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Worthwhile Legal News and Commentary

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Now is the Time to Prepare for OSHA's Enforcement of the Emergency Temporary Standard on COVID-19 Vaccination and Testing

11 Jan 2022

On January 7, 2022, the Supreme Court heard argument on requests to stay enforcement of OSHA's Vaccination, Testing and Face Coverings Standard, a workplace safety standard adopted to deter the spread of COVID-19.

OSHA previously announced that enforcement of the non-testing requirements would begin as soon as January 10, 2022, with enforcement of the testing requirements delayed until February 9, 2022.

Unless and until the Supreme Court intervenes, here is what employers of 100 or more need to know.

What is the Vaccination, Testing and Face Covering Standard?

It is a temporary safety standard issued under OSHA's authority to address dangers in the workplace. The standard was enacted on an emergency basis without the usual public comment period and, as such, may be in effect for no longer than 6 months.

Importantly, despite its name the standard does not mandate vaccinations. The standard compels employers to adopt either (i) a mandatory vaccination policy, or (ii) a policy that requires employees to elect vaccination or regular COVID-19 testing and face covering.

Who is covered?

Private sector employers, with limited exceptions, which employ 100 or more at any time that the standard is in effect.

State and local government employees in jurisdictions with OSHA-approved occupational safety plans.

Which employers are exempt?

Workplaces covered by the Guidance for Federal Contractors and Subcontractors issued by the Safer Federal Workforce Task Force.

Settings where any employee provides healthcare services or healthcare support services subject to 29 CFR 1910.502.

Are any employees exempt?

Yes. There are three categories of employees exempt from the requirements of the standard: (i) employees who do not report to a workplace where other individuals are present; (ii) employees who work exclusively outdoors; and (iii)

employees working from home.

Also, employees with medical conditions or disabilities may be exempted from some or all of the requirements of the standard.

What must employers do?

1. Employers must establish and enforce a written policy that either (i) mandates that all non-exempt employees are fully vaccinated against COVID-19, or (ii) allows non-exempt employees to choose to be fully vaccinated or to provide proof of regular testing for COVID-19 and wear a face covering in the workplace. Fully vaccinated means an employee's status 2 weeks after completing primary vaccination with a COVID-19 vaccine.

2. Employers must determine and maintain a roster of the vaccination status of each employee, including whether the employee is fully or partially vaccinated, and require proof of vaccination from each vaccinated employee.

3. Employers must require employees who are not fully vaccinated and who report to the workplace at least once every 7 days to secure a COVID-19 test at least once every 7 days and to provide documentation to the employer within 7 days of each test.

4. Employers must ensure that each employee who is not fully vaccinated wears a face covering when indoors and when occupying a vehicle with another person for work purposes. The face covering must fully cover the employee's nose and mouth, and must be replaced when wet, soiled, or damaged. Exceptions to the face covering requirements include when an employee is alone in a room with floor to ceiling walls and a closed door, and for a limited time when an employee is eating or drinking, or for identification purposes in compliance with safety and security requirements.

5. Employers must provide support for employee vaccination, including (i) providing time to each employee for each primary vaccination dose with up to 4 hours paid time for employees to travel and obtain each dose, and (ii) reasonable time and paid sick leave for employees to recover from side effects experienced following any primary vaccination dose.

6. Employers must require all employees, regardless of vaccination status, to notify the employer promptly when

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NOW IS THE TIME TO PREPARE FOR OSHA S ENFORCEMENT OF THE EMERGENCY TEMPORARY STANDARD ON COVID-19 VACCINATION AND TESTING

a positive COVID-19 test result or diagnosis is received.

7. Employers must remove from the workplace any employee, regardless of vaccination status, any employee who receives a positive COVID-19 test result or diagnosis.

8. Employers must report work-related COVID-19 fatalities and hospitalizations to OSHA within time periods set forth in the standard.

9. Employers must make available to OSHA within time periods provided in the standard the employer's written policy on COVID vaccinations required by the ETS.

10. Employers must provide each employee the CDC document "Key Things to Know About COVID-19 Vaccines," available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html.

The standard may be found at 29 C.F.R. 1910.501 and in the Federal Register for November 5, 2021.

This summary is not intended to contain legal advice or to be an exhaustive review. Employers with questions on how to craft and implement an ETS-compliant policy – and how to handle exemption and accommodation requests – should contact Erica L. Litovitz, Esq., John J. Matteo, Esq., or another member of Jackson & Campbell's Employment Law Practice Group for more information.

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TAGGED: Supreme Court, COVID-19, OSHA, Guidance On Preparing Workplaces For COVID-19, reporting COVID-19 in the workplace, covid testing