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OSHA Releases Vaccination or Testing Requirement for Large, Private Employers

On September 9th, Biden announced his Path Out of the Pandemic COVID-19 Action Plan. That plan required the Occupational Safety and Health Administration (“OSHA”) to develop a rule that requires employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce negative test results on at least a weekly basis before coming to work. On November 4th OSHA officially issued its Emergency Temporary Standard (“ETS”), leaving employers reeling over the quickly looming requirements.



Biography

What does 100 employees really mean?

The ETS covers all private employers with 100 or more employees (excluding healthcare employers and federal contractors already covered by earlier directives or Executive Orders). The count should be done company-wide, not by individual locations. It includes temporary workers, seasonal workers, and minors. It does not include independent contractors.

What must covered employers do to comply?

Covered employers must implement a mandatory vaccination policy. The policy must require all employees to be fully vaccinated unless the employee is entitled to a

reasonable accommodation due to medical reasons or a sincerely held religious belief. The policy may offer a COVID-19 testing program in lieu of mandatory vaccinations. The testing program must include regular testing and require all unvaccinated employees to wear a face mask at work. Employers may exempt those employees working exclusively from home from the vaccination mandate or testing program.

What documentation serves as acceptable proof of vaccination?

The ETS calls for covered employers to require “acceptable” proof of vaccinations from their employees, including whether they are fully or partially vaccinated. Acceptable documentation for proof of vaccinations are:

- the record of immunization from a health care provider or pharmacy;
- a copy of the U.S. COVID-19 Vaccination Record Card;
- a copy of medical records documenting the vaccination;
- a copy of immunization records from a public health, state, or tribal immunization information system; or
- a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

If the employee is unable to provide acceptable proof of vaccination, the employee may submit a signed and dated statement (1)attesting to his vaccination status, (2)declaring he is unable to produce acceptable proof, and (3)acknowledging that knowingly providing false information in the statement will subject the employee to criminal penalties.

Those records must be maintained, while the ETS is in effect, in a confidential file that is kept separate from personnel files.

Arizona to challenge?

Governor Ducey publicly objected to OSHA’s plans to issue the ETS. In response, OSHA threatened to revoke federal approval of Arizona’s health and safety program through the Industrial Commission of Arizona (“ICA”). Not backing down, on October 19, Governor Ducey released a statement that the “federal government’s threat to strip the ICA of its OSHA authority is nothing short of a political stunt and desperate power grab.”

On October 22, the Arizona Attorney General’s Office filed an amended lawsuit

challenging the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors. A similar challenge to the ETS is likely.

Next step?

No one advisory can cover all the aspects of OSHA's ETS. The ETS also outlines additional information related to a permissible testing program for employees who are unable to or choose not to become vaccinated. Those unvaccinated employees are required to wear a proper face covering while indoors or when occupying a vehicle with another person for work purposes. Employers must familiarize themselves with all ETS requirements.

We encourage employers who have specific questions about the ETS or other COVID-19 related employment issues to contact Jodi Bohr at jrb@tblaw.com or (602) 255-6082, to ensure your workplace is ready to comply with the December 5th policy deadline.

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