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OSHA Releases Emergency Temporary Standard for Federal Vaccine Mandate

11.10.2021

On Thursday, November 4, 2021, the Occupational Safety and Health Administration (OSHA) finally released its federal vaccine Emergency Temporary Standard (ETS). The Standards provide that by **January 4, 2022**, employers with 100 or more employees in the United States must implement a mandatory vaccination policy (subject to religious or medical exemptions) or implement mandatory weekly testing for covered employees.

1. Who would be covered?

The ETS is based on the size of an employer, in terms of number of employees, rather than on the type or number of workplaces. If an employer has less than 100 employees, and while the ETS is in effect exceeds 100 employees they become covered. If an employer has 100 employees or more while the ETS is in effect and later drops below 100 employees, they remain covered. Here are some other relevant criteria of the 100 employee threshold:

- Federal contractors and certain healthcare entities are excluded from the OSHA rule as they fall under other federal mandates.
- In determining the number of employees, employers must include all employees across all of their U.S. locations, regardless of employees' vaccination status or where they perform their work.
- Part-time employees do 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 for coverage under this ETS.

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- 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.
- There are detailed rules for staffing agencies. For purposes of the 100-employee threshold, generally only the staffing agency would count any jointly employed employees. The host employer, however, would still be covered by this ETS if it has 100 or more employees in addition to the employees of the staffing agency.

2. My company is covered, what happens next?

If the employer meets this threshold, they will be required to take a number of steps in the next month, including but not limited to determining the vaccination status of each employee, providing employees paid time off to become vaccinated, and providing employees paid sick leave to recover from the side effects of each vaccine dose. Employers will also be required to develop, implement, and enforce a mandatory COVID-19 vaccination policy OR implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.

3. Who pays for employee testing?

The ETS does not require employers to pay for any costs associated with testing (at least to the extent it is not required by other laws, regulations, or collective bargaining agreements). Meaning, Employers can require employees to foot the bill for testing in most instances if the employee is choosing not to get vaccinated for nonreligious or medical reasons. Notably, the regulation also does not prohibit employers from voluntarily assuming the costs associated with testing.

4. Status of the ETS

As we indicated in our previous client alert, we anticipated immediate challenges to the vaccine mandate upon its release. There have already been several lawsuits filed against the Biden Administration, including lawsuits filed by Attorneys General from a number of states. On Saturday November 6, the U.S. Court of Appeals for the Fifth Circuit granted a request from Louisiana Attorney General Jeff Landry to halt implementation of the vaccine mandate. The Federal Court has given the government until 5 P.M. on November 8th to respond to the Landry's motion for a permanent injunction. Landry will have until 5 P.M. on Tuesday, Nov. 9 to file a reply. Therefore, as of now, the mandate is enjoined nationwide for the foreseeable future. Butzel's Labor & Employment team will be monitoring the situation closely and will publish additional client alerts as this lawsuit and others proceed.

If you have any questions about this ETS or any other Labor & Employment issue, please contact your Butzel Labor & Employment Attorney. Many of the Covid related issues facing employers will also be addressed at Butzel's upcoming November 17 annual labor and employment, benefits and immigration seminar.[1]

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