

OSHA Releases Emergency Temporary Standard on COVID-19 Vaccination and Testing

This morning, the Occupational Safety and Health Administration ("OSHA") released its Emergency Temporary Standard ("ETS") governing COVID-19 vaccination and testing requirements for private employers. According to the ETS, employers with 100 employees or more must develop, implement, and enforce policies mandating vaccination for all employees or requiring that unvaccinated employees wear face coverings and produce negative COVID-19 tests weekly.

The ETS will go into effect tomorrow, November 5, when it is published in the federal register. By December 5, private employers are required to establish a written vaccination policy and determine the vaccination status of each employee. They must also provide employees with up to four hours paid time off per dose and sick leave for recovery (or more if required by applicable state and/or local law or a collective bargaining agreement). Employers must begin requiring weekly testing of unvaccinated employees by January 4. Employers are not required to pay for the cost of this testing, but they may choose to do so (but state or local law may require otherwise).

Non-compliant employers could face fines of up to \$14,000 per violation, according to a senior White House official.

The ETS only applies to employers of 100 employees or more firm- or corporation-wide. While part-time, off-site, and remote employees count towards the 100-employee threshold, independent contractors do not. Unvaccinated, remote workers are not required to submit weekly testing even though they count toward the 100-person threshold. However, if they need to work in-person, perhaps on an irregular basis, they may need to furnish a negative test.

Employers can still adopt more stringent COVID-19 policies if they so choose. Nothing in the ETS prevents employers from terminating employees' employment who refuse to comply with a mandatory vaccination policy for unvaccinated employees (unless said employees are entitled to accommodations) and it does not appear that employers are **required** to offer weekly testing as an alternative. Other safety precautions, such as social distancing, do not replace the vaccination and face covering requirements of the standard, but can complement them.

The ETS is subject to change, and several key questions are still unanswered, including what protections exist for whistleblowers. Furthermore, the ETS will likely face legal challenges, including from states and municipalities whose laws prohibit workplace vaccination mandates.

For questions relating to this client alert, please contact:



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On behalf of employers, Randi's counseling experience includes advising a broad range of clients concerning all aspects of the employment relationship to avoid litigation. She advises employers about hiring and termination of employment, policies, and practices, employee misconduct, restrictive covenants, leaves of absence, and compliance with federal, New York state, and New York City laws governing employment. Randi also regularly drafts, reviews, and negotiates employment and executive compensation agreements, restrictive covenants, and separation agreements.



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