

Chapman Client Alert

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Current Issues Relevant to Our Clients

OSHA Issues Emergency Temporary Standard on COVID-19 Vaccines

The Occupational Safety and Health Administration (OSHA) released its anticipated COVID-19 Vaccination and Testing: Emergency Temporary Standard (ETS), which will require that workers at large private sector businesses be vaccinated or undergo weekly COVID-19 testing. Employers will be required to comply with the ETS by January 4, 2022. The ETS is being released as a proposed rule subject to public comment on whether a permanent standard should be issued.

Applicability

The ETS is applicable to employers that have 100 or more employees at any time the standard is in effect. The rule does not apply to workers who: (i) are already subject to Executive Order 14042 on Requiring Coronavirus Disease 2019 Vaccination for Federal Contractors; (ii) work remotely 100% of the time; (iii) are in specified industries and who work exclusively outdoors; or (iv) are subject to the previously issued healthcare vaccine mandate. According to OSHA, the ETS preempts any state or local law that bans or limits employers from imposing vaccine or masking requirements regardless of the number of employees.

Requirements

Mandatory Vaccine Policy. Covered employers must develop, implement, and enforce a mandatory COVID-19 policy requiring that all workers either (i) be fully vaccinated against COVID-19; or (ii) undergo weekly COVID-19 testing and wear a face covering at work. Despite providing for the testing option, OSHA “strongly encourages” employers to adopt a more restrictive policy that requires all employees to be vaccinated.

Employers subject to the ETS must, *inter alia*, require that their employees promptly notify them of a positive COVID-19 test or diagnosis and remove any employee who is positive for COVID-19 until such employee receives a negative test, meets the criteria for return to work set forth in the Center for Disease Control and Prevention’s (CDC) “Isolation Guidance,” or receives a recommendation to return to work from a licensed healthcare provider.

Vaccinated Employees. For vaccinated employees, employers must:

- Determine the vaccination status of each employee by requiring such employee to provide acceptable proof of vaccination status.
 - Acceptable proof includes: (A) immunization records from a doctor, pharmacy, or public health entity; (B) a COVID-19 Vaccination Record Card; (C) medical records documenting vaccination; or (D) other official documentation that includes the type of vaccine, the date of administration, and the name of the professional administering the vaccine.
 - Where an employee cannot provide official vaccination documentation, the employer may accept a signed and dated statement by the employee attesting to their vaccinated status and the fact that they are unable to produce proof of vaccination with a statement that the employee acknowledges that he/she is subject to criminal penalties for knowingly providing false information.
- Provide up to four hours of paid time, including travel time, at the employee’s regular rate of pay for obtaining the vaccine during work hours and reasonable time and paid leave to recover from vaccine side effects for each dose. Employers may require that employees use paid sick leave benefits to offset these costs.

Employees Who Are Not Fully Vaccinated. For employees who are not fully vaccinated and who report to work where others are present:

- The employee must be tested for COVID-19 at least once every 7 days (or within 7 days prior to return to the workplace) and provide documentation of COVID-19 testing to the employer.
- The employer must remove any employee who does not provide the required testing documentation from the workplace until they provide a timely negative test result.

Reporting and Recordkeeping.

- The ETS incorporates earlier OSHA guidance on reporting/recording COVID-19 fatalities and hospitalizations. Employers must report each work-related COVID-19 fatality within 8 hours of the employer learning of the fatality and each work-related hospitalization within 24 hours of the employer learning of the hospitalization.
- For fully vaccinated employees, employers must maintain records and a roster of each employee's vaccination status and proof of vaccination as employee medical records. The records must be maintained while the ETS is in effect.

- For non-vaccinated employees, employers must maintain a record of employee COVID-19 test results as employee medical records.
- Employers must make records (including of aggregate numbers of vaccinated employees) available to employees, their representatives, and/or the Department of Labor as specified in the ETS.

Assuming it survives the onslaught of litigation that will likely be filed upon publication in the Federal Register, the ETS is expected to cover approximately 84 million workers. More than 17 million workers are already subject to a vaccination requirement applicable to the healthcare industry and the Administration has signaled that it will consider imposing vaccine/testing mandates on employers with fewer than 100 employees. Businesses who do not comply with the ETS are subject to fines up to \$13,650 per violation.

For More Information

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