

What Employers Need to Know About OSHA's COVID-19 Vaccine Mandate and Testing Alternative

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As widely reported in the press, on September 9, 2021, President Biden issued an Executive Order as part of his COVID-19 Action Plan that, among other things, directed the Occupational Safety and Health Administration (OSHA) to develop an emergency temporary standard ("ETS") requiring that all private employers with 100 or more employees ensure their workforce is fully vaccinated against COVID-19 or require any workers who remain unvaccinated

to produce a negative COVID-19 test result at least weekly. On October 12, 2021, OSHA submitted a draft ETS to the White House for review. Although the ETS had not been released as of the writing of this article, reports have circulated about its expected requirements. This article provides a preview of the ETS based on available information and provides guidance for businesses trying to comply with the ever-changing rules and regulations. And while the ETS applies to businesses with 100 or more employees, businesses of all sizes should take note of its requirements.

Calculating the Number of Employees

The first question every business should ask is: Will the ETS apply to me? Although the ETS has not been released, employers should be prepared for the following:

- All employer locations will likely be included in the calculation. In other words, if a business has three locations, each with only 50 employees, the entire business will be deemed to have "100 or more employees" and the ETS will apply.
- All employee categories will likely be included in the calculation. Based on existing OSHA regulations, it is expected that OSHA will count labor, executive, hourly, salary, part-time, seasonal and migrant workers. For purposes of calculating the 100-employee threshold, the ETS may even include employees who are not on a business's payroll if that business has "day-to-day supervision" over them.
- Remote employees likely will be included in the calculation—even employees who are 100% remote workers. Other portions of the President's COVID-19 Action Plan expressly apply to fully remote workers. It is expected that the new ETS will be the same.

Paying for Weekly Testing

When President Biden first announced his COVID-19 Action Plan, he emphasized that employers must be prepared to give their workers paid time off ("PTO") for those seeking weekly COVID-19 testing in lieu of vaccination. It is unclear whether businesses will be able to compel employees to use existing PTO or paid sick leave under the ETS. It is also unclear what should be done when an employee has exhausted his or her accrued leave. In the meantime, employers should be aware of the following:

- In New York State, employers are required to pay for a medical exam when it is: (1) a condition of employment; (2) not covered by the employee's insurance; and (3) not required by law. Because the

weekly testing will be an "alternative" under the ETS, employers who choose the testing alternative should be prepared to cover the cost of the weekly COVID-19 tests. See New York Labor Law § 201-b.

- Further, wage and hour laws arguably require employers to pay non-exempt employees for the time spent getting their COVID-19 tests. Employers implementing the testing alternative should, therefore, be prepared to accurately track this time; a non-exempt employee could unknowingly exceed the maximum number of hours in a given workweek, potentially qualifying for overtime pay.
- For non-exempt employees at or near

minimum wage, travel expenses could be compensable if the costs would reduce their earnings below the New York State minimum wage in a given workweek.

Penalties Are Significant

Violations of the new ETS will likely be considered either "serious" or "willful." The current maximum penalty for a "serious" violation is \$13,653 per violation. The current maximum penalty for a "willful" violation (i.e., one committed with "purposeful disregard" for a safety requirement or "plain indifference" to employee safety) is \$136,532.

Next Steps for Employers

While the details of the ETS are not

available, employers should nevertheless consider how they will meet its likely requirements once compliance becomes mandatory. Employers should also consult with their labor and employment counsel for further guidance when the ETS is released.

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