THE WAIT IS FINALLY OVER: HIGHLY ANTICIPATED OSHA EMERGENCY TEMPORARY STANDARD MANDATES COVID-19 VACCINATION OR TESTING FOR LARGER EMPLOYERS

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Shortly after publication of this alert, the United States Court of Appeals for the Fifth Circuit granted an emergency motion to stay enforcement of OSHA's Emergency Temporary Standard (OSHA ETS), finding there is "cause to believe there are grave statutory and constitutional issues with the Mandate." On 12 November 2021, the Fifth Circuit affirmed its decision, leaving the stay in place. Despite this decision, since petitions challenging the OSHA ETS were filed in every geographically-based circuit court, the Judicial Panel on Multidistrict Litigation held a multicircuit lottery on 16 November 2021 consistent with 28 USC § 2112, whereby all the petitions would be transferred to the winner of the lottery. The Sixth Circuit was selected as the federal appellate court to hear all the consolidated petitions. It is expected that the Department of Justice will now submit a motion to set aside the Fifth Circuit panel's stay, which will be heard by a Sixth Circuit panel. (The Sixth Circuit typically has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee, although here will be exercising jurisdiction over petitions filed nationwide). No matter how the Sixth Circuit rules on the stay, there is a likelihood the losing party will seek review of the stay order on an emergency basis by the U.S. Supreme Court. Justice Brett Kavanaugh is the assigned justice to hear emergency requests from the Sixth Circuit, although there is a potential in this instance that such an emergency request would be heard by the whole Court. In light of the stay order and ongoing litigation, OSHA has now indicated on its website that it has "suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation."

After two months of speculation, the Occupational Safety and Health Administration (OSHA) released its emergency temporary standard related to COVID-19 (ETS) yesterday. The standard[1] was issued as part of President Biden's comprehensive national strategy for addressing the COVID-19 pandemic, which directed OSHA to issue regulations regarding vaccination for larger employers (as discussedhere). At a high level, the ETS requires private employers with 100 or more employees to comply with the following, with some limited exceptions:

- Implement a mandatory COVID-19 vaccination policy or a policy allowing unvaccinated employees to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.
- Determine the vaccination status of each employee and collect and maintain proof of vaccination.

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- Provide employees up to four hours of paid time to get vaccinated and to recover from any side effects.
- Require all unvaccinated employees to be tested weekly (if in the workplace at least once a week) or within seven days before returning to the workplace (if away from the workplace for a week or longer) at no cost to the employer unless required by other laws, regulations, or collective bargaining agreements.
- Implement notification protocols for when an employee is diagnosed with or tests positive for COVID-19 and remove those employees from the workplace until cleared to return under applicable guidelines.
- Require unvaccinated employees to wear a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.
- Retain accurate records of both vaccination status and COVID-19 test results and comply with reporting requirements.

To note, the ETS does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (as discussed here) or in settings where employees provide health care services or health care support services when subject to the requirements of the emergency temporary standard issued for the health care industry in June 2021 (Healthcare ETS) (as discussed here). Importantly, as further outlined below, the requirements of the ETS do not apply to (i) employees who do not report to a workplace where other individuals are present, (ii) employees while working from home, or (iii) employees who work exclusively outdoors.

The ETS is expected to be published in the *Federal Register* on 5 November 2021 and will go into effect immediately, though employers will have until 4 January 2022 to comply with the testing component and 5 December 2021 for all other requirements.

Although the ETS is effective immediately, it also serves as a proposal for a final standard. In this regard, OSHA requests stakeholder comments on the ETS; comments must be submitted within 30 days of publication in the *Federal Register*. Comments are also being requested on information collected within 60 days of publication in the *Federal Register*.

DETERMINING COVERAGE

The ETS applies to employers with a total of 100[2] or more employees at any time the standard is in effect. OSHA states that the ETS is proceeding in a "stepwise" fashion because larger employers have the "administrative capacity" to develop, implement, and enforce the standard[3]. In determining the number of employees, all employees in U.S. locations must be included, regardless of the employees' vaccination status or where the employees perform work. Part-time employees count towards the company total, but independent contractors do not.

For a single corporate entity with multiple locations, all employees at all locations are counted for purposes of the 100-employee threshold. In a traditional franchisor-franchisee relationship in which each franchise location is independently owned and operated, the franchisor and franchisees would be separate entities for coverage purposes, such that the franchisor would only count "corporate" employees, and each franchisee would only count employees of that individual franchise. In other situations, two or more related entities may be regarded as a

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single employer for the Occupational Safety and Health Act (OSH Act) purposes if they handle safety matters as one company, in which case the employees of all entities making up the integrated single employer must be counted. For situations where employees of a staffing agency are placed at a host employer location, only the staffing agency would count jointly employed workers for purposes of the 100-employee threshold[4] given the fact that threshold for coverage is based primarily on administrative capacity for purposes of protecting workers as quickly as possible.

Importantly, OSHA notes that determining whether a particular employer is covered by the ETS requirements is distinct from determining whether individual employees are covered by the ETS requirements. In other words, some employers may be covered, but they have no duties with respect to some of their employees. For example, even where the standard applies to a particular employer, its requirements do not apply to employees (i) who do not report to a workplace where other individuals such as coworkers or customers are present, (ii) while working from home,[5] or (iii) who work *exclusively* outdoors.[6] As a practical interpretation, OSHA provides the example of a landscaping contractor with at least 100 employees. The landscaping contractor would be a covered employer under the ETS, but the standard's protections would not apply to any employees that work exclusively outdoors. Alternatively, if all indoor workers work exclusively from home or in locations where no other individuals are present and all outdoor workers work exclusively outdoors, then the landscaping contractor would be a covered employer under the ETS but would not be required to comply with the ETS provisions.

DOCUMENTATION OF VACCINATION STATUS

Regardless of whether a covered employer requires all employees to be vaccinated or elects to permit unvaccinated employees to undergo weekly COVID-19 testing, it must collect and maintain a record of each employee's vaccination status.[7] The following forms of documentation will satisfy the proof of vaccination status as required by the ETS: (i) record of immunization from a health care provider or pharmacy; (ii) a copy of a Centers for Disease Control and Prevention (CDC) COVID-19 Vaccination Record Card; (iii) a copy of medical records documenting the vaccination; (iv) a copy of immunization records from a public health, state, or tribal immunization information system; or (v) 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. When an employee is unable to produce proof of vaccination status in the aforementioned methods, the ETS allows employees to provide an attestation, subject to criminal prosecution.

MANDATORY VACCINATION POLICY

Consistent with current guidance from the Equal Employment Opportunity Commission (EEOC), and similar to the other federal vaccination mandates for federal contractors and Medicare and Medicaid recipient facilities, employers that implement a mandatory vaccination program must provide accommodations under applicable law for employees “(i) for whom a vaccine is medically contraindicated; (ii) for whom medical necessity requires a delay in vaccination; or (iii) who are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement.” In its preamble, OSHA notes that employees who recovered from a COVID-19 infection are not exempt from the vaccination requirement. However, employers should be aware that an employee may be

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able to substantiate a request for an accommodation if sufficient documentation from a physician notes the inability to receive a vaccine.

ADMINISTRATION OF COVID-19 TESTING PROGRAM

Employers that do not require all employees to be vaccinated must require all unvaccinated employees, regardless of reason, to undergo COVID-19 testing at least weekly. Employees who are present in the workplace at least one day a week must be tested once every seven days and provide a negative COVID-19 test result no later than the seventh day following the date the employee last provided a test result. Given the flexible work schedules of many employees, employers must also ensure that employees who are not fully vaccinated and do not report to the workplace during a period of seven days or more are: (i) tested for COVID-19 within seven days prior to returning to the workplace, and (ii) provide documentation of that test result upon return to the workplace.

The ETS specifies the types of COVID-19 tests an employer may use in satisfying the testing obligation. Specifically, the following tests are acceptable for use under the ETS: any COVID-19 test that is "(i) cleared, approved, or authorized, including in an Emergency Use Authorization (EUA) by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test); (ii) administered in accordance with the authorized instructions; and (iii) not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor."[8] In requiring that a COVID-19 test used by an employee must have a level of review, the ETS addresses concerns about unreliable test results. Employees who fail to present documentation of a COVID-19 test result must be prohibited from entering the workplace until a test result is produced. Employees diagnosed with COVID-19 are not required to undergo testing for 90 days following such diagnosis.[9]

Employers that offer a testing option are not required to cover the cost of testing under the ETS. With respect to the cost burden on covered employers, OSHA has determined that for purposes of this ETS, it would not be "appropriate" to impose on employers any costs associated with COVID-19 testing for employees who choose not to be vaccinated. For most of the agency's existing standards containing medical testing and removal provisions, OSHA has found it necessary to impose the costs of such provisions on employers in order to remove barriers to employee participation in medical examinations that are critical to effectuating the standards' safety and health protections. Here, OSHA has determined that the safety and health protections of the ETS are best effectuated by employee vaccination, not testing. Accordingly, OSHA only requires employers to bear the costs of employee compliance with the preferred, and more protective, vaccination provision, but not costs associated with testing. Moreover, OSHA has also determined that it is not appropriate to require employers to pay for face coverings for employees who choose not to be vaccinated.[10]

However, covered employers may be required to cover the cost of testing as required by other laws, regulations, collective bargaining agreements, or other collectively negotiated agreements. For example, a reasonable interpretation of Title VII, the Americans with Disabilities Act, and other anti-discrimination laws is to require, if the nonvaccination status is an approved accommodation under the law, that the employer pay for the testing. Employers may, however, require employees to go to locations where, for example, the testing is free or covered by insurance. Finally, under current guidance from the Department of Labor (DOL), nonexempt employees likely should be compensated for any time spent for the administration of a COVID-19 test.

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FACE COVERING REQUIREMENT

Covered employers must require all employees who are not fully vaccinated to wear a face covering when indoors and when occupying a vehicle with another person for work purposes, except in limited circumstances. Specifically, an unvaccinated employee does not have to wear a face covering: "(i) when alone in a room with floor to ceiling walls and a closed door; (ii) 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; (iii) when employees are wearing respirators or face masks; or (iv) where the employer can show that the use of face coverings is infeasible or creates a greater hazard." The ETS broadly defines "face coverings" to include various different types of masks, such as clear face coverings or cloth face coverings with a clear plastic panel that may be used to facilitate communication with individuals who have disabilities or other limitations. Unless required under other federal, state, or local laws, employers are not required to cover the cost of a face covering for employees who elect not to be vaccinated.

EMPLOYEE NOTIFICATION AND REMOVAL FROM THE WORKPLACE

Similar to the requirements under the Healthcare ETS, the ETS contains COVID-19 notification requirements for both the employer and the employee. Under this provision, the employer must require each employee, regardless of vaccination status, to promptly notify the employer if they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed health care provider. Employees who are diagnosed with or test positive for COVID-19 must be removed from the workplace immediately. Such employees are not permitted to return to the workplace until the employee "(i) receives a negative result on a COVID-19 nucleic acid amplification test (NAAT) following a positive result on a COVID-19 antigen test if the employee chooses to seek a NAAT test for confirmatory testing; (ii) meets the return to work criteria in CDC's "Isolation Guidance" (incorporated by reference, § 1910.509); or (iii) receives a recommendation to return to work from a licensed healthcare provider." Unlike the Healthcare ETS, the ETS does not require employers to provide paid leave to employees who must be removed from the workplace due to a COVID-19 diagnosis or positive test result. However, other federal, state, or local laws may provide such an entitlement.

RECORDKEEPING

As with most OSHA regulations, the ETS also imposed certain recordkeeping requirements on employers. For employees who are fully vaccinated, OSHA requires employers to maintain a record of vaccination status, a copy of the proof of vaccination (as specified in the ETS), as well as a roster of each employee's vaccination status. Consistent with current EEOC guidance on vaccination records, both the records and the roster are to be maintained as confidential employee medical records in accordance with applicable law. To note, employers that have already collected proof of vaccination through another form of attestation or proof, prior to the effective date, are exempt from collecting such documentation again.

PAID TIME OFF

All covered employers must provide employees with a reasonable amount of time,[11] including up to four hours of paid time off at the employee's regular rate of pay, in order to receive each primary vaccination dose(s) against

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COVID-19. The four hours of paid time off cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. Additionally, covered employers must provide reasonable time and paid sick leave to recover from side effects experienced following any vaccination dose to each employee. Employers may require employees to use paid sick leave benefits otherwise provided by the employer to offset these costs, if available. If the employee does not have available sick leave, leave must be provided for this purpose.[12]

Comparatively, where an employee chooses to remain unvaccinated, the ETS does not require employers to pay for the costs associated with regular COVID-19 testing or the use of face coverings. Of note, employers nonetheless may be required to pay for testing or face covering costs under other collective bargaining obligations or federal, state, or local laws. Where collective bargaining agreements or federal, state or local laws require employers to provide employees additional paid time off for vaccination or paid sick leave to recover from vaccination side effects, the ETS requirements are satisfied so long as the employer provides each employee (i) reasonable time and four hours of paid time to receive each primary vaccination dose, and (ii) reasonable time and paid sick leave to recover from side effects experienced following a primary vaccination dose.

INTERSECTION WITH STATE LAW

With the various state and local orders, legislation, and other regulations that address vaccination mandates, specifically those that limit or prohibit such requirements, the ETS specifically provides for preemption of "inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees." OSHA's authority to preempt inconsistent state or local requirements is derived from section 18 of the OSH Act as well as general principles of conflict preemption.[13] Further, the ETS requires the 28 states[14] that have elected to implement OSHA-approved occupational safety and health plans to adopt a standard ETS or an ETS that is at least as effective as this ETS within 30 days of the promulgation date of the final federal rule. State plans must notify OSHA of the action they will take within 15 days. OSHA has recently signaled that it intends to enforce this requirement against states who fail to adopt an appropriate standard.

INTERSECTION WITH FEDERAL CONTRACTOR MANDATE AND CENTERS FOR MEDICAID AND MEDICARE SERVICES MANDATE

The ETS does not apply to workplaces covered by the federal contractor mandate. However, that is not a wholesale exemption for employers subject to the contractor mandate, as it only exempts a covered workplace, not the entire workforce of the employer. Therefore, employers with only a segment of their workforce subject to a federal contractor mandate may still be subject to the ETS with respect to their other employees if employing 100 or more employees. Although the ETS does not specifically exempt health care entities that may be subject to the Centers for Medicaid and Medicare Services Interim Final Rule on vaccinations, if such health care facilities are subject to the Healthcare ETS, they would not be expected to comply so long as the Healthcare ETS is in effect. Health care employers should note, however, that if the Healthcare ETS is no longer in effect at any point while this ETS is in effect, some employees working in settings that were covered by the Healthcare ETS may become covered by this ETS.

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POLICY IMPLICATIONS

Since President Biden announced the COVID-19 vaccination policy in September 2021, OSHA's ETS has been the subject of intense debate. Republican policymakers and various stakeholder groups have raised concerns about the scope of the ETS and its potential impact, as well as about OSHA's authority to issue the requirements as an ETS, particularly with regard to the rulemaking process.

At the federal level, Republicans members of the House Education and Labor Committee sent a letter to the Secretary of Labor shortly after the president's announcement requesting that he "immediately suspend work on the inappropriate, unprecedented, and likely unlawful national mandate for COVID-19 vaccination and testing in the workplace."[15] The letter highlighted that they had "doubts that courts will look favorably on such a rushed and hastily written emergency temporary standard that circumvents the notice-and-comment rulemaking process."[16]

Since then, Republican members of Congress have initiated steps to try to block the ETS. Representatives Jim Banks (R - Indiana) and Claudia Tenney (R - New York), for example, introduced the Health Freedom For All Act to prevent the DOL from implementing President Biden's vaccine requirements. Specifically, the bill would amend the Occupational Safety and Health Act to provide that "the Secretary [of the DOL] may not issue an emergency temporary standard that requires an employer to ensure that employees of the employer have received a COVID-19 vaccine or undergo COVID-19 testing."[17] With Democratic majorities in the U.S. House of Representatives and the U.S. Senate, the Banks-Tenney legislation and other similar measures are unlikely to advance, but they serve as positioning and messaging tools as the debate around the ETS continues.

At the state level, the Republican attorneys general from 24 states sent a letter to President Biden in September expressing their opposition to the ETS. The attorneys general expressed their view that the ETS would represent "not only a threat to individual liberty, but a public health disaster that will displace vulnerable workers and exacerbate a nationwide hospital staffing crisis, with severe consequences for all Americans."[18] They questioned the authority of the DOL to issue the policy as an ETS, which requires a determination that employees are exposed to "grave danger" and that the standard is "necessary" to protect employees. The attorneys general urged President Biden to reconsider the plan, noting that they would otherwise "seek every available legal option to hold you accountable and uphold the law."[19]

States led by Republican governors and/or Republican legislative majorities also have pushed back with executive orders or legislative proposals that would provide broad exemptions or prevent employer enforcement of the requirements.[20]

In the coming months, we expect OSHA's ETS to continue to be the subject of debate. Congress will begin oversight on the ETS's implementation, potentially holding hearings. Opponents of the ETS will likely revamp efforts to block the ETS. Sen. Mike Braun (R - Indiana), Ranking Member on the Senate Committee on Health, Education, Labor, and Pensions, Subcommittee on Employment and Workplace Safety, and over 40 other Republican senators, have initiated a Congressional Review Act (CRA) disapproval of OSHA's ETS.[21] By way of background, the CRA allows Congress to overturn certain federal agency regulations and actions through a joint resolution of disapproval. If such a joint resolution were to be approved by both chambers of Congress and signed by the president, or if Congress successfully overrides a presidential veto, the rule at issue becomes invalid. At this point, given Democratic control of both the White House and both chambers of Congress, it appears unlikely that the resolution will be approved; however, the resolution is significant from a messaging perspective.

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Opponents are likely to challenge the ETS in court. In addition to the 24 attorneys general noted above, various impacted stakeholders groups could bring a challenge to the ETS, such as employer and business groups. As mentioned, potential challenges could focus on DOL's authority to issue the policy as an ETS given the general requirements for an ETS, particularly given its scope, applicability, and timing. It is possible that some of these challenges may result in an injunction.

Finally, in parallel to the political and legal challenges to the ETS, it is important to note that OSHA has requested stakeholder comment for consideration ahead of a final standard. Ahead of the ETS's release, stakeholders were engaging with OSHA, DOL, the White House Office of Management and Budget's Office of Information and Regulatory Affairs, and the Biden administration on a range of issues related to the ETS. Advocacy efforts are expected to ramp up as part of the comment period ahead of finalizing the ETS, which will remain open for 30 days after publication in the *Federal Register*. Although OSHA is seeking comment on all aspects of the ETS, it notes particular interest in employers with fewer than 100 employees, assessment of significant risk, prior COVID-19 infections, experience with COVID-19 vaccination policy, COVID-19 testing and removal, face coverings, other COVID-19 controls, educational materials, and feasibility and health impacts.

In sum, the political and legal dynamics likely will be fluid in the coming weeks with regard to the ETS.

LEGAL AND PRACTICAL CONSIDERATIONS

As an initial matter, employers should evaluate coverage of their workforce based on the 100-employee threshold in the ETS. Any employer that may be required to comply must identify its plan for compliance, either to implement a mandatory vaccination program or a COVID-19 testing protocol for its unvaccinated employees. Since determining the vaccination status of all employees will be required regardless of the type of program implemented, covered employers should ascertain, to the extent they have not done so already, the vaccination status of employees and maintain records in accordance with the ETS.

Though the ETS does not require the employer to bear any costs associated with COVID-19 testing, employers should be cognizant of other laws, especially state or local regulations, which may require an employer to shoulder the cost of medical tests or reimburse the employee for such a requirement. Additionally, employers likely will continue to bear the cost of COVID-19 testing for employees that receive an accommodation on the basis of a medical condition or sincerely held religious belief from a mandatory vaccination program. Finally, although unionized employers must comply with the ETS, they should engage with union representation to facilitate the development and implementation of a compliance program in accordance with the ETS.

KEY TAKEAWAYS

- Employers should work with counsel to determine whether they are a covered employer under the ETS.
- Covered employers should work with counsel to discuss the interpretation, implementation, and enforcement of ETS requirements for their workforce, including the creation of a mandatory COVID-19 vaccination policy.
- Covered employers should review existing workplace policies, including existing COVID-19 health and safety screening protocols, to ensure compliance with the ETS requirements.

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- Covered employers should provide employees with the notice requirements outlined in the ETS.
- Covered employers should be prepared to address an increase in employee questions and concerns related to the ETS requirements and develop a communication strategy to respond to such inquiries.

The K&L Gates Labor, Employment and Workplace Safety (LEWS) group can assist with all aspects of a mandatory vaccination program, including determining coverage under the ETS, addressing compliance with federal and state laws, developing COVID-19 safety policies and procedures, and crafting communications to employees and contractors. In addition, as competing efforts continue in Washington, D.C. to bolster and unwind the Biden administration's efforts, the K&L Gates Public Policy and Law team is available to assist clients on the frontlines to engage with OSHA, the Biden administration, and Congress on issues related to the ETS and vaccination policies.

FOOTNOTES

[1] OSHA is authorized to issue emergency temporary standards under limited conditions, specifically when it has determined that workers may be in grave danger and a new standard is necessary for their protection in the workplace. Emergency temporary standards may be challenged in the requisite U.S. Court of Appeals. OSHA most recently issued an ETS on 10 June 2021 that was limited to the health care industry (as discussed here).

[2] OSHA defends the 100-employee threshold, given it will enable the standard to reach two-thirds of all private-sector workers in the nation and reach the largest facilities, where the most deadly outbreaks of COVID-19 can occur.

[3] OSHA notes it needs additional time to assess the capacity for smaller employers and is seeking comments in order to make a determination.

[4] The host employer would nonetheless be covered by the ETS if it has 100 or more employees in addition to the employees of the staffing agency.

[5] Importantly, an employee who switches between remote work to working in a setting where other people are present is not covered by this exemption.

[6] An employee whose outdoor time is interrupted by indoor periods does not work “exclusively” outdoors and will still be subject to the requirements of the ETS.

[7] Of note, the definition of fully vaccinated permits employees to be vaccinated with a vaccine authorized or approved by the U.S. Food and Drug Administration (FDA) as well as authorized for emergency use by the World Health Organization, in addition to vaccinations received by participants in clinical trials. Further, the ETS addresses the recent FDA and CDC guidelines on combining vaccines with specific time frames for determining full vaccination. 29 C.F.R. § 1905.01(c)(i).

[8] The ETS provides examples of acceptable tests, including “tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection is either done or observed by an employer.”

[9] However, this does not serve as a basis for an employee to be excused from vaccination unless medically

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required as part of an accommodation request under applicable law.

[10] OSHA notes that while the ETS does not impose these testing or face covering costs on employers, in some circumstances employers may be required to pay for the costs related to testing or face coverings by other laws, regulations, or collectively negotiated agreements. Further, OSHA has no authority under the OSH Act to determine whether such obligations under other laws, regulations, or agreements might exist.

[11] OSHA notes that reasonable time may include time spent during work hours related to the vaccination appointment(s), such as registering, completing required paperwork, all time spent at the vaccination site (e.g., receiving the vaccination dose, post-vaccination monitoring by the vaccine provider), and time spent traveling to and from the location for vaccination (including travel to an off-site location (e.g., a pharmacy), or situations in which an employee working remotely (e.g., telework) or in an alternate location must travel to the workplace to receive the vaccine). Employers are not, however, obligated by this ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare) incurred to receive the vaccination.

[12] Neither the paid time required to receive any vaccine dose(s) nor the paid sick leave required to recover from side effects experienced following any vaccination dose are retroactive requirements for vaccine dose(s) received prior to the promulgation of this ETS.

[13] In its guidance, OSHA cites to *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88 (1992) and 29 U.S.C. 667, in support of preemption.

[14] Of the 28 states with OSHA-approved occupational safety and health plans, 22 apply to both private and public sector employees. The states are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. The remaining six states and territories cover only state and local government employees: Connecticut, Illinois, Maine, New Jersey, New York, and the U.S. Virgin Islands.

[15] *See* House Comm. on Educ. & Lab., Letter to the Honorable Martin J. Walsh, Secretary of Labor, Regarding OSHA Emergency Temporary Standard (29 Sept., 2021).

[16] *Id*.

[17] *See* Press Release, Rep. Claudia Tenney, Reps. Claudia Tenney and Jim Banks Introduce Bill to Reverse Biden's Unconstitutional Vaccine Mandate (30 Sept., 2021)

[18] *See* Off. of the W. Va. Att'y Gen., Letter to President Biden Regarding COVID-19 Plan (16 Sept., 2021).

[19] *Id*.

[20] *See*, e.g., Texas Executive Order No. GA-40; see also Texas S.B. 51 – Relating to prohibited COVID-19 vaccine mandates and vaccination status discrimination and to exemptions from certain vaccine requirements.

[21] *See* Press Release, Sen. John Kennedy (R - Louisiana), Kennedy, Braun, colleagues challenge Biden vaccine mandate, Press Release (3 Nov., 2021)

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