed employees out of the workplace until they meet criteria for returning to work. Employees who are diagnosed with COVID-19 or have received a positive test may not be tested for 90 days following date of positive test or diagnosis. While the ETS does not mandate paid leave following a positive diagnosis, paid time might be required by other laws or collective bargaining agreements or by company policies.

The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances, i.e. where an employee is alone in a room with floor to ceiling walls and closed door or for a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements, where employee is wearing a respirator or facemask or where the employer can show that the use of face coverings is infeasible or creates a greater hazard that would excuse compliance (i.e. when it is important to see employee's mouth for reasons related to job duties, when work requires use of the employee's uncovered mouth or when the use of face covering presents a risk of serious injury or death to the employee).

Moreover, the ETS provides that employees may be excused from face coverings where the employee requesting a reasonable accommodation under the ADA cannot be vaccinated and/or wear a face covering because of a disability or where a face covering conflicts with a worker's sincerely held religious beliefs.

Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).

The ETS requires employers to provide employees the following in a

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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.

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.

The ETS requires employers to make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Employers are also required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

The attorneys at Rose Kallor, LLP regularly represent and advise private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Marketing and Creative Design Associate at jsmith@ccm-ct.org.

For more information about CIRMA's Employment Practices Liability Helpline Program, please contact your CIRMA Risk Management Consultant.