

Publication

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Client Alert: OSHA Issues Highly Anticipated Emergency Rule Requiring Most Private Employers to Implement a Mandatory Vaccination Policy

On October 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its much-anticipated Emergency Temporary Standard (ETS), stating that employers with 100 or more employees must implement a mandatory COVID-19 vaccination policy or, alternatively, implement a weekly testing and mask mandate for unvaccinated employees.

In addition, most federal contractors and subcontractors are subject to a separate COVID-19 vaccination mandate pursuant to President Biden's recent Executive Order 14042 (Executive Order) and its related guidance.

The requirements of the ETS, as well as the requirements of the Executive Order, are summarized below:

OSHA COVID-19 Vaccination and Testing Requirements

The ETS establishes minimum vaccination, vaccination verification, face covering, and testing requirements for covered employers. The key requirements of the ETS include:

1. **Creation and Implementation of a Vaccination/Testing Policy.** The ETS requires that covered employers develop, implement, and enforce a mandatory COVID-19 vaccination policy.

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In the alternative, covered employers may elect to establish, implement, and enforce a policy allowing unvaccinated employees to undergo weekly COVID-19 testing so long as the employees wear a face covering while in the workplace.

2. **Provision of Paid Time Off and Sick Leave.** The ETS requires employers to support vaccination efforts by providing employees reasonable paid time off, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects associated with the vaccine.
3. **Collection and Retention of Employee Records.** The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status. Acceptable proof of vaccination includes:
 - a. The record of immunization from a health care provider or pharmacy;
 - b. A copy of the COVID-19 Vaccination Record Card;
 - c. A copy of medical records documenting the vaccination;
 - d. A copy of immunization records from a public health, state, or tribal immunization information system;
 - e. 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)/clinic site(s) administering the vaccine(s); or

- f. A signed and dated attestation from the employee when the employee is unable to provide proof of vaccination status.
- 4. **Notice to Employees.** The ETS requires employers to provide employees with information concerning: (a) the requirements of the ETS and any workplace policies and procedures established to comply with the ETS; (b) existing protections under 29 CFR 1904.35(b)(1)(iv) and Section 11(c) of the Occupational Safety and Health Act against retaliation and discrimination; and (c) the existing prohibitions against knowingly supplying false statements or documentation and associated criminal penalties. Employers also must provide each employee with a copy of the CDC's document, "Key Things to Know About COVID-19 Vaccines."
- 5. **Reporting of Positive Cases, Hospitalizations, and Fatalities.** The ETS mandates that employers: (a) require employees to promptly provide notice when they receive a positive COVID-19 test or diagnosis; (b) immediately remove any employee from the workplace, regardless of vaccination status, who tests positive for or is diagnosed with COVID-19; and (c) keep such employees removed from the workplace until they meet CDC criteria for returning to work. The ETS also requires employers to report to OSHA within 8 hours of learning of any work-related COVID-19 fatalities and within 24 hours of learning of any COVID-19 in-patient hospitalizations.
- 6. **Production of Records and Test Results Upon Request.** The ETS requires employers to make an employee's vaccination record and/or test results available to that employee (or anyone having written authorized consent from the employee) upon request. Employers also are required to make available the aggregate number of vaccinated employees in the workplace along with the total

number of employees at that workplace to employees and/or an employee representative.

The foregoing ETS vaccine, testing, and other requirements do not apply to: (1) employees who do not report to a workplace where other individuals are present, remote workers, or those who work exclusively outdoors; (2) workplaces already covered under separate federal contractor COVID-19 vaccination mandates (as discussed in more detail below); or (3) workplaces covered by the separately issued Centers for Medicare and Medicaid Services rule (CMS Rule) issued on November 4, 2021, which requires covered healthcare facilities to implement policies and procedures to ensure that covered workers are fully vaccinated against COVID-19 by January 4, 2022. However, employees who currently are excused from complying with the ETS either because they work alone, remotely or outdoors, will be subject to the ETS requirements in the event that they later are required report to a covered employer's indoor facility.

Employers must ensure that all ETS requirements, other than mandatory testing for unvaccinated employees, are satisfied by December 5, 2021. Procedures to ensure mandatory testing of unvaccinated employees must be implemented by January 4, 2022.

Federal Contractor Vaccine Mandate Obligations

Employers also should consider whether they separately are subject to President Biden's September 9, 2021 Executive Order, which, as was discussed in our prior client alert, called for the Safer Federal Workforce Task Force (Task Force) to issue guidelines which contractors and subcontractors doing business with the federal government must follow. The Task Force guidance is separate from and supersedes the requirements set forth under the ETS.

In particular, the Task Force's resulting Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Guidance), issued on September 24, 2021, requires covered federal contractors and subcontractors to take the following action:

1. ensure their employees are vaccinated against COVID-19, except in circumstances in which an employee is legally entitled to an accommodation;
2. comply with all guidance related to masking and physical distancing while in covered contractor workplaces; and
3. designate a person to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The original compliance deadline was December 8, 2021. However, on November 4, 2021, the White House announced that in light of the recent release of the ETS and CMS Rule, federal contractors would now need to ensure that all employees are vaccinated against COVID-19 by January 4, 2022.

Contracts covered under the Task Force Guidance include any contracts: (i) with the federal government for the procurement of services, construction, or leasehold in real property; (ii) for services covered by the Service Contract Act; (iii) for concessions; or (iv) entered into with the federal government in connection with federal property/lands and related to offering services for federal employees, their dependents, or the general public.

Conversely, the Task Force Guidance does not extend to: (i) grants; (ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act; (iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold as defined by

the Federal Acquisition Regulation (currently \$250,000); (iv) employees who perform work outside of the United States; or (v) subcontracts solely for the provision of products.

In addition to the Task Force Guidance, the Executive Order also directed the Federal Acquisition Regulatory Council (FAR Council) to develop a contract clause requiring contractors and subcontractors at any tier to comply with all guidance published by the Task Force. The FAR Council issued its contract clause language on September 30, 2021, and mandated that the clause be included in the following federal contracts:

- Contracts entered into on or before November 14, 2021;
- Contract solicitations issued between October 15 and November 14, 2021;
- Extensions, renewals, of existing contracts awarded on or after October 15, 2021; and
- Options on existing contracts and orders exercised after October 15, 2021.

Given all of the foregoing requirements, employers should take the time now to examine their existing federal contracts to determine whether they are or will be subject to the Executive Order and its related guidance or the alternative ETS (or the CMS Rule). The Executive Order, ETS and CMS Rule impose differing obligations on employers—for instance, the weekly testing alternative available under the OSHA ETS is not available to federal contractors and subcontractors under the Executive Order and its related guidance or healthcare employers subject to the CMS Rule. Thus, it is imperative that employers determine which federal guidelines apply to them and proceed accordingly before January 4, 2022.



If you have any questions regarding the OSHA ETS, federal contractor vaccination requirements, or other vaccination mandates, please contact Alex Dominguez, Alissa Griffin, Kathleen Okon, or your Neal Gerber Eisenberg attorney.

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